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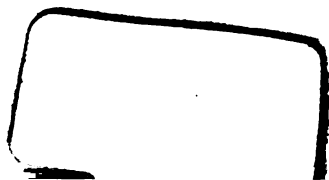
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THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

SEPARATE PROPERTY OF MARRIED WOMEN.—(See also **COMMUNITY PROPERTY**, vol. 3, p. 350; **EQUITY**, vol. 6, p. 716; **HUSBAND AND WIFE**, vol. 9, p. 848; **MARRIAGE SETTLEMENTS**, vol. 14, p. 538; **MARRIED WOMEN**, vol. 14, p. 589.)

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I. DEFINITION.—The separate property of a married woman is that of which she has the exclusive control, independent of her husband, and of which she may dispose as she pleases.¹

The separate property of married women may be classified into the equitable and the statutory; the former being that recognized by the courts of equity irrespective of statutes;² the lat-

1. *Alston v. Rowles*, 13 Fla. 126; *Petty v. Malier*, 14 B. Mon. (Ky.) 199; *Bowen v. Seabee*, 2 Bush (Ky.) 115.

2. *Stewart's Husband & Wife*, § 197; *Clark v. Windham*, 12 Ala. 800; 2 *Perry Trusts*, § 646.

Professor Minor says on this subject: "The whole doctrine of the separate estate of a married woman is the creature of equity, and sets at naught all or most of the principles of the common law touching the marital relation, and also touching property generally. Thus, a wife may be enabled to dispose of her separate estate as freely, and with less solemnity than a *feme sole*, to charge it merely by implication, as a *feme sole* cannot do, and may also be restrained from conveying or charging it at all, a restraint adverse to one of the most settled doctrines of the general law of property. In respect to the power of alienation of a wife's separate estate, a distinction is made between real and personal property. As to personal property, the *jus disponendi* is incident to it in the fullest manner. The wife may dispose of it absolutely at her pleasure, by deed or will, as if she were a *feme sole*; unless the instrument which creates the estate and vests it in her shall impose restrictions, and then these restrictions will constitute the law of the case. In respect to real property her power of disposition is more circumscribed. If she is not in terms allowed, by the instrument which clothes her with the separate estate, to alien it in some designated way, she can do so only by will duly executed, or by deed executed with the formalities prescribed for married women. And it seems that, though permitted to alien otherwise than in pursuance of the statute, she is not thereby precluded from adopting the statutory mode. The rents and profits of her separate real estate constitute personalty, and may be disposed of accordingly, unless invested in lands. Where the wife has the power of disposition, she may bestow her separate property as well on her

husband as on a stranger, and that not by giving it to a third person to give to him, but by conveyance directly to himself (unless where she conveys under the statute). But a court of equity will not give sanction or effect to a conveyance to the husband without first subjecting the wife to a privy examination, and adopting such other precaution as shall seem needful to ascertain her freedom of action." 2 *Minor's Inst.* 576.

It is said in 1 *Pom. Eq. Jur.*, § 52: "Still another most remarkable illustration of the extent and manner in which the court of chancery invaded the rules and contradicted the policy of the common law was exhibited by its doctrine concerning the separate estate of married women, and their power to deal therewith as though they were unmarried. Nothing was more diametrically opposed to the principles of the ancient common law than this capacity to be a separate proprietor conferred upon the wife: and no equitable doctrine perhaps interfered with a greater number of legal rules concerning the status of marriage, and the proprietary rights of the husband which it created." In a note to the foregoing statement, Professor *Pomeroy* further cites *Fleta* (b. iii, ch. 3) as expressly stating the doctrine that conveyance to a stranger for the benefit of a married woman is void as being against the policy of the law.

In 2 *Story Eq. Jur.*, § 1378, it is said: "It is well known that the strict rules of the old common law would not permit the wife to take or enjoy any real or personal estate separate from or independent of her husband. And although these rules have been in some degree relaxed and modified in modern times, yet they have still a very comprehensive influence and operation in courts of law. (*Citing Coomes v. Elling*, 3 Atk. 679; 2 *Roper on Husband and Wife*, ch. 18, p. 151; *Agar v. Blethyn*, 1 Tyrw. & Grang. 160.) On the other hand courts of equity have for a great length of time admitted the doctrine that a married woman is ca-

Definition.

MARRIED WOMEN.

Definition.

ter that recognized and created by those statutes which limit the common-law rights of the husband in his wife's property, and

pable of taking real and personal estate to her own separate and exclusive use, and that she has also an incidental power to dispose of it. (*Citing 1 Fonbl. Eq. b. 4, ch. 2, § 6, note (n); 2 Roper on Husb. and Wife, ch. 18, pp. 151 to 266.*)"

Wife's Paraphernalia.—See PARAPHERNALIA, vol. 17, p. 312; *Richardson v. Louisville, etc., R. Co.*, 85 Ala. 559. The wearing apparel purchased by a married woman after her marriage, with the husband's money or upon his credit, belongs to him as against her creditors. *Smith v. Abear*, 87 Mich. 62.

Paraphernal Property.—See PARAPHERNAL, vol. 17, p. 312. In *Louisiana* a wife may buy property for cash with her paraphernal funds, and if the income from her paraphernal property is sufficient to meet the accruing payments, may buy on credit, and the property thus bought is paraphernal. *Miller v. Handy*, 33 La. Ann. 160. And where a husband has been a party to such purchase, and was informed of the terms of the contract at the time, he cannot afterwards avoid its effect in a contest with her heirs as to the ownership of the property. *Succession of Bellande*, 42 La. Ann. 241. A wife may rebut the presumption that property bought by her is community property by showing that it was purchased with her paraphernal funds, which were administered by her separately and apart from her husband. *Stauffer v. Morgan*, 39 La. Ann. 632. And this she may prove by parole evidence. *Succession of Pinard*, 30 La. Ann. 167.

A wife may employ her husband as her agent in the management of her paraphernal property, and the proceeds of such management belong to her and not to the community. *Miller v. Handy*, 33 La. Ann. 160; but it cannot be pledged as security for debts of the husband, or of the community. *Putnam v. New York L. Ins. Co.*, 42 La. Ann. 739. A sale of a wife's paraphernal immovables will not be set aside, on the ground that a part of the purchase money went to pay debts of the husband. *Morrow v. Goudchaux*, 41 La. Ann. 711. And a married woman was allowed to bind legally her paraphernal property in order to liberate her hus-

band from jail, and was not allowed to deny her obligation on the ground of marital influence and coercion, where she had bound the property by contracting with third persons in good faith. *Jaffa v. Myers*, 33 La. Ann. 406.

Pin Money.—See HUSBAND AND WIFE, vol. 9, p. 847. Pin money is a provision made by the husband, either in pursuance of a marriage contract or by a gift, for the purpose of supplying the wife with articles of dress, and with pocket money, in order to prevent the annoyance of a constant recourse to him with petty demands for personal expenditures. It may consist of gifts of money made from time to time, or of a specific periodical allowance, or of the savings and profits accruing from her domestic management. It must not be to the prejudice of the husband's creditors; and the wife acquires an unimpeachable right of property therein subject to two qualifications. First, it is bestowed for the specific purpose of decking her person for the credit of the common household, and a husband has a certain interest in it as well as the wife, and may demand, or constrain, the expenditure to be made accordingly; second, even though stipulated for by a marriage settlement, she cannot call upon her husband to pay any arrears if he has meanwhile provided for her current wants; nor in any event beyond the arrears of a single year. Nor, it seems, can her personal representative demand any arrears at all, for the money is designed to dress and adorn the wife during the year and not for the accumulation of the fund. 1 *Minor's Inst.* 321; *citing 2 Bright's Husb. & W.* 288, *et seq.*; 2 *Story's Eq.*, § 1375, 1375a, *citing Jodrell v. Jodrell*, 9 Beav. 45; *Slanning v. Style*, 3 P. Wms. 337; *Acton v. Acton*, 1 Ves. 267; *Peacock v. Monk*, 2 Ves. 190; *Fowler v. Fowler*, 3 P. Wms. 355; *Ball v. Coutts*, 1 Ves. & B. 305; *Howard v. Digby*, 8 Bligh. N. R. 224, *et seq.*; and see *Stanway v. Styles*, 2 Eq. Abr. 246; *Mangey v. Hungerford*, 2 Eq. Abr. 156.

Pin money has been recognized in *Maryland*. *Miller v. Williamson*, 5 Md. 219; otherwise in *North Carolina*. *McKinnon v. McDonald*, 4 Jones Eq. (N. Car.) 6; 72 Am. Dec. 574; *Stewart's Husb. & W.*, § 188.

which enlarge the rights of the wife.¹ The two classes of property may exist together.²

II. EQUITABLE SEPARATE PROPERTY—1. **Creation of**—*a.* **HOW CREATED**.—An equitable separate estate may be created in a married woman by a written instrument, or even orally in the case of personalty; it may be by deed or by will, in trust or direct, ante-nuptial or post-nuptial.³

b. **WORDS NECESSARY TO CREATE**.—Technical words are not required. It is necessary only that the terms of the settlement show that the settlor intended the husband should have no marital rights in the property in question. If no such intent appears, there is created but an ordinary trust for a married woman.⁴

1. *Stewart's Husband & Wife*, § 217; *Dow v. Gould, etc.*, *Silver Min. Co.*, 31 Cal. 631. See, for a collation of these statutes, *Stimson's Am. Stat. Law*, § 6420, *et seq.*

Lands in *Texas* belonging to a married woman are termed in that State her "separate property," and she has in equity all the power to dispose of them which could be given to her by the amplest deed of settlement. *Slaughter v. Glenn*, 98 U. S. 242.

2. *Musson v. Trigg*, 51 Miss. 183.

The *Alabama Code*, 1886, §§ 2351, *et seq.*, establishes an entirely new system of laws relating to the property of married women, and abrogates the distinction between the equitable and statutory separate estates, except in cases where the property is conveyed to an active trustee, and, therefore, with that exception, equitable separate estates are now statutory in *Alabama*. *Rooney v. Michael*, 84 Ala. 585.

3. *Morrison v. Thistle*, 67 Mo. 596; *Holthaus v. Hornbostle*, 60 Mo. 439; *Porter v. Bank of Rutland*, 19 Vt. 410; *Chew v. Beall*, 13 Md. 348; *George v. Spencer*, 2 Md. Ch. 353; *Jackson v. McAliley*, 1 Speers Eq. (S. Car.) 303; 40 Am. Dec. 620; *Paul v. Leavitt*, 53 Mo. 595; *Wood v. Wood*, 83 N. Y. 575, *affirming* 18 Hun (N. Y.) 350; and see *Gillespie v. Burleson*, 28 Ala. 551; *Walton v. Broadbudd*, 6 Bush (Ky.) 328; *Pond v. Skeen*, 2 Lea (Tenn.) 126; *Lee v. Prieaux*, 3 Bro. C. C. 381; *Fears v. Brooks*, 12 Ga. 195.

No Trustee Necessary.—A conveyance may be to the wife direct, no trustee being necessary; equity never suffering a trust to fail for want of a trustee. It has even been held unnecessary to make the settlement in the form of a trust. The husband will be deemed to hold as trustee for his wife

and to be accountable to her for the rents and profits as any other trustee would be. *Bennet v. Davis*, 2 P. Wms. 316; *Izod v. Lamb*, 1 C. & J. 35; *Slanning v. Style*, 3 P. Wms. 337; *Lucas v. Lucas*, 1 Atk. 270; *Lee v. Prideaux*, 3 Bro. C. C. 381; *McLean v. Longlands*, 5 Ves. 79; *Parker v. Brooke*, 9 Ves. 583; *Rich v. Cockrell*, 9 Ves. 369; *Arundell v. Phipps*, 10 Ves. 139; *Davidson v. Atkinson*, 5 T. R. 434; 1 *Minor's Inst.* 319; *Pepper v. Lee*, 53 Ala. 33; *Wilkinson v. Cheatham*, 45 Ala. 331; *Sledge v. Clopton*, 6 Ala. 589; *Sadler v. Bean*, 9 Ark. 202; *Green v. Brooks*, 25 Ark. 318; *Riley v. Riley*, 25 Conn. 154; *Fears v. Brooks*, 12 Ga. 195; *Long v. White*, 5 J. J. Marsh. (Ky.) 226; *Richardson v. Stodder*, 100 Mass. 528; *Gover v. Owings*, 16 Md. 91; *Holthaus v. Hornbostle*, 60 Mo. 439; *Smith v. Seiberling*, 35 Fed. 677; *Schafroth v. Amba*, 46 Mo. 114; *McKenna v. Phillips*, 6 Whart. (Pa.) 571; 37 Am. Dec. 438; *Vance v. Nogle*, 70 Pa. St. 176; *Trenton Banking Co. v. Woodruff*, 2 N. J. Eq. 117; *Armstrong v. Ross*, 20 N. J. Eq. 109; *Shirley v. Shirley*, 9 Paige (N. Y.) 363; *Shepard v. Shepard*, 7 Johns. Ch. (N. Y.) 57; *Wood v. Wood*, 83 N. Y. 575; *O'Brien, Petitioner*, 11 R. I. 419; *Boyd v. Ciples*, 2 Hill Eq. (S. Car.) 200; 29 Am. Dec. 67; *Hamilton v. Bishop*, 8 Yerg. (Tenn.) 33; 29 Am. Dec. 101; *Porter v. Bank of Rutland*, 19 Vt. 410; *Radford v. Carwile*, 13 W. Va. 573; *Jones v. Obenchain*, 10 Gratt. (Va.) 259; *Sayers v. Wall*, 26 Gratt. (Va.) 354; *Wallingsford v. Allen*, 10 Pet. (U. S.) 583.

But in *Michigan* the necessity for a trustee, in a conveyance from husband to wife, was removed only by statute. *Ransom v. Ransom*, 30 Mich. 328.

4. **HUSBAND AND WIFE**, vol. 9, p.

848; Hulme v. Tenant, 1 Bro. C. C. 16; 1 White & Tudor's Lead. Cas. 481 (Text Book Series, vol. 2, p. 536); Hale v. Stone, 14 Ala. 803; Short v. Battle, 52 Ala. 456; Jenkins v. McConico, 26 Ala. 213; Vail v. Vail, 49 Conn. 52; Magill v. Mercantile Trust Co., 81 Ky. 129; Duke v. Duke, 81 Ky. 308; Gaines v. Poor, 3 Metc. (Ky.) 503; Walton v. Broadbudd, 6 Bush (Ky.) 328; Brant v. Mickle, 28 Md. 436; Carroll v. Lee, 3 Gill & J. (Md.) 505; 22 Am. Dec. 350; Williams v. Claiborne, 7 Smed. & M. (Miss.) 488; Hunt v. Booth, Freem. Ch. (Miss.) 215; Edwards v. Burns, 26 Mo. App. 44; Boatman's Sav. Bank v. Collins, 75 Mo. 280; Paul v. Leavitt, 53 Mo. 595; Hart v. Leete, 104 Mo. 315; Metropolitan Bank v. Taylor, 53 Mo. 444; Boal v. Morgner, 46 Mo. 48; Ashcraft v. Little, 4 Ired. Eq. (N. Car.) 236; Rudisell v. Watson, 2 Dev. Eq. (N. Car.) 430; Hamilton v. Bishop, 8 Yerg. (Tenn.) 33; 29 Am. Dec. 101; Beaufort v. Collier, 6 Humph. (Tenn.) 497; 44 Am. Dec. 321; Pond v. Skeen, 2 Lea (Tenn.) 126; Murdock v. Memphis, etc., R. Co., 7 Baxt. (Tenn.) 557; Buck v. Wroten, 24 Gratt. (Va.) 250; Logan v. Thrift, 20 Ohio St. 62; Quigley v. Graham, 18 Ohio St. 42.

The words designed to create a separate estate for a married woman need not appear in the granting clause or in the *habendum* clause of the deed. Morrison v. Thistle, 67 Mo. 596.

The release of her dower is a good consideration for a conveyance to her separate use. Skyes v. Chadwick, 18 Wall. (U. S.) 141. A conveyance by a husband during the marriage, in consideration of love and affection, in trust for the use of his wife during life, remainder to his children, does not give her the life estate, "in consideration or by reason of the marriage." Phillips v. Phillips, 9 Bush (Ky.) 183.

Phrases Held Sufficient in Themselves to Create a Separate Estate.—The following phrases by themselves have been held to have the effect, in a settlement on a married woman, of excluding the husband's rights: "For her sole and separate use." Parker v. Brooke, 9 Ves. 583; Williams v. Maull, 20 Ala. 721; Clarke v. Windham, 12 Ala. 798; Robinson v. O'Neal, 56 Ala. 541; Swain v. Duane, 48 Cal. 358. "For her own sole use and benefit." Heathman v. Hall, 3 Ired. Eq. (N. Car.) 236. "For her use and benefit." Goulder v. Cann, 1 De G. F. &

J. 146. "For her sole use." Guishaber v. Hairman, 2 Bush (Ky.) 320; Fears v. Brooks, 12 Ga. 195. "As her separate estate." Fears v. Brooks, 12 Ga. 195; Swain v. Duane, 48 Cal. 358. "For her full and sole use and benefit." Arthur v. Arthur, 11 Ir. Eq. 511. "Only as and for her own separate estate, free from the control of her husband." Wood v. Wood, 83 N. Y. 575. "For her sole use and benefit." Adamson v. Armitage, 19 Ves. 415; Purdue v. Montgomery Bldg., etc., Assoc., 79 Ala. 478; Hutchins v. Dixon, 11 Md. 29. "To her exclusive use, benefit, and behoof." Williams v. Avery, 38 Ala. 115. "To her sole use, benefit, and behoof." Fears v. Brooks, 11 Ga. 195; Guishaber v. Hairman, 2 Bush (Ky.) 320; Steel v. Steel, 1 Ired. Eq. (N. Car.) 452. "For her exclusively." Gould v. Hill, 18 Ala. 84. "For her exclusive use and benefit." Hutchins v. Dixon, 11 Md. 29. "For her own use and at her own disposal." Pritchard v. Ames, Turn. & R. 222. "For her sole and absolute use." Short v. Battle, 52 Ala. 456. "To be hers and hers only." Ozley v. Ikelheimer, 26 Ala. 332. "For her own use and benefit independent of any other person." Williams v. Maull, 20 Ala. 721; Brown v. Johnson, 17 Ala. 232; Ashcraft v. Little, 4 Ired. Eq. (N. Car.) 236. "For her without any hindrance or molestation whatever." Newman v. James, 12 Ala. 29. "For her use independent of any husband." Wagstaff v. Smith, 9 Ves. 520. "Not subject to the control of her husband." Bain v. Lescher, 11 Sim. 297. "Not to be sold, bartered, or traded by the husband." Woodrum v. Kirkpatrick, 2 Swan (Tenn.) 218. "For her livelihood." Darby v. Darby, 3 Atk. 399. "For her sole and exclusive use." Townshend v. Matthews, 10 Md. 251. And see further 1 Min. Inst. 318; Young v. Young, 3 Jones Eq. (N. Car.) 216; Turner v. Kelly, 70 Ala. 85; Miller v. Voss, 62 Ala. 122; Pepper v. Lee, 53 Ala. 33; Sprague v. Shields, 61 Ala. 428; Gest v. Williams, 4 Del. Ch. 55; MacConnell v. Lindsay, 131 Pa. St. 476; Charles v. Coker, 2 S. Car. 123; Gray v. Robb, 4 Heisk. (Tenn.) 74.

Phrases Held Insufficient in Themselves to Create a Separate Estate.—The following phrases by themselves have been held not to have the effect, in a settlement on a married woman, of excluding the husband's rights:

Where the settlement proceeds from the husband it is generally to be construed as operating to her separate use, though no such words are used as would be necessary to create a separate estate in a conveyance by a stranger; otherwise the conveyance would be without effect.¹

c. CONSTRUCTION OF INSTRUMENT CREATING.—The intention is to be gathered from the "four corners of the instrument," and in ascertaining it, a liberal construction is to be adopted; and the court is not confined to the deed itself, but may resort to the marriage contract, if there is one.²

"To A's wife." *Moore v. Jones*, 13 Ala. 296; *Fitch v. Ayer*, 2 Conn. 143. "In trust for her." *Vail v. Vail*, 49 Conn. 52. "For her proper use." *Tyler v. Lake*, 2 R. & M. 183. "To her and her children." *Dunn v. Bank of Mobile*, 2 Ala. 152. "For her own use." *Brandt v. Mickle*, 28 Md. 436; *Turton v. Turton*, 6 Md. 375. "For her use." *Merrill v. Bullock*, 105 Mass. 486; *Clevenstein's Appeal*, 15 Pa. St. 499. "And enjoy as she sees fit." *Wood v. Polk*, 12 Heisk. (Tenn.) 220. "For her use and benefit." *Turton v. Turton*, 6 Md. 375; *Brandt v. Mickle*, 28 Md. 436. "For the joint use of herself and husband." *Gould v. Hill*, 18 Ala. 86. "For her own use, benefit, and behoof." *Guishaber v. Hairman*, 2 Bush (Ky.) 320. "In her own right." *Merrill v. Bullock*, 105 Mass. 486. And see also *Pollard v. Merrill*, 15 Ala. 169; *Gillespie v. Bursleson*, 28 Ala. 551; *Lewis v. Elrod*, 38 Ala. 17; *Harris v. Harbeson*, 9 Bush (Ky.) 397; *Fears v. Brooks*, 12 Ga. 195; *Whitten v. Whitten*, 3 Cush. (Mass.) 193; *Tennent v. Stoney*, 1 Rich. Eq. (S. Car.) 22; 44 Am. Dec. 213; 1 Min. Inst. 317.

1. 1 Minor's Inst. 318; *Whitten v. Whitten*, 3 Cush. (Mass.) 191; *Peters v. Clements*, 46 Tex. 114; *Garland v. Pamplin*, 32 Gratt. (Va.) 314; *Teague v. Downes*, 69 N. Car. 280; *Deming v. Williams*, 26 Conn. 226; 68 Am. Dec. 386; *Underhill v. Morgan*, 33 Conn. 105; *Riley v. Riley*, 25 Conn. 153; *Williams v. King*, 43 Conn. 569; *Darcy v. Ryan*, 44 Conn. 518; *McMillan v. Peacock*, 57 Ala. 127; *Smith v. Seiberling*, 35 Fed. Rep. 677; *Harris v. Harris*, 71 Ala. 536.

In *Whitten v. Whitten*, 3 Cush. (Mass.) 191, the court, by Fletcher, J., said: "The doctrine that a gift to the wife is a gift to the husband cannot apply where the husband himself makes a gift or grant to the wife, which surely

cannot be taken as a gift or grant to himself. . . . And where the husband himself makes a gift or grant to the wife, the intention to relinquish his own rights in favor of the wife, and thus to give her a separate property or interest, is necessarily and most clearly and unequivocally manifested and declared."

And see *Harris v. Harbeson*, 9 Bush (Ky.) 397, where a husband showed, by clear and explicit acts, an intention to give his wife the rents and profits of her land, by having her rents kept separate from his own, and, when sold, paying the proceeds to her, and, when loaning her moneys, by taking notes payable to her. The acts showed not only an intention to give them to his wife, but constituted an executed gift, which a court of equity would uphold and enforce as against him after her death. *Gill v. Woods*, 81 Ill. 64; 25 Am. Rep. 264.

A promissory note of a third person, given by the husband to the wife during coverture, becomes a part of her equitable, and not her statutory, estate, and any conveyance of property by him to her directly during coverture, except in compensation or substitution for other property which belongs to her statutory estate, creates in her an equitable estate. *Hamaker v. Hamaker*, 88 Ala. 431.

Where a married woman claims her earnings as her equitable separate estate, by way of gift from her husband, it will not be sustained, unless it is made clear that the husband intended to divest himself of all interest in such earnings, and to set them apart to the wife. *Bolman v. Overall*, 86 Ala. 168.

2. *Morrison v. Thistle*, 67 Mo. 596; *Porter v. Bank of Rutland*, 19 Vt. 410; *Klenke v. Koeltze*, 75 Mo. 239.

Where a fund is given to trustees to pay to a married woman "the rents, dividends, and income thereof annu-

ally," the increase, as it becomes payable, is not to be regarded as estate newly acquired, and therefore the marital rights of the husband, as to such income, are not affected by an act which provides that all property thereafter acquired by any married woman shall be held by her to her sole and separate use. *Vail v. Vail*, 49 Conn. 52; citing *Sterns v. Weather*, 30 Ala. 712; but see *Nelson v. Hollins*, 9 Baxt. (Tenn.) 553.

In a settlement of property by a husband on his wife, free from all his liabilities, an exception of such incumbrances as the two together shall request the trustee to make, is not repugnant to the grant, but is merely a qualification thereof. *Ætna Ins. Co. v. Brodinax*, 48 Fed. Rep. 892.

Decisions Allowing a Separate Estate.—Where land was devised to a trustee to be used for the maintenance of a devisor's son, and any family that he might thereafter have, on the subsequent marriage of the son his wife was held to be entitled to a maintenance out of the profits of the lands, as her equitable separate estate. *Jones v. Reese*, 65 Ala. 134. And where the earnings of the wife, gifts from her friends, or her separate estate, is invested in land, it will be held to be her separate estate, even though the husband takes the title in his own name. *Martin v. Colburn*, 88 Mo. 229; *Cox v. Cox*, 91 Mo. 71; *Haden v. Ivey*, 51 Ala. 381; *Whitehead v. Whitehead*, 64 N. Car. 538; *Grantham v. Grantham*, 34 S. Car. 504. Where her property is sold and a security taken for the purchase money in the husband's name, it is still the wife's, and she may file a bill in chancery by her next friend to enforce the lien, if the security is not paid. *Sampley v. Watson*, 43 Ala. 377; and if he has entered land in his own name with money of his wife's separate estate, because of a regulation of the land office, he is bound, although in embarrassed circumstances, to convey the land to a trustee for her benefit. *Payne v. Twyman*, 68 Mo. 339.

A recital in a deed that it is the separate property of the wife, removes any presumption that it is community property, and vests the title according to the terms of the deed. *McCutchen v. Purinton* (Tex. 1892), 19 S. W. Rep. 710.

A verbal antenuptial contract by a woman that she shall own and control, as separate estate, the property she

then has, will be valid, and though her husband contributes his services as carpenter and builder in erecting a house upon land purchased by her, it cannot be subjected to his debts. *Turner v. Short* (Ky. 1888), 7 S. W. Rep. 391.

If, in a sealed instrument, the husband acknowledges the receipt of money as his wife's share of her parent's estate and binds himself to return it to her when she so desires, it shows a sufficient intent to create a separate estate in the wife, and the marital rights of the husband do not attach. *Wadsworthville Poor School v. Bryson*, 34 S. Car. 401. Where she is dissatisfied with his investment of her money in land, and he promises to pay her the value of the property, her executors may claim the value of the same against his estate on his failure to do so. *In re Lazarus' Estate* (Pa. 1892), 23 Atl. Rep. 372.

Where a married woman mingles with the profits of a boarding house run by her, a monthly allowance from her husband, and it is not apparent whether the furniture of the house is purchased with her money or that furnished by the husband, it will be deemed to be her separate property. *Diefendorff v. Hopkins* (Cal. 1891), 28 Pac. Rep. 265. A court of equity can settle on her, her share in the personality of her father's estate, in the hands of an administrator, and the creditors of her insolvent husband cannot have the same applied to the payment of their claims. *Bethel v. Smith*, 83 Ky. 84.

Where the plaintiff's husband drove a number of cows at night from her premises, and the next day they were found in defendant's possession, he claiming to have purchased them from her husband and refusing to return them, and the evidence showed that the plaintiff had purchased the cows with her own funds; that feed bought for them on credit was charged to her; that she had supported the family, and that the owner of the premises she occupied had given her permission to live there, it was sufficient to sustain the finding of a referee, in an action of trover for the cows, that they were hers. *Pangburn v. Crouner* (Supreme Ct.), 17 N. Y. Supp. 301.

If a husband allows his wife, during his lifetime, to hold a note and use the proceeds as her own property, it must be considered to have been her separate

2. Power of Disposition.—In a few States it is held that a married woman has no power over her separate estate but such as is given her by the instrument creating it;¹ but the English rule and the one adopted in a majority of the States is, that,

estate. *Miller v. Eram*, 37 Wis. 142. And if he recognizes a trust, made for her benefit by an investment of her share in an estate during his absence, it will be considered her separate estate. *Louisville Bank v. Gray*, 84 Ky. 565. But where, by an ante-nuptial parol contract, he agrees, in consideration of the marriage, that she shall hold all her property then owned or thereafter acquired, as her separate estate, but vesting in her no power of disposition, she takes from him the use and control thereof during life, but at her death bank stock owned by her goes to him. *Brown v. Brown* (Ky. 1890), 13 S. W. Rep. 105.

Decisions Denying a Separate Estate.—A wife cannot claim as her separate estate property of her husband on which she has erected a dwelling, under an agreement with him for its conveyance to her, so as to exclude the claims of her husband's creditors. *Johnston v. Johnston* (Ky. 1892), 19 S. W. Rep. 526; nor is alimony awarded to a wife by the decree of divorce her separate estate. *Stevenson v. Stevenson*, 34 Hun (N.Y.) 157, *distinguished*, *Romaine v. Chauncey* (Supreme Ct.), 15 N. Y. Supp. 198; nor lands, in the absence of recitals in the deed sufficient to create a separate estate, conveyed to the wife by the husband with the intent to shield it from his creditors. *Gaston v. Wright* (Tex. 1892), 18 S. W. Rep. 576.

An ante-nuptial contract entered into in France, excluding property there owned by the wife from the community property, does not, in the absence of an agreement that the real estate of the wife shall be her sole estate free from the control of the husband, secure to the wife as separate estate, real estate owned by her at that time in *Missouri*. *Richardson v. De Giverville*, 107 Mo. 422.

It has been held in *Pennsylvania* that where a woman, at the date of a will devising property to her, is neither married nor contemplating marriage, she will not take a separate estate therein, although she was married at the death of the testator, and the devise vests in her absolutely. *Neale's Appeal*, 104 Pa. St. 214; *followed in In re*

Quinn's Estate (Pa. 1891), 22 Atl. Rep. 965. And also that a wife cannot recover against the execution creditors of her husband, where the property seized was in possession of the husband, unless she shows that the property was paid for out of her separate estate. *Bolinger v. Gallagher* (Pa. 1891), 22 Atl. Rep. 815.

Evidence.—In an action by a wife for the conversion of property claimed by her, she may show receipts for rent given to her. *Hill v. Fouse* (Neb. 1891), 49 N. W. Rep. 760. Where a husband listed for taxation and mortgaged as his own certain of the stock on a farm cultivated by himself and wife, such stock being claimed by the wife as hers, though used indiscriminately for the purpose of cultivation, it was held not to be evidence against the wife on the question of title, unless authorized or known and acquiesced in by her. *Miller v. Lathrop* (Minn. 1892), 52 N. W. Rep. 274.

There is no error in permitting the wife of the plaintiff to testify as to services rendered by her, the earnings of the wife being the property of the husband, unless she carries on a separate business or works for others on her own account. *Tipton Co. v. Brown* (Ind. 1892), 30 N. E. Rep. 925.

The presumption that property bought by a wife with the money of her husband was intended as a settlement for her, may be rebutted by proof that it was understood between them that the property should be his, or that she took the title thereof without his knowledge or consent. *Parker v. Newitt*, 18 Oregon 274.

Where a wife owned lands lying in another State, never during her lifetime reduced into possession by the husband, the court of *Vermont* treated moneys received for rent of the lands as assets of her estate, without requiring proof that she might have held the income thereof as her own, by the laws of the State wherein the land lay. *Gill v. Cook*, 42 Vt. 140.

1. *Staley v. Hamilton*, 19 Fla. 275; *Dollner v. Snow*, 16 Fla. 86; *Doty v. Mitchell*, 9 Smed. & M. (Miss.) 435; *Montgomery v. Agricultural Bank*, 10 Smed. & M. (Miss.) 567; *Hardy v.*

a. AS TO PERSONAL PROPERTY or the produce of lands, she may dispose of it freely, by will or otherwise, precisely as if she were *feme sole*, save only when it is otherwise provided by the instrument whence she derives the estate;¹ but,

b. AS TO REAL PROPERTY, a more rigorous doctrine prevails. If not expressly allowed to dispose of it in some designated way,

Holly, 84 N. Car. 661; Knox v. Jurdan, 5 Jones Eq. (N. Car.) 175; Maurer's Appeal, 86 Pa. St. 380; Page's Estate, 75 Pa. St. 87; Wright v. Brown, 44 Pa. St. 224; Wells v. McCall, 64 Pa. St. 207; Rogers v. Smith, 4 Pa. St. 93; Lyne v. Crouse, 1 Pa. St. 111; Dorrance v. Scott, 3 Whart. (Pa.) 309; 31 Am. Dec. 509; Thomas v. Folwell, 2 Whart. (Pa.) 11; 30 Am. Dec. 230; Wallace v. Coston, 9 Watts (Pa.) 137; Lancaster v. Dolan, 1 Rawle (Pa.) 231; 18 Am. Dec. 625; Creighton v. Clifford, 6 Rich. (S. Car.) 188; Ewing v. Smith, 3 Desaus. (S. Car.) 417; 5 Am. Dec. 557; Reid v. Lamar, 1 Strobb. Eq. (S. Car.) 27; Rochell v. Tompkins, 1 Strobb. Eq. (S. Car.) 114; Robinson v. Dart, Dudley Eq. (S. Car.) 128; 31 Am. Dec. 569; Magwood v. Johnson, 1 Hill Eq. (S. Car.) 228; Frazier v. Center, 1 McCord Eq. (S. Car.) 270.

1. 1 Minor's Inst. 322; 2 Story, Eq., § 1393; Hulme v. Tenent, 1 White & Tudor Lead. Cas. 481 (4th Am. ed.) 679; Pybus v. Smith, 3 Bro. C. C. 346; Barford v. Street, 16 Ves. 135; Towney v. Ward, 1 Beav. 563; Lechmere v. Brotheridge, 32 Beav. 360; Taylor v. Meade, 4 De G. J. & S. 597; Moore v. Morris, 4 Drew 38; Grigby v. Cox, 1 Ves. 518; Peacock v. Monk, 2 Ves. 191; Fettiplace v. George, 1 Ves. Jr. 193 and notes; Rich v. Cockell, 9 Ves. 369; Wagstaff v. Smith, 9 Ves. 520; Sturgis v. Corp, 13 Ves. 190; Smith v. Thompson, 3 MacArthur (U. S.) 291; Fiske v. Bigelow, 2 MacArthur (U. S.) 427.

In Metcalf v. Cook, 2 R. I. 355, it was held that a married woman had no power to charge her separate estate unless it was given her in the instrument creating the trust. But in the later case of Ives v. Harris, 7 R. I. 413, the court said that without words in the instrument restraining her "it is not to be doubted that the equitable estate of a married woman, in real property settled to her sole, and separate use, is as alienable by her—she and her husband joining in a deed executed in solemn form under the statute—as her legal estate in real property."

And see Gunter v. Williams, 40 Ala. 561; Paulk v. Wolfe, 34 Ala. 541; Baker v. Gregory, 28 Ala. 544; 65 Am. Dec. 366; Ozley v. Ikelheimer, 26 Ala. 332; Brame v. McGee, 46 Ala. 174; Nunn v. Givhan, 45 Ala. 375; Wilkinson v. Cheatham, 45 Ala. 341; Short v. Battle, 52 Ala. 456; Cowles v. Pallard, 51 Ala. 445; Puryear v. Puryear, 16 Ala. 486; Wilburn v. McCalley, 63 Ala. 436; McCroan v. Pope, 17 Ala. 612; Bradford v. Greenway, 17 Ala. 797; 52 Am. Dec. 203; Puryear v. Beard, 14 Ala. 122; Gillespie v. Simpson (Ark. 1892), 18 S. W. Rep. 1050; Oswalt v. Moore, 19 Ark. 257; Dobbin v. Hubbard, 17 Ark. 196; 65 Am. Dec. 425; Buckner v. Davis, 29 Ark. 447; Palmer v. Rankin, 30 Ark. 771; Henry v. Blackburn, 32 Ark. 445; Little v. Dodge, 32 Ark. 459; Scott v. Ward, 35 Ark. 480; Miller v. Newton, 23 Cal. 554; Imlay v. Huntington, 20 Conn. 149; Platt v. Hawkins, 43 Conn. 139; Wells v. Thorman, 37 Conn. 318; Taylor v. Shelton, 30 Conn. 122; Buckingham v. Moss, 40 Conn. 461; Fears v. Brooks, 12 Ga. 195; Wyly v. Collins, 9 Ga. 223; Weeks v. Sego, 9 Ga. 201; Dallas v. Heard, 32 Ga. 604; Robert v. West, 15 Ga. 123; Morrison v. Solomon, 52 Ga. 206; Huff v. Wright, 39 Ga. 41; Seabrook v. Brady, 47 Ga. 650; Van Arsdale v. Joiner, 44 Ga. 173; Cox v. Wood, 20 Ind. 54; Kantrowitz v. Prather, 31 Ind. 92; 99 Am. Dec. 587; Hasheagan v. Specker, 36 Ind. 414; Pomeroy v. Manhattan L. Ins. Co., 40 Ill. 398; Knaggs v. Mastin, 9 Kan. 532; Bell v. Kellar, 13 B. Mon. (Ky.) 381; Lillard v. Turner, 16 B. Mon. (Ky.) 374; Burch v. Breckenridge, 16 B. Mon. (Ky.) 482; 63 Am. Dec. 553; Jarman v. Wilkerson, 7 B. Mon. (Ky.) 293; Long v. White, 5 J. Marsh. (Ky.) 226; Sweeney v. Smith, 15 B. Mon. (Ky.) 325; 61 Am. Dec. 188; Christmas v. Hahn (Ky. 1888), 9 S. W. Rep. 279. In Maryland the early cases held the American rule, Farr v. Williams, 4 Md. Ch. 68; Miller v. Williamson, 5 Md. 219; but late cases hold the English rule. Cooke v. Husbands, 11 Md. 492; Hall v. Eccleston, 37 Md. 520; Schull v. Murray, 32 Md.

she can do so only by will, executed as wills of land are required to be executed, or by deed of conveyance executed with the formalities prescribed by law for married women.¹ When the instru-

9; *Koontz v. Nabb*, 16 Md. 549; *Chew v. Beall*, 13 Md. 348; *Willard v. Eastham*, 15 Gray (Mass.) 328; 77 Am. Dec. 366; *Rogers v. Ward*, 8 Allen (Mass.) 387; 85 Am. Dec. 710; *Harding v. Cobb*, 47 Miss. 599; *Whitesides v. Cannon*, 23 Mo. 457; *Segond v. Garland*, 23 Mo. 547; *Coats v. Robinson*, 10 Mo. 757; *Schafroth v. Amba*, 46 Mo. 114; *Claffin v. Van Wagoner*, 32 Mo. 252; *Kimm v. Weipert*, 46 Mo. 532; 2 Am. Rep. 541; *Lincoln v. Rowe*, 51 Mo. 571; *Metropolitan Bank v. Taylor*, 62 Mo. 338; *Batchelder v. Sargent*, 47 N. H. 262; *Leaycraft v. Hedden*, 4 N. J. Eq. 512; *Johnson v. Cummins*, 16 N. J. Eq. 97; 84 Am. Dec. 142; *Armstrong v. Ross*, 20 N. J. Eq. 109; *Perkins v. Elliot*, 23 N. J. Eq. 526; *Pentz v. Simonson*, 13 N. J. Eq. 232; *Oakley v. Pound*, 14 N. J. Eq. 178; *Jaques v. Methodist Episcopal Church*, 17 Johns. (N. Y.) 548, *overruling* 3 Johns. Ch. (N. Y.) 77; 8 Am. Dec. 447; *Yale v. Dederer*, 22 N. Y. 450; 78 Am. Dec. 216; 17 How. Pr. (N. Y.) 165; 20 How. Pr. (N. Y.) 242; 21 Barb. (N. Y.) 286; 31 Barb. (N. Y.) 525; 68 N. Y. 329, *overruling* 18 N. Y. 265; 72 Am. Dec. 503; *Dyett v. North American Coal Co.*, 20 Wend. (N. Y.) 570; 32 Am. Dec. 508; *Powell v. Murray*, 2 Edw. Ch. (N. Y.) 636; *Cruger v. Cruger*, 5 Barb. (N. Y.) 227; now partly regulated by 3 *New York Rev. Sts.* 1882, § 63; *Hardy v. Van Harlingen*, 7 Ohio St. 208; *Phillips v. Graves*, 20 Ohio St. 390; 5 Am. Rep. 675; *Williams v. Urmston*, 35 Ohio St. 296; *Lightfoot v. Bass*, 8 Lea (Tenn.) 351; *Young v. Young*, 7 Coldw. (Tenn.) 461; *Sherman v. Turpin*, 7 Coldw. (Tenn.) 382; *Robertson v. Queen*, 87 Tenn. 445; *Milburn v. Walker*, 11 Tex. 329; *Hall v. Dotson*, 55 Tex. 520; *Partridge v. Stocker*, 36 Vt. 117; 84 Am. Dec. 664; *West v. West*, 3 Rand. (Va.) 373; *Vizonneau v. Pegram*, 2 Leigh (Va.) 183; *Williamson v. Beckham*, 8 Leigh (Va.) 20; *Lee v. Bank of U. S.*, 9 Leigh (Va.) 200; *Whiting v. Rust*, 1 Gratt. (Va.) 483; *Ellis v. Baker*, 1 Rand. (Va.) 47; *Woodson v. Perkins*, 5 Gratt. (Va.) 345; *Nixon v. Rose*, 12 Gratt. (Va.) 431; *Penn v. Whitehead*, 17 Gratt. (Va.) 503; 94 Am. Dec. 478; *Muller v. Bayley*, 21 Gratt. (Va.) 528; *Burnett v. Hawfe*, 25 Gratt. (Va.) 481; *Darnall*

v. Smith, 26 Gratt. (Va.) 878; *Patton v. Charlestown, etc., Bank*, 12 W. Va. 587; *Radford v. Carwile*, 13 W. Va. 572; *citing* all the cases; *Todd v. Lee*, 15 Wis. 380.

1. 2 Story's Eq. Jur., §§ 1389, 1390 and notes; *McChesney v. Brown*, 25 Gratt. (Va.) 393; *Radford v. Carwile*, 13 W. Va. 572; *Bressler v. Kent*, 61 Ill. 426; 14 Am. Rep. 67; and see cases *cited*, preceding note.

The *Kentucky* statute, allowing a married woman to dispose by will "of any estate secured to her separate use by deed or devise, or in the exercise of a written power," does not allow her to dispose of land, unless the deed itself creates in her a separate estate. And where the husband, after her death, executes a writing relinquishing all his interest, the same as though it had been deeded to her separate use, and the will had been made in pursuance of a written power, and files it at the probate, it does not validate the will where the rights of heirs have already vested under the statutes of descent. *Craine v. Edwards* (Ky. 1891), 17 S. W. Rep. 211. Nor does a power to "use, sell, exchange, reinvest or otherwise dispose of as she may think proper," give her such special power to will. *Harris v. Harbeson*, 9 Bush (Ky.) 397.

Her separate property may be conveyed by order of court. *Terrell v. Spence*, 5 Bush (Ky.) 637. Her signature to the application for the sale, and to the deed, is sufficient evidence of her assent. *Moseley v. Hankinson*, 25 S. Car. 519. Or her separate property may be conveyed under a power of attorney to her husband. *Christmas v. Hahn* (Ky. 1888), 9 S. W. Rep. 279; and she may dispose of it to secure the payment of his debts. *Collins v. Wassell*, 34 Ark. 17; *Gillespie v. Simpson* (Ark. 1892), 18 S. W. Rep. 1050. She will be bound by covenants contained in her deeds. *Barlow v. Delaney*, 40 Fed. Rep. 97; *Yerkes v. Hadley*, 5 Dak. 324. But a lease by the husband, without her consent, is void, and in an action by her to recover possession no notice to quit is necessary. *Wood v. Wood*, 83 N. Y. 575.

ment creating the trust provides that it may be disposed of by one mode, other modes are generally excluded.¹

1. *Swift v. Castle*, 23 Ill. 132; *Cooke v. Husbands*, 11 Md. 492; *Lowry v. Tiernan*, 2 Har. & G. (Md.) 34; *Tiernan v. Poor*, 1 Gill & J. (Md.) 216; 19 Am. Dec. 225; *Brundige v. Poor*, 2 Gill & J. (Md.) 1; *Miller v. Williamson*, 5 Md. 219; *Leaycraft v. Hedden*, 4 N. J. Eq. 551; *Morgan v. Elam*, 4 Yerg. (Tenn.) 375; *Lightfoot v. Bass*, 8 Lea (Tenn.) 350; *Hardy v. Holly*, 84 N. Car. 661; *Weeks v. Sego*, 9 Ga. 199; *Williamson v. Beckham*, 8 Leigh (Va.) 27; *Nixon v. Rose*, 12 Gratt. (Va.) 425.

A number of cases support the opposite doctrine, that a power of disposition specifically pointed out does not preclude the adoption of any other mode of disposition, unless there are negative words restraining the exercise of the power to the very mode pointed out. On an examination of these cases it will be found that an absolute estate was granted the wife, the instrument specifying that it should be conveyed by deed, in which the husband or trustee joins, or by will, and the question arose on her power to charge it with her debts. *Jaques v. Methodist Episcopal Church*, 17 Johns. (N. Y.) 549; 8 Am. Dec. 447; *Kimm v. Weippert*, 46 Mo. 532; 2 Am. Rep. 541; *Vizonneau v. Pegram*, 2 Leigh (Va.) 183; *West v. West*, 3 Rand. (Va.) 373; *Whitaker v. Blair*, 3 J. J. Marsh. (Ky.) 239; *Strong v. Skinner*, 4 Barb. (N. Y.) 546; *Radford v. Carwile*, 13 W. Va. 577.

Restraint on Alienation and Anticipation.—To restrain a married woman's power of alienation and anticipation of the profits of her separate estate, there must be an expressed restraint in the instrument creating it. It is not to be implied from her being authorized to dispose of the property in an ordinary manner, and a specific mode of disposition pointed out by the instrument does not necessarily exclude any other mode. *Jaques v. Methodist Episcopal Church*, 17 Johns. (N. Y.) 548; 8 Am. Dec. 447; *Radford v. Carwile*, 13 W. Va. 572; *Cheever v. Wilson*, 9 Wall. (U. S.) 108; *Hooks v. Brown*, 62 Ala. 258; *Wilburn v. McCalley*, 63 Ala. 436; *Williams v. Maull*, 20 Ala. 721; *Fellows v. Tann*, 9 Ala. 1003; *Fears v. Brooks*, 12 Ga. 195; *Freeman v. Flood*, 16 Ga. 528; *Hathaway v. Yeaman*, 8 Bush (Ky.) 391; *Parker v. Converse*,

5 Gray (Mass.) 336; *Waters v. Tazewell*, 9 Md. 291; *Gully v. Hull*, 31 Miss. 20; *Wells v. McCall*, 64 Pa. St. 207; *Witsell v. Charleston*, 7 S. Car. 88; *Greensboro Bank v. Chambers*, 30 Gratt. (Va.) 202; 32 Am. Rep. 661; *Burnett v. Hawfe*, 25 Gratt. (Va.) 481; *Nixon v. Rose*, 12 Gratt. (Va.) 431; *Parker v. White*, 11 Ves. 209; *Tullett v. Armstrong*, 1 Beav. 1; 4 M. & C. 377; *Pybus v. Smith*, 3 Bro. C. C. 340; *Field v. Evans*, 15 Sim. 372; *Kenrick v. Wood*, L. R., 9 Eq. 33; *Arnold v. Woodhams*, L. R., 16 Eq. 29; 1 Min. Inst. 327.

As in creating the separate estate, it is not necessary that the settlement contain technical words, but only that the settler's intent to prevent anticipation and alienation clearly appear. *Fears v. Brooks*, 12 Ga. 195; *Greensboro Bank v. Chambers*, 30 Gratt. (Va.) 202; 32 Am. Rep. 661. The restraint may be by implication only, as where powers inconsistent with her powers of alienation are given to the trustees. *Gully v. Hull*, 31 Miss. 20.

Provisions that the property shall be "for her sole and separate use," or "pay to her from time to time on her receipt or personal appearance," or "exempt from her husband's debts," have been held not to be restraints upon the wife's powers of anticipation and control. *Pybus v. Smith*, 3 Bro. C. C. 340; 1 Ves. Jr. 189; *Hulme v. Tenent*, 1 Bro. C. C. 16; *Scott v. Davis*, 4 M. & C. 87; *Sturgis v. Corp*, 13 Ves. 190; *Browne v. Like*, 14 Ves. 302; *Parker v. White*, 11 Ves. 222; *Ellis v. Atkinson*, 3 Bro. C. C. 565; *Cooke v. Husbands*, 11 Md. 492; *Whitsell v. Charleston*, 7 S. Car. 88.

But it is a restraint where the deed provides that it is to be "inalienable," or "unassignable," or that "she shall not sell, mortgage, charge, or incumber," or that she is to have it "without power of anticipation." *Rennie v. Ritchie*, 12 C. & F. 204; *D'Oechsner v. Scott*, 24 Beav. 239; *Spring v. Pride*, 10 Jur. N. S. 646; *Bagget v. Neux*, 1 Collyer C. C. 138; *Brown v. Bamford*, 11 Sim. 131; *Cooper v. Macdonald*, L. R., 7 Ch. 288.

The restraint upon anticipation operates during a second or subsequent coverture, unless destroyed by the act of the woman while discovered. *Robert v. West*, 15 Ga. 122; *Staggers v. Mat-*

3. Power to Charge.—As a corollary to the above proposition, it is the settled doctrine in *England* that a married woman may charge her separate estate in equity, even by implication, with her debts, contracts and engagements. By entering into such engagements she must have meant to effect something, and as she cannot have expected to charge her person, she could have had no other design than to subject to the fulfillment of her engagements so much of her separate estate as is subject to her absolute disposal as if she were a *feme sole*.¹ And this is the general rule in

thews, 13 Rich. Eq. (S. Car.) 142; Nix v. Bradley, 6 Rich. Eq. (S. Car.) 43; Beaufort v. Collier, 6 Humph. (Tenn.) 487; Brown v. Foote, 2 Tenn. Ch. 255; 44 Am. Dec. 321. In *Pennsylvania* and a few other States it only operates during the single marriage for which the separate use was originally created. Hammersley v. Smith, 4 Whart. (Pa.) 126; Kuhn v. Newman, 26 Pa. St. 227; Dubs v. Dubs, 31 Pa. St. 149; Freyvogle v. Hughes, 56 Pa. St. 228; Hepburn's Appeal, 65 Pa. St. 468; Bush's Appeal, 33 Pa. St. 85; McKee v. McKinley, 33 Pa. St. 92; Lindsay v. Harrison, 8 Ark. 302; Miller v. Bingham, 1 Ired. Eq. (N. Car.) 423; 36 Am. Dec. 58; Apple v. Allen, 3 Jones Eq. (N. Car.) 120; Duke v. Duke, 81 Ky. 308.

The doctrine of the wife's separate estate is neatly summed up by Lord Chancellor Cottenham in *Tullett v. Armstrong*, 4 M. & C. 405: "When this court," says he, "first established the separate estate, it violated the (existing) laws of property as between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a *feme sole*, the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property supported the validity of the prohibition against alienation. In the case now under consideration, if the after-taken husband be permitted to interfere with the property given or settled before the marriage to the separate use of the wife, much of the benefit and security of the rules which have been so established will be lost. Why, then, should not equity in this case also interfere; and if it cannot protect the wife consistently with the ordinary

rules of property, extend its own (peculiar) rules with respect to the separate estate, so as to secure to her the enjoyment of that estate which has been so invented for her benefit? It is, no doubt, doing violence to the rules of property to say that property which, being given with qualifications and restrictions which are held to be void, belonged absolutely to the woman up to the moment of her marriage, shall not be subject to the ordinary rules of law as to the interest which the husband is to take in it; but it is not a stronger act to prevent the husband from interfering with such property than it was originally to establish the separate estate, or to maintain the prohibition against alienation. In doing this, I feel that I have much to overcome of which the observations thrown out by myself in *Masse v. Parker*, 2 M. & K. 174, is the only part of which I do not feel the important weight. I have to contend with Lord Brougham's observations, in *Woodmeston v. Walker*, 2 R. & M. 197, and the vice-chancellor's decisions in *Newton v. Reid*, 4 Sim. 141; *Brown v. Pocock*, 2 R. & M. 210; 5 Sim. 663; *Malcolm v. O'Callaghan*, 4 M. & C. 399; *Johnson v. Freeth*, 6 Sim. 423, &c.; and *Davies v. Thornycroft*, 6 Sim. 420. In establishing the validity of the separate estate, with its qualifications (which constitute its value)—that is, the prohibition against anticipation—I am not doing more than my predecessors have done for similar purposes."

1. Schouler's Dom. Rel., § 134, *et seq.*; 1 Min. Inst., p. 224; *Hulme v. Tenant*, 1 White & Tudor's Lead. Cas. 361 (4th Am. ed.) 679, where the English cases are collected; *Murray v. Barlee*, 3 M. & K. 209; *Owens v. Dickinson*, 1 Cr. & Ph. 53; *London, etc., Bank v. Lempriere*, L. R., 4 P. C. 572; *Butler v. Cumpston*, L. R., 7 Eq. 16; *Picard v. Hine*, L. R., 5 Ch. App. 274; *Johnson*

the *United States*, though in some States the contract must be for the benefit of the wife or her separate estate.¹ The contracts are

v. Gallagher, 3 De G. F. & G. 494; *Vaughan v. Vanderstegen*, 2 Drew 165.
1. See MARRIED WOMEN, vol. 14, p. 607.

In the following note the doctrine as to a married woman's charging her equitable separate estate is given as it exists in each of the States of the Union.

Alabama.—There is, in this State, an essential difference in the manner of charging the statutory separate estate of a married woman and her equitable separate estate, or separate estate by contract. The former is charged by the statute with the price of certain articles, the character of which is specified, and her agency in purchasing them is immaterial; while the latter can only be charged by the act and agreement of the wife, and, in the absence of restraining words in the instrument creating the estate, it may be charged to the same extent as if she were a *feme sole*. *Wilburn v. McCalley*, 63 Ala. 436; *Steed v. Knowles*, 79 Ala. 446; *McKenna v. Rowlett*, 68 Ala. 186; *Sprague v. Shields*, 61 Ala. 428; *Short v. Battle*, 52 Ala. 456; *Parker v. Marks*, 82 Ala. 548; *Cowles v. Pollard*, 51 Ala. 445; *Wilkinson v. Cheatham*, 45 Ala. 341; *Nunn v. Givhan*, 45 Ala. 375; *Gunter v. Williams*, 40 Ala. 521; *Paulk v. Wolfe*, 34 Ala. 541; *Cowles v. Morgan*, 34 Ala. 535; *Baker v. Gregory*, 28 Ala. 544; 65 Am. Dec. 366; *Ozley v. Ikleheimer*, 26 Ala. 332; *Collins v. Rudolf*, 19 Ala. 616; *Puryear v. Puryear*, 16 Ala. 486.

By giving a promissory note for the purchase price of land conveyed as statutory estate, and a mortgage to secure the same, a married woman thereby charged her equitable separate estate. *Turner v. Kelly*, 70 Ala. 85.

She may become a member of a partnership and her interest will be subject to a judgment against it in the common name. *Rabitt v. Orr*, 83 Ala. 185. Where the conveyance was to her use, "with power to sell, mortgage . . . the same, provided she . . . join with the said [trustee] in any sale, conveyance . . . of the property, and by such joint action manifest her consent in writing to the disposal of the same," she was allowed to mortgage it to secure her husband's debts without the trustee joining. *Burrus v. Dawson*, 66 Ala. 476.

A charge against the equitable separate estate can only be enforced in equity. *Pollard v. Cleaveland*, 43 Ala. 102; *Bell v. Watkins*, 82 Ala. 512; 60 Am. Dec. 756; and the creditors have priority in the order in which their bills are filed. *Kelly v. Turner*, 74 Ala. 513.

Arkansas.—In order that her separate property may be bound, it is not necessary that she should execute an instrument expressly referring to it or purporting to exercise a power over it. It is sufficient that she professes to act as a *feme sole*; for the court of chancery in giving her the capacity to hold separate property gives also the capacity, incident to property in general, of incurring debts to be paid out of it, and enforces payment of such debts when contracted, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied. *Dobbin v. Hubbard*, 17 Ark. 196; *Palmer v. Rankins*, 30 Ark. 771; *Rudd v. Peters*, 41 Ark. 177.

But the contract must be for the benefit of herself, or her separate estate, or it cannot be enforced against it. *Collins v. Underwood*, 33 Ark. 265; *Stowell v. Grider*, 48 Ark. 220; *Henry v. Blackburn*, 32 Ark. 445; *Stillwell v. Adams*, 29 Ark. 346.

A married woman may charge her separate estate by the employment of counsel to prosecute a suit for divorce, and if she die before the termination of the suit, the counsel will be entitled to be paid out of her estate for the service rendered during her life. *Viser v. Bertrand*, 14 Ark. 271; *Oswalt v. Moore*, 19 Ark. 257. A judgment against a married woman upon a claim for which she is not legally liable—for instance, as maker of a note for the accommodation of her husband—is not void, but may be enforced against her separate property. *Chollar v. Temple*, 39 Ark. 238.

California.—A married woman may contract for services to be rendered for the protection and preservation of her separate estate, which is personal property, and for services thus rendered on the faith of her separate estate, a court of equity will enforce a lien; but she cannot create a lien on her separate real estate except by contract in writing signed and acknowledged by her. *Terry v. Hammonds*, 47 Cal. 32; over-

ruling, to this extent, the rule laid down in *MacLay v. Love*, 25 Cal. 367; *Smith v. Greer*, 31 Cal. 476; *Bodley v. Ferguson*, 30 Cal. 511. And see *Burkle v. Levy*, 70 Cal. 250; *Brenham v. Davidson*, 51 Cal. 356.

But courts of equity are careful in guarding her against imposition, and in seeing that dealings with her affecting her separate estate are free from fraud and reasonable in their terms, and that no unfair advantage has been taken of her. *Miller v. Newton*, 23 Cal. 554.

Colorado.—There must be an express promise binding the separate estate, unless the contract is for her benefit, or for the benefit of her separate estate. *Farrand v. Beshoar*, 9 Colo. 291. Her contracts were formerly valid only against her separate property in equity. *Hochstadter v. Hays*, 11 Colo. 118.

Connecticut.—The presumption is that a contract entered into by a married woman having a separate estate, for its benefit or for its exclusive benefit, was contracted upon the credit of her estate. *Williams v. King*, 43 Conn. 569; *Smith v. Williams*, 43 Conn. 409; *National Bank v. Smith*, 43 Conn. 327; *Platt v. Hawkins*, 43 Conn. 143; *Donovan's Appeal*, 41 Conn. 551; *Hitchcock v. Kiely*, 41 Conn. 611; *Adams v. Charter*, 46 Conn. 551; *Wells v. Thorman*, 37 Conn. 318; *Taylor v. Shelton*, 30 Conn. 122; *Leavitt v. Beirne*, 21 Conn. 1; *Imlay v. Huntington*, 20 Conn. 146; *Jones v. Aetna Ins. Co.*, 14 Conn. 501.

A husband cannot rebut the presumption of law that a building erected by him, on her separate property, is intended for her benefit, and cannot recover the value of such building either from her or her estate. *In re Sturdevant's Estate* (Conn. 1892), 23 Atl. Rep. 826.

District of Columbia.—A purchase of furniture by a married woman, for a house forming her separate estate, is a contract relating to her separate estate and will be enforced. *Harmon v. Garland*, 1 Mackey (D. C.) 1. But otherwise if the house was not her separate estate. *Solomon v. Garland*, 2 Mackey (D. C.) 113. Nor is the purchase of a horse and carriage to be used in riding back and forth from her home in the country to look after property in the city, for the benefit of her separate estate or a contract relating to it. *McDermott v. Garland*, 1 Mackey (D. C.) 496. If she allows her husband

to buy supplies for the family upon the credit of her separate estate, she will be liable therefor. *McDermott v. Garland*, 1 Mackey (D. C.) 496.

Florida.—Unless the indebtedness is incurred on account of the beneficial nature of the consideration, as inuring to the benefit of her property or estate, the only manner in which a married woman, living with her husband, can create a charge upon her separate property, is by some deed, mortgage, or other instrument of writing, duly executed and acknowledged according to the statute. *Staley v. Hamilton*, 19 Fla. 275; *Harwood v. Root*, 20 Fla. 940; *Hodges v. Price*, 18 Fla. 342.

But real estate of a wife will be charged in equity with the value of improvements which she causes to be built thereon. *Schnabel v. Betts*, 23 Fla. 178; and see *Thrasher v. Doig*, 18 Fla. 809; *Caulk v. Fox*, 13 Fla. 147; *Sanderson v. Jones*, 6 Fla. 430; *Maiben v. Bobe*, 6 Fla. 381; *Lewis v. Yale*, 4 Fla. 418; *Smith v. Poythress*, 2 Fla. 92.

Georgia.—*Georgia Code*, § 1783, declares "that, while the wife may contract, she cannot bind her separate estate by any contract of suretyship, nor by any assumption of the debts of her husband; and any sale of her separate estate made to a creditor of her husband in extinguishment of his debt, shall be absolutely void;" and this applies not only to a separate estate of the wife created by deed, but to any property held by her as "separate estate." *Dunbar v. Mize*, 53 Ga. 435; *Humphrey v. Copeland*, 54 Ga. 543; *Ruffin v. Paris*, 75 Ga. 653.

This does not affect the power of a widow to contract with reference to such debts after her husband's death. *Mize v. Hawkins*, 54 Ga. 500.

In other respects the rule is the same as in England. *Fears v. Brooks*, 12 Ga. 195; *Morrison v. Solomon*, 52 Ga. 206; *Seabrook v. Brady*, 47 Ga. 650; *Van Arsdale v. Jonier*, 44 Ga. 41; *Huff v. Wright*, 39 Ga. 41; *Carmichael v. Walters*, 33 Ga. 316; *Dallas v. Heard*, 32 Ga. 604; *Robert v. West*, 15 Ga. 123; *Wylly v. Collins*, 9 Ga. 223; *Weeks v. Sego*, 4 Ga. 201; *Mathews v. Paradise*, 74 Ga. 523.

Illinois.—The debt must be contracted for her own benefit, on the credit of her separate property, or in reference to it, or there must be some appropriate instrument executed by her with a view to make the debt a specific charge. *Williams v. Hugunin*, 69 Ill. 214; *Fur-*

ness *v. McGovern*, 78 Ill. 337; *Elder v. Jones*, 85 Ill. 384; *Forbes v. Williams*, 13 Ill. App. 291; *Roberts v. Jenks*, 5 Ill. App. 484; *Carpenter v. Mitchell*, 50 Ill. 470; *Schmidt v. Postel*, 63 Ill. 58; *Pomeroy v. Manhattan L. Ins. Co.*, 40 Ill. 398.

A contract by a married woman compromising a *bona fide* claim against an estate in which she has a right to a distributive share, is one in respect to her separate estate, and binding on her, notwithstanding her coverture. *Husband v. Epling*, 81 Ill. 172.

Indiana.—In this State the rule is the same as in *Illinois*. The intent to charge must be clear and is not to be presumed, and the contract must be one from which benefit results to the property. *Kantrowitz v. Prather*, 31 Ind. 92; *Smith v. Howe*, 31 Ind. 233; *Hasheagen v. Specker*, 36 Ind. 413; *Hodson v. Davis*, 43 Ind. 258; *Shannon v. Bartholomew*, 53 Ind. 54; *Crickmore v. Breckenridge*, 51 Ind. 294; *Armstrong v. Nichols*, 32 Ind. 408; *Montgomery v. Sprankle*, 31 Ind. 113; *Stevens v. Parish*, 29 Ind. 260; *Coats v. McKee*, 26 Ind. 223; *Abdil v. Abdil*, 26 Ind. 287; *Cox v. Wood*, 20 Ind. 54; *Reese v. Cochran*, 10 Ind. 195; *Chrisman v. Leonard*, 126 Ind. 202; *Lindley v. Cross*, 31 Ind. 106.

The plaintiff must aver and prove that the contract was one which the married woman had the power to make. *Cupp v. Campbell*, 103 Ind. 213; *Juchert v. Johnson*, 108 Ind. 436. A personal judgment may be rendered against her. *Fawcner v. Scottish American Mortgage Co.*, 107 Ind. 555.

A note, and mortgage to secure the same, given by a wife in payment of her husband's debts, are void. *Warey v. Forst*, 102 Ind. 205; but where, at the time of executing a joint mortgage with her husband, a married woman made an affidavit that it was for her own use, to secure the purchase price of property bought of plaintiff and not to secure any debt of her husband's, and the plaintiff, relying on her affidavit, sold her the property and took the mortgage to secure the note given therefor, she was estopped, in an action to foreclose the mortgage, from claiming that she signed the note and mortgage as surety for her husband. *Taylor v. Hearn* (Ind. 1892), 31 N. E. Rep. 201.

A complaint to enforce against the separate real estate of a married

woman an alleged indebtedness contracted by her for its improvement, which does not allege that she intended to charge or did charge or agree to charge, the indebtedness against her separate estate, is insufficient. The fact that she caused necessary and proper improvements to be made on the real estate does not raise the inference that she intended to create a charge upon it. *Shannon v. Bartholomew*, 53 Ind. 54. The complaint must also contain averments showing that the improvements were necessary and proper to her complete and full enjoyment of the land. *Lindley v. Cross*, 31 Ind. 106.

Iowa.—*Iowa* adopts the same rule as *Indiana* and *Illinois*. *First Nat. Bank v. Haire*, 36 Iowa 443; *Jones v. Crosthwaite*, 17 Iowa 393; *Patton v. Kinsman*, 17 Iowa 428.

A wife who merely joins her husband in a mortgage to secure his note, is not liable to a personal judgment on the debt. *Wolf v. Van Metre*, 23 Iowa 397; *Knox v. Moser*, 69 Iowa 341; but where she has procured credit to be given him on the faith of his ownership of certain lands, she cannot afterwards, as against those giving the credit, assert that he held the land in trust for her. *Hendershott v. Henry*, 63 Iowa 744.

If a wife permits her husband to buy lumber with which to make improvements on her land, with the full knowledge of all the facts and that it is unpaid for, the seller will be entitled to a lien on the land for the value of the materials furnished. *Miller v. Hollingsworth*, 36 Iowa 163; but where she does not authorize its purchase, or know that it was not paid for, her property will not be subject to the lien. *Price v. Seydel*, 46 Iowa 696.

Kansas.—*Kansas* follows the English rule, and a married woman may bind herself, by her contracts, to the extent of her separate property. A personal judgment may be rendered against her which will reach any or all of her separate property not exempt from execution under the exemption laws. *Miner v. Pearson*, 16 Kan. 27; *Deering v. Boyle*, 8 Kan. 528; *Tallman v. Jones*, 13 Kan. 438; *Furrow v. Chapin*, 13 Kan. 107; *Larimer v. Kelley*, 10 Kan. 298; *Faddis v. Woollomes*, 10 Kan. 56; *Knaggs v. Mastin*, 9 Kan. 532; *Monroe v. May*, 9 Kan. 466; *Going v. Orns*, 8 Kan. 85; *Wicks v. Mitchell*, 9 Kan. 80.

In *Deering v. Boyle*, 8 Kan. 528, the court by Valentine, J., said: "When a married woman executes a promissory note, she, of course, means something. She either means to charge her separate estate, or else she means to cheat and defraud the person to whom she gives the note. Is it not more charitable to suppose she means the former? But suppose she means the latter, will courts of equity hear her plead her own guilt and fraud? If the contract of a married woman does not bind her separate estate, then, of course, it is a nullity; for it is well settled that it cannot bind her personally. But to give her contract such a construction violates at least two well-settled principles of law: First, it presumes her guilty of fraud before the fraud is shown. Second, it adopts a construction which will defeat the contract, instead of adopting the construction which will prevent its violation and give effect to the obligation of each and all parties."

Kentucky.—A married woman may charge her separate estate whenever she thinks proper to do so, but her intention must be manifest or otherwise it will not be held liable. The execution of a note or indorsement of a bill of exchange has been regarded as manifesting an intention by a *feme covert* to charge her separate estate. *Burch v. Breckinridge*, 16 B. Mon. (Ky.) 482; 63 Am. Dec. 553; *Lillard v. Turner*, 16 B. Mon. (Ky.) 374; *Cardwell v. Perry*, 82 Ky. 129; *Sweeney v. Smith*, 15 B. Mon. (Ky.) 325; 61 Am. Dec. 188; *Coleman v. Woolley*, 10 B. Mon. (Ky.) 320; *Bell v. Kellar*, 13 B. Mon. (Ky.) 381; *Jarman v. Wilkerson*, 7 B. Mon. (Ky.) 293; *Long v. White*, 5 J. J. Marsh. (Ky.) 226; *Hounshell v. Clay F. Ins. Co.*, 81 Ky. 304; *Hackett v. Metcalfe*, 6 Bush (Ky.) 352. It must be the debt of the wife and the credit be given to her, or she must receive the benefit of it. *Huss v. Rice* (Ky. 1891), 17 S. W. Rep. 869.

A married woman, with power to sue and be sued, to contract and manage, sell, convey, and devise her property cannot make herself liable upon a contract of suretyship for the husband or for others. *Bidwell v. Robinson*, 79 Ky. 29; but where a devise in trust to pay her the income, contained a provision that it was not to be liable for her debts, it was held that it might be subjected nevertheless. *Parsons v. Spencer*, 83 Ky. 305.

Her separate property is not liable, after marriage, for necessities, unless the contract be in writing and signed by herself and husband. *Harris v. Dale*, 5 Bush (Ky.) 61; but a joint note by herself and husband given in payment for necessities, is sufficient "evidence in writing." *Marsh v. Alford*, 5 Bush (Ky.) 392.

Maryland.—In *Maryland* it must be affirmatively shown that the contract was made by the married woman with direct reference to her separate estate, and that it was her intention to charge the same. *Wilson v. Jones*, 46 Md. 349; *Girault v. Adams*, 61 Md. 1; *Jackson v. West*, 22 Md. 71; *Koontz v. Nabb*, 16 Md. 549. But where a husband and wife bound themselves to execute a mortgage of the separate estate of the wife, by a contract founded upon a proper consideration, it was enforced by a court of equity and the estate held liable for the debt intended to be secured. *Hall v. Eccleston*, 37 Md. 510.

Where a husband and wife own adjoining tracts of land, and the husband, intending to build a house for his own, selected a site on the tract belonging to the wife because it was a more commanding and in every way a more desirable location, and made a contract with the Messrs. P. for the erection of the house, and, when it was finished, paid them in full the contract price; notice to the husband by a furnisher of materials that he intended to claim a mechanics' lien was held insufficient, as the notice should have been given to the wife, the husband not being her agent in contracting for the erection of the house. *Conway v. Crook*, 66 Md. 290.

Massachusetts.—The contract must be made with reference to the separate estate. *Nourse v. Henshaw*, 123 Mass. 96; *Allen v. Fuller*, 118 Mass. 402; *Wilder v. Richie*, 117 Mass. 382; *Tracy v. Keith*, 11 Allen (Mass.) 214; *Rogers v. Ward*, 8 Allen (Mass.) 387; 85 Am. Dec. 710; *Willard v. Eastham*, 15 Gray (Mass.) 328; 77 Am. Dec. 366; *Wright v. Dresser*, 110 Mass. 51.

A married woman cannot bind her separate estate by a contract of suretyship, unless in consideration of a benefit to herself or to the estate. *Athol Mach. Co. v. Fuller*, 107 Mass. 437. And the fact that a note given for the indebtedness of her husband, and signed by both, is secured by a mortgage on her real estate, does not render her liable on the note. *Heburn v. Warner*,

112 Mass. 271; 17 Am. Rep. 86; Williams v. Hayward, 117 Mass. 532. Her husband may act as her agent, and evidence that he had the general management of her premises, and employed a man to perform labor upon a house on the land with the wife's knowledge, and that she gave directions as to parts of the work, will justify a finding that he was her authorized agent. Wheaton v. Trimble, 145 Mass. 345. While evidence that work done on the separate property of a married woman was done with her knowledge, may warrant a jury in finding that she agreed to pay for it, it raises no such presumption of law, and the judge has no right to direct a verdict for the plaintiff in an action against her. Westgate v. Munroe, 100 Mass. 227.

Michigan.—To sustain a contract made by a married woman it must appear to have been made with the intent to bind her separate property, as well as upon a consideration that would sustain it for that purpose. West v. Laraway, 28 Mich. 464. She may be held personally liable on her indorsement of paper due to herself upon an affirmative showing that it was directly for the advantage of her separate estate. Russel v. People's Sav. Bank, 39 Mich. 671; 33 Am. Rep. 444; Kenton Ins. Co. v. McClellan, 43 Mich. 564; Powers v. Russell, 26 Mich. 179; Jenne v. Marble, 37 Mich. 318; Rankin v. West, 25 Mich. 195; Denison v. Gibson, 24 Mich. 187.

Where a married woman living with an irresponsible husband promises that she will pay for goods and medical services to be furnished to her and her family, and they are charged directly to her upon the creditor's books, it appearing that he would not furnish them upon the husband's credit, she is liable therefor in *assumpsit*. Meads v. Martin, 84 Mich. 306.

The holder of a bond, executed by a husband and wife for money borrowed for the wife's sole benefit and use in erecting a house upon land of which she was the owner in fee, is entitled to have the claim allowed out of her separate estate. Wilson v. Wilson, 80 Mich. 472. But where the husband and wife gave a promissory note for money loaned for the sole benefit of the husband, and there was no representation by either that it was for the benefit of the wife's separate estate, the payee cannot recover, as the fact that the note was signed by both was suffi-

cient notice that it was not for the benefit of her separate estate. The fact that the husband acted as agent for the wife in procuring the loan makes no difference. Schmidt v. Spencer, 87 Mich. 121.

A married woman is not liable upon her promissory note given to secure a debt of her husband. It is void as soon as made and will not be protected in the hands of a *bona fide* holder whether negotiable or not. Waterbury v. Andrews, 67 Mich. 281; Edwards v. McEnhill, 51 Mich. 160; Buhler v. Jennings, 49 Mich. 538; Reed v. Buys, 44 Mich. 80; Kenton Ins. Co. v. McClellan, 43 Mich. 564; Gantz v. Toles, 40 Mich. 725; McCombs v. Merryhew, 40 Mich. 721; Johnson v. Sutherland, 39 Mich. 579; Russel v. People's Sav. Bank, 39 Mich. 671; 33 Am. Rep. 444; Carley v. Fox, 38 Mich. 387; Ross v. Walker, 31 Mich. 120; West v. Laraway, 28 Mich. 464; Emery v. Lord, 26 Mich. 431; DeVries v. Conklin, 22 Mich. 255. But a mortgage given to secure credit for him will be enforced if no fraud is practiced on the wife. Knowlson v. Bruist, 86 Mich. 588.

Minnesota.—A married woman cannot bind herself personally by any contract she may make. But her separate estate will, in equity, be held liable for all the debts, charges, incumbrances and other engagements which she does, expressly or by implication, charge thereon in any manner not inconsistent with the instrument by which she acquires her title to the property. Pond v. Carpenter, 12 Minn. 430; Tuttle v. Howe, 14 Minn. 145; 100 Am. Dec. 205; Carpenter v. Leonard, 5 Minn. 155; Flynn v. Messenger, 28 Minn. 208; 41 Am. Rep. 279; Wolf v. Banning, 3 Minn. 202; Northwestern Mut. L. Ins. Co. v. Allis, 23 Minn. 337.

Where a building was erected upon land of which a married woman was part owner, under a contract entered into by her husband and others, and it did not appear that she was a party to the contract in any way, or that her husband or any other person acted as her agent; that she had any connection whatever with the erection of the building, or that it was erected for her on her account, or with her knowledge; or that she ever agreed to pay anything for or towards the expense of its erection, she could not be held liable for the expense incurred therein. Holley v. Huntington, 21 Minn. 325.

Mississippi.—In Mississippi a mar-

ried woman may deal with her separate estate as if she were *feme sole*, unless her power is restrained by the instrument creating it. These estates have grown up with equity jurisprudence and are not recognized by courts of law. The Married Woman's Law of 1857 does not apply to them, and the class of contracts which that statute enables her to make is not the criterion of her capacity to bind her equitable estate. *Musson v. Trigg*, 51 Miss. 172; *Shacklett v. Polk*, 51 Miss. 378; *Witcher v. Wilson*, 47 Miss. 663; *Pollen v. James*, 45 Miss. 129; *Dunbar v. Meyer*, 43 Miss. 679; *Davis v. Wilkerson*, 48 Miss. 585; *Armstrong v. Stovall*, 26 Miss. 275; *Robertson v. Bruner*, 24 Miss. 242; *Boarman v. Graves*, 23 Miss. 283. She may render it liable for the payment of her debts by her separate act. *Musson v. Trigg*, 51 Miss. 172. She may mortgage it to secure the payment of her husband's debts, but the incumbrance reaches only to the rents and profits of the realty, and does not affect the fee. *Foxworth v. Magee*, 44 Miss. 430. The plea of coverture is no bar to an action for the price of family supplies and necessities sold to her, or to her husband with her consent, for the use and benefit of the separate estate. *Gulon v. Doherty*, 43 Miss. 538.

The plaintiff, in order to charge the separate estate, must set out in his pleadings, under the Revised Code of *Mississippi*, the special circumstances which gave validity to the contract. *Dunbar v. Meyer*, 43 Miss. 679.

A foreign judgment against a married woman cannot be enforced unless some fund consisting of her separate property is pointed out from which it may be satisfied. *Choppin v. Harmon*, 46 Miss. 304.

In only one instance can the husband impose a charge upon the wife's estate without her consent, and that is where her lands are devoted to agriculture. He may burden the estate in such a case with a charge for such things as are necessary to the production of a crop, and for its management, without consulting her, and nothing can exempt the estate from this liability except a waiver of it by the creditor. *Clopton v. Matheny*, 48 Miss. 286; *Porter v. Staten*, 64 Miss. 421; *Cook v. Ligon*, 54 Miss. 368; *Grubbs v. Collins*, 54 Miss. 485; *Klotz v. Butler*, 56 Miss. 333. It is liable notwithstanding the husband misapplies the supplies and she receives no benefit therefrom.

Wright v. Walton, 56 Miss. 1; and such liability may be enforced in a court of chancery. *Ogden v. Guice*, 56 Miss. 330. But where the supplies were sold to the husband without knowing that the plantation was his wife's, she was not estopped, after his death, from denying that she ever received them or that they were used for her benefit. *Caldwell v. Hart*, 57 Miss. 123.

The contract of a married woman to purchase land on a credit imposes no obligation on her personally or on her separate estate. *Morrison v. Kinstra*, 55 Miss. 71. Her separate property may be subjected to the payment of a judgment, even though acquired after its rendition. *Taggart v. Muse*, 60 Miss. 870. A judgment against husband and wife, on a note for borrowed money, is erroneous where the note is not shown to have been applied to her use or to her separate estate. *Stokes v. Shannon*, 55 Miss. 583.

Missouri.—It is well settled in *Missouri* that a married woman is to be regarded as a *feme sole* as to her separate property, and competent to contract debts which will bind it, whether it be named or referred to, or not, and by giving a note or making a written contract she raises a presumption that she intends to bind such estate, and a contrary intention, to be shown, must appear from the instrument itself and cannot be shown by parol. *Metropolitan Bank v. Taylor*, 62 Mo. 338; *Rosenheim v. Hartsock*, 90 Mo. 357; *Hooton v. Ransom*, 6 Mo. App. 19; *Davis v. Smith*, 75 Mo. 219; *Boatmen's Sav. Bank v. Collins*, 75 Mo. 280; *Whiteley v. Stewart*, 63 Mo. 363; *Gage v. Gates*, 62 Mo. 417; *Sharpe v. McPike*, 62 Mo. 307; *Lincoln v. Rowe*, 51 Mo. 571; *Kimm v. Weippert*, 46 Mo. 532; 2 Am. Rep. 541; *Schafroth v. Amba*, 46 Mo. 114; *Miller v. Brown*, 47 Mo. 504; 4 Am. Rep. 345; *Whitesides v. Cannon*, 23 Mo. 457; *Segond v. Garland*, 23 Mo. 547; *Coats v. Robinson*, 10 Mo. 757; *Pratt v. Eaton*, 65 Mo. 157. The estate may be bound by a note executed in blank. *Morrison v. Thistle*, 67 Mo. 596. She may subject her separate estate to a mechanics' lien. *Tucker v. Gest*, 46 Mo. 339. The fact that a husband, as trustee, contracted debts for the improvement of her property, does not of itself create a lien on the same, in the absence of a deed or other appropriate instrument of writing executed by him. *Druhe v. De Lassus*, 51 Mo. 165. Where

her husband acts as her authorized agent, she will be bound, but not personally. *Keating v. Korfhage*, 88 Mo. 524; *Burgwald v. Weippert*, 49 Mo. 60.

Where a married woman gives her notes for the purchase money of real estate, and secures them by a mortgage upon the property purchased, no personal judgment can be given on the notes, but the lien created by the mortgage will be enforced by an action analogous to a proceeding in equity to subject the property to the debt. *Pemberton v. Johnson*, 46 Mo. 342. Her property cannot be attached. *Gage v. Gates*, 62 Mo. 412; *Bachman v. Lewis*, 27 Mo. App. 81. A proceeding in equity is the only method by which the separate estate of a married woman can be charged with the payment of her debts, and the jurisdiction of the court is in no way dependent upon antecedent legal proceedings of any kind. *Schafroth v. Amba*, 46 Mo. 114. If she has but a life estate and only the usufruct of it inures to her benefit, she can create no equitable charge upon the property. *Arnold v. Brockebrough*, 29 Mo. App. 625.

Demands against the separate estate stand upon the same footing at her death as other unpreferred demands, but the general creditors should resort to any other estate that she may have first. *Klenke v. Koeltze*, 75 Mo. 239.

In order to bind the separate estate the contract need not be based upon a consideration moving directly to her. *Siemers v. Kleeburg*, 56 Mo. 196; and though the contract may be made a charge upon the separate estate, it does not necessarily become a lien thereon. *Nash v. Norment*, 5 Mo. App. 545.

There is this difference between the written and parol promise of a married woman: Where goods designed for family consumption are sold to a wife on her parol promise of payment, she will be presumed to purchase on the credit of her husband, while purchases made on her written agreement will be presumed to have been made on her separate credit. *Miller v. Brown*, 47 Mo. 504; 4 Am. Rep. 345. The indorsement of a promissory note has been held to be an appointment in writing. *Chaffin v. Van Wagoner*, 32 Mo. 352; and though the terms of the deed of settlement only allow the wife to convey the separate estate by joining her husband, she may still subject it to the

payment of her debts. *Gay v. Ihm*, 69 Mo. 584.

Her separate estate will be charged in equity with damages for her breach of contract to purchase real estate. *Boeckler v. McGowan*, 9 Mo. App. 373.

New Hampshire.—This State adopts the English rule, and by statute the wife is made liable at law personally, as well as in respect of her estate, for debts contracted by her in respect to it. *Batchelder v. Sargent*, 47 N. H. 266. But she can make no contract for money or property in anticipation of the purchase of such separate estate. *Ames v. Foster*, 42 N. H. 381; and see *Vogt v. Tichner*, 48 N. H. 242; *Nims v. Bigelow*, 45 N. H. 343; *Hutchins v. Colby*, 43 N. H. 159; *Albin v. Lord*, 39 N. H. 196; *Bailey v. Pearson*, 29 N. H. 77.

New Jersey.—The separate estate of a married woman will be held liable in equity for all debts which she, either expressly or by implication, charges thereon. But if she, during the coverture, contracts debts generally without indicating any intention to charge her separate estate for the payment of them, it will not be liable. *Oakley v. Pound*, 14 N. J. Eq. 178. If she assigns a bond belonging to her separate estate, for a valuable consideration, and guarantees the payment, she will be held liable on the guaranty. *Roy v. Decker*, 44 N. J. L. 245.

She cannot bind herself personally, but the charge is one upon her separate estate. *Pentz v. Simonson*, 13 N. J. Eq. 232. Such debts are not a lien upon the separate estate until made so by a decree of a court of equity. *Armstrong v. Ross*, 20 N. J. Eq. 109.

A married woman cannot charge her separate estate by a contract of suretyship, unless in consideration of a benefit to herself or to the estate. But the release of lands in which she has a dower right from an incumbrance is such a benefit. *Perkins v. Elliott*, 23 N. J. Eq. 526.

An obligation enforceable in equity will support an express promise to pay. Where a *feme covert* has no separate estate, her contract does not create an obligation which is enforceable in equity; and, therefore, is not such a consideration as will support an express promise to pay after the death of her husband. *Condon v. Barr*, 49 N. J. L. 53.

The jurisdiction of a court of equity

over the separate estate of a married woman, rests not merely on the ground that it is an equitable estate, but on the ground that it is her separate estate, which is equitably subject to contracts and engagements entered into by her, which are not legally binding on her personally, and which cannot be enforced at law. *Johnson v. Cummins*, 16 N. J. Eq. 97; 84 Am. Dec. 142.

New York.—It must clearly appear from a written instrument that it was a married woman's intention to charge her separate estate, or the consideration of the contract must be for the direct benefit of the estate itself. *Yale v. Dederer*, 18 N. Y. 265; 72 Am. Dec. 503; 22 N. Y. 450; 78 Am. Dec. 216; 68 N. Y. 329; 21 Barb. (N. Y.) 286; 31 Barb. (N. Y.) 525; 17 How. Pr. (N. Y.) 165; 19 How. Pr. (N. Y.) 146; 20 How. Pr. (N. Y.) 242; *Jaques v. Methodist Episcopal Church*, 17 Johns. Ch. (N. Y.) 548; 8 Am. Dec. 447; *Saratoga Co. Bank v. Pruyn*, 90 N. Y. 250; *Eisenlord v. Snyder*, 71 N. Y. 45; *McVey v. Cantrell*, 70 N. Y. 295; 26 Am. Rep. 605; *Gosman v. Cruger*, 69 N. Y. 87; 25 Am. Rep. 141; *Conlin v. Cantrell*, 64 N. Y. 217; *Second Nat. Bank v. Miller*, 63 N. Y. 639; *Manhattan Brass, etc., Co. v. Thompson*, 58 N. Y. 80; *Maxon v. Scott*, 55 N. Y. 247; *Corn Exchange Ins. Co. v. Babcock*, 42 N. Y. 613; *Johnston v. Peugnet*, 17 Hun (N. Y.) 540; *Baken v. Harder*, 4 Hun (N. Y.) 272; *Weir v. Groat*, 4 Hun (N. Y.) 193; *White v. McNett*, 33 N. Y. 371; *Scott v. Otis*, 25 Hun (N. Y.) 33; *Speck v. Gurnee*, 25 Hun (N. Y.) 644; *Travis v. Lee*, 58 Hun (N. Y.) 605; *Coon v. Brook*, 21 Barb. (N. Y.) 546; *Knowles v. McCamly*, 10 Paige (N. Y.) 343; *Gardner v. Gardner*, 7 Paige (N. Y.) 112; *Shorter v. Nelson*, 4 Lans. (N. Y.) 114; *Deinatt v. McMullen*, 8 Abb. Pr. N. S. (N. Y.) 335. And if charged by a written instrument it will bind whatever separate estate she may possess at the time of the trial and judgment, even though acquired after the instrument was signed. *Todd v. Ames*, 60 Barb. (N. Y.) 454.

Where a wife knew that the plaintiff was at work on a house that she was building on her separate premises, and the kind of work he was doing, the law will imply a promise on her part to pay for his services, although he was employed by the husband without any express agreement whether he should be paid by the husband or by

the wife. *Fairbanks v. Mothersell*, 60 Barb. (N. Y.) 406. And where a married woman informed the physician attending her that she owned a team of horses and carriages, and was worth enough to pay him her account, and it was on the strength of these representations that he attended her, it was held sufficient to show the existence of a separate estate, and to sustain a verdict for the plaintiff. *Ellison v. Sessions*, 18 N. Y. Supp. 108.

Where a husband gave, in payment of an antecedent debt, his note, indorsed by his wife, to one who does not, on the faith thereof, release any security or legal rights, or extend the time of payment of the debt, the wife cannot be held liable. *Harlem River Bank v. Meyer*, 16 N. Y. Supp. 872. And when a married woman sent an order to the payee of a note, signed by her as principal with her husband as surety, requesting that the money be sent by the holder of the order, and it was thereupon paid to such holder, the presumption that the money was received by her and applied to the benefit of her estate might be overcome by proof that the money was actually paid to the husband by the party receiving it. *Prendergast v. Borst*, 7 Lans. (N. Y.) 489. It does not impair the negotiability of a note made by a married woman for it to contain a clause making it a charge upon her separate estate. *Loomis v. Ruck*, 14 Abb. Pr. N. S. (N. Y.) 385. The burden of proof is always on the plaintiff to show that the contract was for the benefit of the wife's separate estate, and if made by her husband as her agent, that it was within his power as agent. *Nash v. Mitchell*, 71 N. Y. 200; 27 Am. Rep. 38; *Ainsley v. Mead*, 3 Lans. (N. Y.) 116. By an act of the legislature, a married woman is liable for an attorney's fees without reference to the question of actual benefit to her separate estate. *Owen v. Cawley*, 36 N. Y. 600. But see *Embree v. Franklin*, 23 Hun (N. Y.) 203.

North Carolina.—Where an instrument executed by a married woman with the written consent of her husband, does not specifically charge her separate estate, it is necessary to show such a consideration inuring to her benefit, or the benefit of her separate estate, as will necessarily imply such a charge. *Farthing v. Shields*, 106 N. Car. 289. But if the money borrowed be used to improve the separate estate,

a charge will be implied. *Withers v. Sparrow*, 66 N. Car. 129.

A married woman's power to charge her separate estate is limited in *North Carolina* to the manner and mode prescribed by the instrument creating it. *Hardy v. Holly*, 84 N. Car. 661; and see *Norris v. Luther*, 101 N. Car. 204; *Knox v. Jordan*, 5 Jones Eq. (N. Car.) 176; *Felton v. Reid*, 7 Jones (N. Car.) 269; *Pippen v. Wesson*, 74 N. Car. 442; *Atkinson v. Richardson*, 74 N. Car. 458; *Rogers v. Hinton*, Phil. Eq. (N. Car.) 101. And under the former practice it could only be subjected by a bill in equity—a proceeding *in rem* not *in personam*. *Smith v. Gooch*, 86 N. Car. 276.

A deed of trust, executed by a husband and his wife upon her separate estate, to secure the purchase-money thereof and money borrowed to defray expenses of farming operations on other lands, is valid. *Jeffrees v. Green*, 79 N. Car. 330.

Ohio.—Where a married woman, having a separate estate, executes a promissory note as surety for the principal maker, a presumption arises that she thereby intends to charge her separate estate with its payment. *Williams v. Urmston*, 35 Ohio St. 296; *overruling Levi v. Earl*, 30 Ohio St. 147; and *Rice v. Columbus, etc.*, R. Co., 32 Ohio St. 380, as far as they conflict. See also *Avery v. Vansickle*, 35 Ohio St. 270; *Phillips v. Graves*, 20 Ohio St. 371; 5 Am. Rep. 675; *Hershizer v. Florence*, 39 Ohio St. 516.

But a contract, to charge the separate estate, need not be in writing. *Elliott v. Lawhead*, 43 Ohio St. 171, though it must be valid in law, or just and equitable between the parties. *Rice v. Columbus, etc.*, R. Co., 32 Ohio St. 380.

Oregon.—*Oregon* also adopts the English rule. *Orange Nat. Bank v. Traver*, 7 Sawy. (U. S.) 210.

Pennsylvania.—A married woman's power over property settled to her separate use cannot exceed the limits prescribed in the deed of settlement, and she has only those powers to transfer and charge which are expressly given by the instrument under which she acquired her title. *MacConnell v. Lindsay*, 131 Pa. St. 476; *Shuyder v. Noble*, 94 Pa. St. 286; *Maurer's Appeal*, 86 Pa. St. 380; *Moore v. Cornell*, 68 Pa. St. 320; *Wells v. McCall*, 64 Pa. St. 207; *McMullin v. Beatty*, 56 Pa. St. 389;

Walker v. Coover, 65 Pa. St. 430; *Shonck v. Brown*, 61 Pa. St. 320; *Hartman v. Ogborn*, 54 Pa. St. 120; 93 Am. Dec. 679; *Hinney v. Phillips*, 50 Pa. St. 382; *Wright v. Brown*, 44 Pa. St. 224; *Reumfelt v. Clemens*, 46 Pa. St. 455; *Steinman v. Ewing*, 43 Pa. St. 63; *Weiman v. Anderson*, 42 Pa. St. 311; *Parke v. Kleeber*, 37 Pa. St. 251; *Murray v. Keyes*, 35 Pa. St. 384; *Pennsylvania v. Foster*, 35 Pa. St. 134; *Heugh v. Jones*, 32 Pa. St. 432; *Mahon v. Gormley*, 24 Pa. St. 80; *Keeney v. Good*, 21 Pa. St. 349; *Chrisman v. Wagoner*, 9 Pa. St. 478; *Coryell v. Dunton*, 2 Pa. St. 530; 49 Am. Dec. 489; *Rogers v. Smith*, 4 Pa. St. 93; *Lyne v. Crouse*, 1 Pa. St. 111; *Lancaster v. Dolan*, 1 Rawle (Pa.) 231; 18 Am. Dec. 625; *Wallace v. Coston*, 9 Watts (Pa.) 137; *Dorrance v. Scott*, 3 Whart. (Pa.) 306; 31 Am. Dec. 509.

Pennsylvania act of April 11, 1848, conferred upon married women no rights with reference to the disposition of property settled to their sole and separate use to which they were not before entitled. *Twining's Appeal*, 97 Pa. St. 36.

To bind her separate property for medical services employed for the family, affirmative proof of a request by her, is necessary. *Sawtelle's Appeal*, 84 Pa. St. 306.

Rhode Island.—The intention to charge must be declared in writing, or the contract must be for the benefit of herself or her separate estate. *Elliott v. Gower*, 12 R. I. 79.

South Carolina.—It is settled law in *South Carolina* that a married woman can only dispose of, or charge, her separate estate, in the execution of powers conferred by the instrument creating it. *Dunn v. Dunn*, 1 S. Car. 350; *Creighton v. Clifford*, 6 Rich. (S. Car.) 188; *Ewing v. Smith*, 3 Desaus. (S. Car.) 417; 5 Am. Dec. 557; *Magwood v. Johnson*, 1 Hill Eq. (S. Car.) 228; *Robinson v. Dart*, *Dudley Eq.* (S. Car.) 128; 31 Am. Dec. 569; *Clark v. Makenna*, *Cheves Eq.* (S. Car.) 163; *Reid v. Lamar*, 1 Strobh. (S. Car.) 27; but it will be charged with debts contracted for its benefit. *Cater v. Eveleigh*, 4 Desaus. (S. Car.) 19; 6 Am. Rep. 596; *James v. Mayrant*, 4 Desaus. (S. Car.) 591; 6 Am. Dec. 630; *Montgomery v. Eveleigh*, 1 McCord Eq. (S. Car.) 267; *Adams v. Mackey*, 6 Rich. Eq. (S. Car.) 75. Where a married woman is to receive an income for her sole and separate use, and no restriction is imposed

upon her use and disposition of it, she is regarded as a *feme sole* as to the same, and may give it to her husband after it has been paid to her. *Charles v. Coker*, 2 S. Car. 122. But where a married woman gives a bond to secure the payment of money borrowed by the husband for his own use, it is void, and cannot be enforced against her separate estate. *Griffin v. Earle*, 34 S. Car. 246. Under the *South Carolina Constitution*, art. 19, § 8, a married woman may alienate her equitable estate in stock held by her at the time of the adoption of the constitution. *Witsell v. Charleston*, 7 S. Car. 88; and now under the General Statutes of *South Carolina*, § 2037, a married woman "may contract and be contracted with as to her separate property in the same manner as if unmarried." *Howard v. Kitchens*, 31 S. Car. 490; *Dial v. Agnew*, 28 S. Car. 454; *Greig v. Smith*, 29 S. Car. 426; *Pant v. Brown*, 29 S. Car. 598; *Law v. Lipscomb*, 31 S. Car. 504; *Wallace v. Craig*, 27 S. Car. 514; *Witte v. Wolfe*, 16 S. Car. 256.

Tennessee.—A married woman may freely charge her separate estate, unless restricted by the instrument creating it, but to do so there must be an express intent or agreement, and it cannot be made liable by implication. *Young v. Young*, 7 Coldw. (Tenn.) 461; *Warren v. Freeman*, 85 Tenn. 513; *Eckerly v. McGhee*, 85 Tenn. 661; *Jordan v. Keeble*, 85 Tenn. 412; *Cherry v. Clements*, 10 Humph. (Tenn.) 552; *Litton v. Baldwin*, 8 Humph. (Tenn.) 209; 47 Am. Dec. 605; *Marshal v. Stephens*, 8 Humph. (Tenn.) 159; 47 Am. Dec. 601; *Morgan v. Elam*, 4 Yerg. (Tenn.) 375. Thus, though no consideration passed to her, she may mortgage her lands to secure the debt of her husband, and the mortgage will be valid; *McFerrin v. White*, 6 Coldw. (Tenn.) 499. Where she holds land for life, with power to dispose of it by sale or will, the provision of the act of 1870, 99 T. & S. Rev., § 2486, giving a married woman power to sell, etc., or mortgage their separate realty, provided the power is not expressly withheld in the deed or will under which they hold it, does not give her power to mortgage the same, as under such a settlement the power to mortgage is expressly withheld in the sense of the statute. *Lightfoot v. Bass*, 2 Tenn. Ch. 677.

In order that a judgment against a married woman may bind her separate estate, the claim or debt on which it

was based must be one which would have been a charge on the estate if the judgment had not been rendered. *Chatterton v. Young*, 2 Tenn. Ch. 768; *Jordan v. Keeble*, 85 Tenn. 412. Where a wife had separate real estate both in *Mississippi* and *Tennessee*, a *Tennessee* court of chancery refused to charge the *Tennessee* lands with expenditures made for the benefit of the *Mississippi* estate. *Shacklett v. Polk*, 4 Heisk. (Tenn.) 104.

A married woman may charge her separate estate by a contract not executed by a privy examination, such as is required in the case of deeds. *Meneces v. Johnson*, 12 Lea (Tenn.) 561; *Warren v. Freeman*, 85 Tenn. 513; but in the absence of power conferred by the instrument, a woman cannot make liable for her husband's debt property given to her trustee for her sole and separate use for life, and at her death to her children. *Robertson v. Wilburn*, 1 Lea (Tenn.) 633; *Arrington v. Roper*, 3 Tenn. Ch. 572.

Texas.—It has been held in *Texas* that where the wife had separate property, negroes, and there was no common property, and the husband was insolvent and unable to support his family, and purchased goods, wares and merchandise, which were necessary for the wife, children, and negroes, and, afterwards, before the expiration of two years, gave his note for the same, reciting that it was given for the goods, wares, and merchandise furnished his wife, family, and negroes, the separate property of the wife was liable for the payment of the debt, and that, too, notwithstanding the fact that more than two years had elapsed from the date of the account or delivery of the articles, before the commencement of the suit. *Milburn v. Walker*, 11 Tex. 329.

But unless for necessities for herself and family, a wife cannot, by simple contract, even in writing, alone or jointly with her husband, incumber her separate property; though she may mortgage it when joined by her husband. *Rhodes v. Gibbs*, 39 Tex. 432; *Hall v. Dotson*, 55 Tex. 520; *Wallace v. Finberg*, 46 Tex. 35; *Hollis v. Francois*, 5 Tex. 195; 51 Am. Dec. 760; *Shelby v. Burtis*, 18 Tex. 644; *Wiley v. Prince*, 21 Tex. 637; *Magee v. White*, 23 Tex. 180; *Sorrell v. Clayton*, 42 Tex. 188.

When a debt is incurred for the protection of the separate property

enforced in a proceeding *in rem* against the property, and are not binding on her personally.¹ The property will be charged with

of the wife, to secure which a note is executed voluntarily by husband and wife jointly, judgment may be rendered on the note, directing execution to be levied on the community property, or on the separate property, at the option of the plaintiff. *Grant v. Whittlesey*, 42 Tex. 320. But where the husband has no separate estate, and there is no community property, and the wife rents a house for the use of herself and family, such rent, if of reasonable amount, is a valid charge upon her separate estate. *Harris v. Williams*, 44 Tex. 124.

Vermont.—There must be some express pledge, or some benefit resulting to the wife or to the separate estate in order to charge it. *Sargeant v. French*, 54 Vt. 384; *Dale v. Robinson*, 51 Vt. 20; 31 Am. Rep. 669; *Priest v. Cone*, 51 Vt. 499; 31 Am. Rep. 695; *Partridge v. Stocker*, 36 Vt. 108; 84 Am. Dec. 664.

The law will not raise an implied promise against a married woman when she cannot make a valid contract. *Southworth v. Kimball*, 58 Vt. 337.

A wife's separate estate is not chargeable for money paid by her father to a third person as surety for her husband; nor for repairs made on her house by her father, who lived with her, to suit his own convenience, and for his own benefit, he not consulting her, the repairs being unnecessary, and not adding to the value of the house, and there being no understanding that he was to be reimbursed. *Kelsey v. Kelley*, 63 Vt. 41; but where a married woman promised to allow, in payment of a man's note, services rendered by him in supporting her mother, the promise was enforced in equity against her separate estate. *Howe v. Chesley*, 56 Vt. 727.

Virginia.—In *Virginia* a married woman is considered a *feme sole* as to her separate estate unless restricted by the instrument creating it, and it may be charged with her debts and contracts generally. *Woodson v. Perkins*, 5 Gratt. (Va.) 345; *Penn v. Whitehead*, 17 Gratt. (Va.) 503; 94 Am. Dec. 478; *Darnall v. Smith*, 26 Gratt. (Va.) 878; *Leake v. Benson*, 27 Gratt. (Va.) 157; *Muller v. Bayley*, 21 Gratt. (Va.) 521; *Justis v. English*, 30 Gratt. (Va.) 565; *Greensboro Bank v. Chambers*, 30

Gratt. (Va.) 202; 32 Am. Dec. 661; *Bain v. Buff*, 76 Va. 371; *Finch v. Marks*, 76 Va. 207; *Burnett v. Hawfe*, 25 Gratt. (Va.) 481. She may cause land to be pledged as security for her husband's debts. *Christian v. Keen*, 80 Va. 369.

To charge her separate estate for her notes, she must have had such separate estate subject to her *jus disponendi* when she signed the notes, and must have known of it and intended to charge it. *M'Donald v. Hurst*, 86 Va. 885. But where she indorsed a negotiable note in blank to enable her husband to make certain purchases, which he failed to do, and afterwards bought a larger amount of goods than was originally contemplated at the time of the indorsement, and filled up the blanks to suit this purchase, the wife was held bound by the indorsement. *Frank v. Lillienfeld*, 33 Gratt. (Va.) 377.

A court of equity in enforcing the liability of a married woman's separate estate for her general engagements, will order a sale of the personal estate and the subjection of the rents and profits of the lands, until the debt is discharged. *Frank v. Lillienfeld*, 33 Gratt. (Va.) 377.

West Virginia.—The separate estate of a married woman is liable for any simple contract debt for which she would be liable if a *feme sole*. A consideration for such debt need not inure to her own benefit or that of her separate estate; it may inure to the benefit of her husband or any third party, or may be a mere prejudice to the other contracting party. *Dages v. Lec*, 20 W. Va. 584; *Radford v. Carwile*, 13 W. Va. 573; *Hughes v. Hamilton*, 19 W. Va. 366; *Weinberg v. Rempe*, 15 W. Va. 829.

Land which is the separate estate of a married woman cannot be sold for debts contracted by her during coverture, but can only be rented during the coverture. *Hogg v. Dower* (W. Va. 1892), 14 S. E. Rep. 995.

Wisconsin.—The separate estate of a married woman may be charged in equity with the payment of debts contracted for her benefit. *Todd v. Lee*, 15 Wis. 365; *Krouskop v. Shontz*, 51 Wis. 204; *Kavanagh v. O'Neill*, 53 Wis. 101.

1. *Owens v. Dickinson*, Cr. & Ph. 58; *Vaughan v. Vanderstegen*, 2 Drew 165;

any damage resulting to others from failure to keep it in proper repair, or from her careless management.¹

4. **Suits Concerning Equitable Separate Property.**²—As a married woman is considered a *feme sole* as to her separate estate, it necessarily follows that she may sue and be sued in equity in regard to it.³ She may obtain an order to answer separately as a defendant,⁴ have a conveyance fraudulently obtained set aside,⁵ and may prevent her husband's creditors from seizing her property for his debts.⁶ She may present a petition without her husband, and will be bound by her answer, or by her settlement of accounts.⁷ The trustee should be joined with her, though she has been allowed to sue alone.⁸ But the husband should be made a party defendant; especially if he claims any interest in the separate estate, or if any of his acts are in question.⁹ She must be made a party to all suits to subject her separate estate or it will not affect her interest.¹⁰

5. **How Extinguished.**—The clause against alienation and anticipation in a settlement in trust for a married woman becomes inoperative upon the termination of the coverture, either by death,¹¹

Worthington v. Cooke, 52 Md. 297; Bell v. Kellar, 13 B. Mon. (Ky.) 381; Pemberton v. Johnson, 46 Mo. 342; Pawley v. Vogel, 42 Mo. 291. But see Fawcner v. Scottish-American Mortgage Co., 107 Ind. 555.

1. Salomone v. Keiley, 80 Va. 86. And it has even been held that she would be personally liable. Merrill v. St. Louis, 83 Mo. 244; 53 Am. Rep. 576.

2. See MARRIED WOMEN, vol. 14, p. 650.

3. 2 Perry on Trusts, § 654; Jackson v. Haworth, 1 S. & S. 161; Thompson v. Beaseley, Eq. Rep. 59; Pearson v. Pearson, 60 N. H. 497.

4. See preceding note. But it was held in Perine v. Swaine, 1 Johns. Ch. (N. Y.) 24 (1814); Furguson v. Smith, 2 Johns. Ch. (N. Y.) 139 (1816), that if a married woman answered separately without leave of the court, the answer would be quashed.

5. Fargo v. Goodspeed, 87 Ill. 290; Walter v. Walter, 48 Mo. 140. The dealings of a husband with the separate property of his wife are always to be closely scrutinized, and will not be upheld whenever slight evidence of fraud or undue influence appears. Reagan v. Holliman, 34 Tex. 403.

6. Shirley v. Shirley, 9 Paige (N. Y.) 363; Spencer v. Rosenthal, 58 Tex. 4.

7. *In re Crump*, 34 Beav. 570; Clerk v. Miller, 2 Atk. 379; Callow v. Howle, 1 De G. & S. 531; Beeching v. Morphew, 8 Hare 129; Clive v. Carew, 1

John. & H. 207; Wilton v. Hill, 25 L. J. Ch. 156; Kerchner v. Kempton, 47 Md. 568.

8. *In re Crump*, 34 Beav. 570; Palmer v. Murray, 6 Mont. 125. She may foreclose in her own name a mortgage that has been assigned to her, although the note is held by a naked trustee for her use. Elliott v. Deason, 64 Ga. 63.

9. 2 Perry on Trusts, § 654; Thorby v. Yeats, 1 Y. & Coll. C. C. 438; Bradley v. Emerson, 7 Vt. 369; Clarkson v. DePeyster, 3 Paige (N. Y.) 336; Dewall v. Covenhoven, 5 Paige (N. Y.) 581; Grant v. Van Schoonhoven, 9 Paige (N. Y.) 255; 37 Am. Dec. 393; Stuart v. Kissam, 2 Barb. (N. Y.) 493; Sherman v. Burnham, 6 Barb. (N. Y.) 403; Wilson v. Wilson, 6 Ired. Eq. (N. Car.) 236; and see State v. Hulick, 33 N. J. L. 307.

10. A judgment recovered by a tax collector, in a suit to enforce a lien against a married woman's separate property for unpaid taxes, could not affect her interest where she was not made a party defendant, and the purchaser at the tax sale under the judgment could acquire no title. Gitchell v. Messmer, 14 Mo. App. 83.

11. Pooley v. Webb, 3 Coldw. (Tenn.) 599; Smith v. Starr, 3 Whart. (Pa.) 62; 31 Am. Dec. 498; Hammersley v. Smith, 4 Whart. (Pa.) 126; Fox v. Scott, 2 Phila. (Pa.) 151; Estate of Harris, 3 Phila. (Pa.) 326.

And, upon the death of the wife intestate, and without issue, property

or an absolute divorce;¹ and a wife may lose her separate property in personalty by allowing it to be so employed or invested as to become mixed with other funds in such a manner that it becomes impossible to identify or trace it,² or by putting it in the husband's possession without any agreement that he shall repay it.³

limited to her sole and separate use will pass to her husband in his own right. *Cooney v. Woodburn*, 33 Md. 320.

Where a married woman, jointly with her husband, conveys her separate real estate to secure debts of her husband, and dies before sale under the deed, the equity of redemption descends to her heirs, and upon her death their right of property becomes complete, subject only to the trust deed and the curtesy of the husband. *Kinner v. Walsh*, 44 Mo. 65.

1. *O'Kill v. Campbell*, 4 N. J. Eq. 13; *Harvard College v. Head*, 111 Mass. 209; *McGill v. McGill*, 19 Fla. 341.

2. Though a court of equity will throw safeguards around, and see to the proper application of a trust fund, and will follow it so long as it can be clearly and distinctly traced, yet when the means of its identification fail, the powers of the court in reference to that fund must also cease. *Buck v. Ashbrook*, 59 Mo. 200; *Clapp v. Emery*, 98 Ill. 531; *National Bank v. Barry*, 125 Mass. 20; *Newton v. Porter*, 69 N. Y. 133; *Story's Eq. Jur.*, §§ 1210, 1258; 3 *Sugd. Vend.* 270, 272, and cases cited. And it is not necessary, if the trust be moneys, that the particular coin or kind of money, or the individual pieces, shall be identified in order to pursue it, but its identity as a fund must be preserved so that it can be distinguished from all other money. So long as it can be followed as a separate and independent fund, distinguishable from any other fund, it can be pursued. *School Trustees v. Kirwin*, 25 Ill. 73.

3. *Kuhn v. Stansfield*, 28 Md. 210; *Chester v. Greer*, 5 Humph. (Tenn.) 26.

Thus, where a *feme covert*, who had a separate estate, purchased articles of furniture with the rents and profits of such estate, and put them into the possession of her husband without any agreement or understanding with him that he should hold them as her trustee, or that the title should be vested in any other person for her separate use, the articles thus pur-

chased were held to become the property of her husband and liable to be sold for his debts. *Shirley v. Shirley*, 9 Paige (N. Y.) 363.

But where the trustee of a sum of stock for the separate use of a married woman improperly transferred it into the joint names of her husband and herself, and the husband for six years received the dividends, after which the trustee died, and the husband, without his wife's knowledge, sold out the stock and applied the proceeds to his own use, and afterwards left her, it was held that, though the wife might have been presumed to have assented to his actual receipt of the dividends while the stock remained intact, yet no such assent could be presumed after it had been sold, and that she was entitled to recover, as against her husband and the estate of the deceased trustee, the arrears of dividends which had accrued since that time, as well as to have the trust fund replaced. *Dixon v. Dixon*, L. R., 9 Ch. Div. 587.

But the wife will not lose her separate estate by standing silently by while her husband disposes of it; for while in the husband's presence she is, in contemplation of law, under his power and coercion. *Carpenter v. Carpenter*, 27 N. J. Eq. 502.

Wife's Participation in Breaches of Trust.—In *Hughes v. Wells*, 9 Hare 749, it is said that the rights of a married woman may be barred and her estate affected by acts of participation in breaches of trust, but that it would seem that the fact of a married woman's having permitted her husband to receive the trust fund does not preclude a right to relief by her, or her appointee, for that would be to defeat the purpose for which the trust was created—the protection of the wife against the husband.

If the wife accepts and enjoys a resulting trust purchased with her separate property, she is precluded from afterwards asserting her right to the separate property so disposed of, though such disposition was *ultra vires* of the trustee who so disposed of it; but otherwise if she repudiates

6. **Effect of Statutes on Equitable Separate Property.**—Statutes creating a separate estate in a married woman do not interfere with the separate estate in equity, or prevent the creation and existence thereof.¹ The jurisdiction of courts of equity over them is not abridged or limited by virtue of such statutes;² nor do they affect the construction of a gift in trust for a married woman.³ The statutes are to enlarge her privileges and not to take away any pre-existing common-law right.⁴

III. STATUTORY SEPARATE PROPERTY—1. What Constitutes—*a*. PRESUMPTION.—When there is any dispute as to what is or is not statutory separate estate, it seems that the presumption is in favor of the view that the property is held by the wife as her separate property under the statute.⁵ Whether the possession of

the transaction, for, by accepting the resulting trust, she gets an equivalent compensation, and if she elects to hold under it, cannot recover back the property converted. *Dozier v. Freeman*, 47 Miss. 647; *Wiley v. Gray*, 36 Miss. 510; *Kemp v. Kemp*, 85 N. Car. 491.

1. *Bolles v. Munnerlyn*, 83 Ga. 727; *Musson v. Trigg*, 51 Miss. 172; *Pomeroy v. Manhattan L. Ins. Co.*, 40 Ill. 398; *Snyder v. Webb*, 3 Cal. 83; *Pennsylvania Co. v. Foster*, 35 Pa. St. 134.

But the *New York* acts of 1848 and 1849 are held to have converted the wife's equitable into a legal estate. *Wood v. Wood*, 18 Hun (N. Y.) 350.

2. *Phillips v. Graves*, 20 Ohio St. 391; 5 Am. Rep. 675; *Miller v. Newton*, 23 Cal. 554.

3. *Richardson v. Stodder*, 100 Mass. 530; *MacConnell v. Lindsay*, 131 Pa. St. 476.

4. *Abrahams v. Tappe*, 60 Md. 317; *De Vries v. Conklin*, 22 Mich. 255.

5. *Patterson v. Kicker*, 72 Ala. 406; *Steed v. Knowles*, 79 Ala. 446; *Bolman v. Overall*, 86 Ala. 168; *Warren v. Barnett*, 83 Ala. 208; *Darden v. Gerson*, 91 Ala. 323. But see *Reeves v. Webster*, 71 Ill. 307; *Dickson v. Shay*, 45 N. J. Eq. 821.

Thus, in *Alabama*, all property owned by a married woman is presumptively regarded as her statutory separate property, and the burden of proof is on one asserting her estate to be equitable. *Bolman v. Overall*, 86 Ala. 168.

A man took a mortgage from his brother for money loaned. He having died, his widow procured another mortgage to herself from the mortgagor, alleging that the money loaned was hers, and surrendering the first mortgage. In a suit by the decedent's

administrator to foreclose the first mortgage, it was held that the burden of proof was on the widow to show that it was her money and not that of her husband. *Truax v. White* (N. J. 1887), 11 Atl. Rep. 735.

Where property levied on is, as shown by the sheriff's return, in the possession of the husband, but is claimed by the wife as her separate property, the *onus* of explaining such possession is on the wife. But where creditors of the husband levy on personalty which the wife, who has a separate estate, claims as purchased from a third person with her own means, the burden of proving fraud on her part is on the creditors, and she is not bound to show that the price was paid with her own money, and not that of her husband. *Richardson v. Subers*, 82 Ga. 427.

Where a husband, without his wife's authority, executed in his own name a bill of sale of her horse, and indorsed thereon an order to his wife to deliver the horse to the purchaser, who presented the order and took the horse, the wife neither consenting nor refusing to deliver the animal, it was held, in an action by the wife to recover possession, that the court having charged that the burden was on the plaintiff to prove that the horse was her property, it was not error to refuse defendant's instruction, that, if the plaintiff failed to schedule her property, the burden was on her to prove that the horse was her separate property. *Lafargue v. Markley* (Ark. 1892), 18 S.W. Rep. 542.

But in *Illinois* it has been held that the married women's act of 1861 was not designed to abrogate the common-law presumption that the husband owns

chattels by a married woman is *prima facie* evidence of ownership, is disputed.¹ But it is said that there is no presumption of law that money or negotiable securities in the possession of the wife belong to her husband rather than to her.² Where, however, husband and wife are living together, the presumption is that the personal property in the house belongs to the husband;³

all the property in the possession of the wife while they are living together. If the wife claims the benefit of the act, she must bring herself within its provisions by proof. She holds the affirmative of the issue and must prove it. And it is not sufficient for the wife to prove that she purchased the property from a person other than her husband during coverture, to enable her to hold it as against her husband's creditors. She must also show that she obtained in good faith the consideration which she paid for it from a source other than her husband. *Reeves v. Webster*, 71 Ill. 307; *Johnson v. Johnson*, 72 Ill. 489.

And in *New Jersey*, where a wife, possessed of a separate estate, permitted her husband to carry on business therein in her name, and he collected the income of her separate estate, and made expenditures thereon, it was held in a creditors' suit to subject the wife's realty to the payment of her husband's debts, upon the ground that his earnings had been expended in its improvement, that if the amount expended by the husband on the wife's property was not in excess of the amount of her separate income received by him, the presumption would be that he applied her income and not his earnings to the improvement of her estate. *Dickson v. Shay*, 45 N. J. Eq. 821.

1. In the following cases it is held that possession is presumptive evidence of ownership. *Patterson v. Kicker*, 72 Ala. 406; *Whiton v. Snyder*, 88 N. Y. 299. Thus, in the former case, it was held that the principle that possession of personal property is *prima facie* proof of ownership, applies to a wife's separate property, whether the possession be in her, in her husband as trustee, or in both jointly, in recognition of her right. And in *Whiton v. Snyder*, 88 N. Y. 299, it was said that under *New York Laws*, 1862, ch. 172, the general rules of law as to the ownership of property apply to a wife unaffected by the old disabilities of the marital relation; and that, consequently, her separate per-

sonal possession of chattels draws after it the presumption of ownership. It was so held, also, as to a certificate of deposit payable to her order, whereon she had received interest. And it was said, further, that such separate possession is implied in the character and use of articles of her paraphernalia, when actually used by her, even though they were bought by her husband. But see *contra*, *McFerran v. Kinney*, 22 Mo. App. 554; *Hemelreich v. Carlos*, 24 Mo. App. 264; *Philadelphia v. Williamson*, 10 Phila. (Pa.) 179; *State v. Pitts*, 12 S. Car. 180; 32 Am. Rep. 508, the latter case holding that the mere fact that a wife is in the use and enjoyment of clothing or other personal property, is not sufficient to establish her right to a separate estate therein. And in *Hemelreich v. Carlos*, 24 Mo. App. 264, it is said that personal property in the possession of a married woman is presumed to belong to her husband, and that if the fact is otherwise, it must be so shown.

But as to articles such as household furniture and goods which are adapted to the use of the family, and which are used by them generally and are in their common possession, there is no presumption of ownership by the wife. *Whiton v. Snyder*, 88 N. Y. 299. See also the following note.

2. *German Bank v. Himstedt*, 42 Ark. 62; *contra*, *Philadelphia v. Williamson*, 10 Phila. (Pa.) 179, where the contrary rule—namely, that property in the wife's possession is presumed to be her husband's and not her separate estate—was applied to the property of a woman who had lived with a man and falsely claimed to be his wife.

3. *Flynn v. Gardner*, 3 Ill. App. 253; *Burns v. Bangert*, 16 Mo. App. 22; *McFerran v. Kinney*, 22 Mo. App. 554; *Hemelreich v. Carlos*, 24 Mo. App. 264; *McDevitt v. Vial* (Pa. 1887), 11 Atl. Rep. 645; *Philadelphia v. Williamson*, 10 Phila. (Pa.) 179; *State v. Pitts*, 12 S. Car. 180; 32 Am. Rep. 508.

The fact that money earned by the joint labor of a husband, wife, and

and to overcome this presumption, the wife must show that she owned the property before her marriage, or that she has acquired it since in a way entirely independent of her husband.¹ A woman who never released to her husband any right in her property owned at the time of marriage, is presumed to have continued absolute owner, and at her death her real estate passes to her heirs, and her personalty to her personal representatives.²

b. PROPERTY OWNED AT TIME OF MARRIAGE.—The statutes quite generally agree in making property, real or personal, owned by a married woman at the time of her marriage, her separate estate.³

c. PROPERTY ACQUIRED AFTER MARRIAGE—(1) *Wife's Earnings*—(a) *What are Earnings.*—By the term earnings is meant money or property gained by labor, services, or business management.⁴

minor children on a farm, and from the sale of produce, was always kept in the personal possession of the wife, does not rebut the presumption that the title thereto was in the husband. *Burns v. Bangert*, 16 Mo. App. 22.

A husband living with his wife is presumed to be the head of the family; and the fact that she makes the contracts for board and receives the pay therefor, in the business of keeping a hotel or boarding house, will not prove the receipts to be her separate property. *Flynn v. Gardner*, 3 Ill. App. 253.

In *Texas*, however, where a married woman claimed, as against her husband's creditor's a stock of goods, it was held that the presumption was that the goods were community property and not her separate property, and that consequently the burden of proving the goods to be her own was upon her. *Jones v. Epperson*, 69 Tex. 586.

In one case, where the circumstances were peculiar, an exception to the rule in the text above was adopted. A husband and wife had died within a few hours of each other. The wife had a separate estate and income. A sum of money was found in the wife's pocket-book, another sum in a pocket-book marked with her father's name; also some money in a bag, and some coin lying loose—all in a trunk marked with the wife's name, to which both had access, the key being usually kept by the wife. Their deeds, bonds, and other papers were also found in the trunk. There was nothing to show the amount contributed by either one to the money so found. It was held that they should be considered as owning it

in equal shares. *Bergen v. Van Liew*, 36 N. J. Eq. 637; *reversing* 36 N. J. Eq. 251.

1. *McDevitt v. Vial* (Pa. 1887), 11 Atl. Rep. 645.

2. *In re Gillingham's Estate*, 55 Hun (N. Y.) 604.

3. *Stewart's Husb. & W.*, § 221; *Stimson's Am. Stat. Law*, § 6420; *Kincaid v. Anderson*, 33 S. Car. 260.

Property belonging to the wife at the time of her marriage is presumed to be held as a statutory estate in the absence of proof to the contrary. So held where the legatee and devisee of a wife sought to charge the surviving husband with waste, the bill averring that the estate was statutory, and the answer denying the averment. *De Bardeleben v. Stoudenmire*, 82 Ala. 574.

Where an unmarried woman, after acquiring an initiatory right to pre-empt land, marries, and then pays, and takes the patent, the land is her separate estate, and this, whether the money paid belonged to the community or was obtained from the sale of a portion of the land. *Harris v. Harris*, 71 Cal. 314.

A deed conveying land to a single woman sufficiently shows the land to be her separate estate, though followed after her marriage by a second deed from the same grantor to her in her married name, and on an express money consideration. *Maguire v. De Fremery*, 76 Cal. 401.

4. See *MARRIED WOMEN*, vol. 14, p. 668; *Dayton v. Walsh*, 47 Wis. 120; *Lovell v. Newton*, 4 C. P. Div. 11.

In *Haight v. McVeagh*, 69 Ill. 628, the court, by Scholfeld, J., said: "It is not to be supposed that it was within the contemplation of the legislature, in conferring upon married women the

(b) **Effect Where Mention of Earnings Is Omitted in the Statute.**—Married women's property acts which do not specifically mention her earnings, do not change the husband's common-law rights as to the same.¹ But the wife's earnings may be secured to her separate use by the assent of her husband,² or by a settlement made either before or after marriage.³ Or a husband may give his wife her earnings;⁴ but such gift must not defraud creditors,⁵ and the burden lies upon the wife to prove clearly the gift.⁶

(c) **Statutory Provisions.**—In most of the State statutes it is expressly provided that the wife's earnings shall be her separate

right to receive, use, and possess their own earnings, and to sue for the same in their own names, that it was to be limited to such only as should result from manual labor, or that, in conferring upon them the right to have their separate property under their sole and separate control, and to hold, own, possess, and enjoy the same, as though they were sole and unmarried, they were to be restricted in its use or disposition. The right to contract is indispensable to the acquisition of earnings, and to the unrestricted possession, control and enjoyment of property. We perceive no reason why a married woman, invested with these rights, may not, at least with the consent of her husband, earn money in trade, as well as at the washtub, or with the sewing-machine; why she may not as well be the proprietress of a grocery store, as of a farm; contract debts for goods to be used in trade, as for animals and farming implements, or lands, or farm labor. In removing the common-law restrictions upon her right to acquire and to control her property, the legislature have left her to determine, at all events when her husband shall not object, from the dictates of her own judgment, in what lawful pursuit she will engage, and whether it shall be prosecuted alone or in conjunction with others."

1. *Seitz v. Mitchell*, 94 U. S. 580; *Mitchell v. Seitz*, 1 McArthur (U. S.) 480; *McLemore v. Pinkston*, 31 Ala. 267; 68 Am. Dec. 167; *Carleton v. Rivers*, 54 Ala. 467; *Bear v. Hays*, 36 Ill. 280; *Farrell v. Patterson*, 43 Ill. 52; *Schwartz v. Saunders*, 46 Ill. 18; *Connor v. Berry*, 46 Ill. 370; *McMurtry v. Webster*, 48 Ill. 123; *Marshall v. Duke*, 51 Ind. 62; *Duncan v. Roselle*, 15 Iowa 501; *Merrill v. Smith*, 37 Me. 394; *Glover v. Alcott*, 11 Mich. 470; *Henderson v. Warmack*, 27 Miss. 830; *Apple v. Ganong*, 47 Miss. 189; *Hoyt*

v. White, 46 N. H. 45; *Quidort v. Pergeaux*, 18 N. J. Eq. 472; *Rider v. Hulse*, 33 Barb. (N. Y.) 264; *Syme v. Riddle*, 88 N. Car. 463; *Raybold v. Raybold*, 20 Pa. St. 308.

So a statute which provides that a wife may earn money on her separate account, does not affect any earnings of hers, unless they appear to have been acquired by her on her separate account. *McCluskey v. Provident Inst.*, 103 Mass. 300; *Beau v. Kiah*, 4 Hun (N. Y.) 171; *Birkback v. Ackroyd*, 11 Hun (N. Y.) 365.

2. *Richardson v. Estate of Merrill*, 32 Vt. 27.

3. *Andrews v. Andrews*, 8 Conn. 79; *Keith v. Woombell*, 8 Pick. (Mass.) 211; *Skillman v. Skillman*, 15 N. J. Eq. 478; 13 N. J. Eq. 403; 82 Am. Dec. 279.

4. *McLemore v. Pinkston*, 31 Ala. 267; 68 Am. Dec. 167; *Haden v. Ivey*, 51 Ala. 381; *Glaze v. Blake*, 56 Ala. 379; *Andrews v. Andrews*, 8 Conn. 79; *Hinman v. Parkis*, 33 Conn. 188; *Oglesby v. Hall*, 30 Ga. 386; *Hazelbaker v. Goodfellow*, 64 Ill. 238; *Cranor v. Winters*, 75 Ind. 301; *Basham v. Chamberlain*, 7 B. Mon. (Ky.) 443; *Keith v. Woombell*, 8 Pick. (Mass.) 211; *Hoyt v. White*, 46 N. H. 45; *Quidort v. Pergeaux*, 18 N. J. Eq. 478; *Peterson v. Mulford*, 36 N. J. L. 481; *Kee v. Vasser*, 2 Ired. Eq. (N. Car.) 553; 40 Am. Dec. 442; *Elliott v. Bently*, 17 Wis. 591; *Connors v. Connors*, 4 Wis. 112.

5. See FRAUDULENT CONVEYANCES, vol. 8, p. 748; *Hazelbaker v. Goodfellow*, 64 Ill. 238; *Basham v. Chamberlain*, 7 B. Mon. (Ky.) 443; *Keith v. Woombell*, 8 Pick. (Mass.) 211; *Cramer v. Reford*, 17 N. J. Eq. 367; 90 Am. Dec. 594.

6. *McLemore v. Pinkston*, 31 Ala. 267; 68 Am. Dec. 167; *Skillman v. Skillman*, 15 N. J. Eq. 478; 13 N. J. Eq. 403; 82 Am. Dec. 279.

property, free from liability for the debts of her husband.¹ But in some States this is true only where the husband fails to provide

1. *Glenn v. Johnson*, 18 Wall. (U. S.) 476; *Sellmeyer v. Welch*, 47 Ark. 485; *McComb v. Spangler*, 71 Cal. 418; *Meriwether v. Smith*, 44 Ga. 541; *Musgrove v. Musgrove*, 54 Ill. 186; *Martin v. Robson*, 65 Ill. 129; 16 Am. Rep. 578; *Boots v. Griffith*, 89 Ind. 246; *Wilson v. Wilson*, 113 Ind. 415; *Mitchell v. Sawyer*, 21 Iowa 582; *McArthur v. Garman*, 71 Iowa 34; *Hedge v. Glenny* (Iowa, 1868), 39 N. W. Rep. 818; *Bradstreet v. Baer*, 41 Md. 19; *Poffenberger v. Poffenberger*, 72 Md. 321; *Hawkins v. Providence, etc., R. Co.*, 119 Mass. 596; 20 Am. Rep. 353; *Benson v. Morgan*, 50 Mich. 77; *Shortel v. Young*, 23 Neb. 408; *Youngworth v. Jewell*, 15 Nev. 45; *Snow v. Cable*, 19 Hun (N. Y.) 280; *Pursell v. Fry*, 19 Hun (N. Y.) 595; *Stamp v. Franklin*, 59 Hun (N. Y.) 615; *Brooks v. Schwerin*, 54 N. Y. 343; *Atteberry v. Atteberry*, 8 Oregon 224; *Silveus v. Porter*, 74 Pa. St. 448; *Orr v. Bornstein*, 124 Pa. St. 311; *Hairston v. Hairston* (S. Car. 1892), 14 S. E. Rep. 634; *Meyers v. Rahte*, 46 Wis. 655. And compare *Wheeler v. Raymond*, 130 Mass. 247; *Seward v. Arms*, 145 Mass. 195; *Ellison v. Anderson*, 110 Pa. St. 486.

But the married women's statutes cannot deprive the husband of money for the wife's services already paid or due. *Farrell v. Patterson*, 43 Ill. 52; *Jassoy v. Delius*, 65 Ill. 469; *McDavid v. Adams*, 77 Ill. 155; *Kase v. Painter*, 77 Ill. 543; *Rider v. Hulse*, 33 Barb. (N. Y.) 264.

The right of a wife to hold property is as absolute as that of any other person, and whether she paid anything for it or not, does not concern her husband's creditors, so long as it did not come through, or in some way, from him. *Oishei v. Gilbert*, 9 N. Y. Supp. 402.

Thus, where a wife used in the purchase of real estate her earnings before marriage, savings out of money given her by her husband for household expenses, and money borrowed by her, it was held that in the absence of evidence of fraudulent design towards the husband's creditors, the debts of the husband could not be charged upon the land, the same having been purchased by the wife a year before the debt was contracted. *Smyth v. Reber* (N. J. 1889), 18 Atl. Rep. 462.

Where land was conveyed to the wife, and it appeared that she had funds, and the husband had none, and that it was the expectation of all parties that the wife should pay for the land, it was held that the fact that the husband gave his note to the vendor did not, in the absence of fraud or collusion, prevent the land becoming the wife's separate estate. *Ullman v. Jasper*, 70 Tex. 446.

A married woman who uses her separate statutory property to purchase real estate, and has the same conveyed to her sole and separate use, does not thereby change the character of her estate, so as to make it equitable. *Bolman v. Overall*, 86 Ala. 168.

A wife who had been declared a *feme sole* by decree of court, purchased at a judicial sale land which belonged to her husband and which had been mortgaged by him. She paid for it with the proceeds derived from her general estate, which proceeds had never been reduced into possession by the husband. It was held that the land so purchased was not bound by a judgment obtained against the husband upon a debt created by him prior to said purchase. *Wiggins v. Johnson* (Ky. 1886), 1 S. W. Rep. 643.

In *Alabama*, the services and earnings of a married woman belong presumptively to her husband, and after his death to his personal representative. To enable the wife to maintain a suit for such earnings, she must allege that her husband's estate had no creditors, or else that his debts were paid, and also allege facts showing a relinquishment by the husband, express or implied, of the earnings to her. *Bolman v. Overall*, 80 Ala. 451.

In *Georgia*, it was held that the earnings of a married woman prior to 1866, where she was not a free trader and did not live separately from her husband, belonged to her husband; and that, where he bought land with such earnings in his own name, no trust in the wife's favor could be implied as against a creditor of the husband whose debt was contracted after the purchase of the property, and who had no notice of an alleged trust. *Wood v. Wilson Sewing Machine Co.*, 76 Ga. 104.

In an action to recover of executors for ten years' services as housekeeper for the testator, who was plaintiff's

for her, or where, for other reasons, the wife lives apart from her husband.¹ An agreement between husband and wife that the wife's earnings in any special transaction shall belong to her, vests in her all claim on account of such service.² The product of all

father, it appeared that she had separated from her husband, and supported herself by her earnings. It was held that she was entitled to bring the suit, the wages belonging to her. *Pursell v. Fry*, 19 Hun (N. Y.) 595.

If a married woman appropriates to the payment of her husband's debts the earnings made by her from services performed on her sole account, she cannot reclaim them. *Sellmeyer v. Welch*, 47 Ark. 485.

In *West Virginia*, where a married woman, who claimed the fund garnished for the debt of her husband, had no separate estate, and there was no marriage settlement, and it appeared that the money claimed was earned by her, while living with her husband, and in part was acquired by her by raising cattle on her husband's farm, and that another part was given her by her son before the adoption of the law providing for separate estates of married women, the money was held to be the property of the husband. *Lanham v. Lanham*, 30 W. Va. 222.

Promissory Note.—Under the *Indiana* law entitling a married woman to the earnings of her separate business, she may buy a note with such earnings, and her husband's indorsement will pass the title of the note to her, so as to enable her to sue the maker. *Wilson v. Wilson*, 113 Ind. 415.

Equity for a Conveyance.—The equity obtained by a wife who has purchased land, paying part of the purchase money, and taking bond for title on payment in full, is her statutory separate estate. *Prout v. Hoge*, 57 Ala. 29.

The provision of the *Rhode Island* statutes that property acquired by a woman after marriage "by her own industry, shall be absolutely secured to her sole and separate use," is sufficient to enable a woman to recover for board furnished by her father after her separation from her husband and before her divorce. *Berry v. Teel*, 12 R. I. 267.

1. *McComb v. Spangler*, 71 Cal. 418; *Loring v. Stuart*, 79 Cal. 200; *Bernhart v. Mitchell* (Pa. 1887). 7 Atl. Rep. 283; *Hazelbaker v. Goodfellow*, 64 Ill. 238; *Black v. Tricker*, 59 Pa. St. 13; *Ellison v. Anderson*, 110 Pa. St. 486.

The earnings and accumulations of a wife living separate from her husband are her separate property. But the fact that a note and mortgage were given by a wife while living apart from her husband, does not of itself prove that the lands described in the mortgage were her separate property. *McComb v. Spangler*, 71 Cal. 418.

A husband left his wife on account of domestic infelicity, and resolved during his absence never to resume marital relations with her, but to provide for his family when necessary. The wife and children lived together, supported by her exertions. It was held that this was a separate living within the *California* Statute (*California* Civ. Code, § 169) providing that the wife's earnings, while she is living separate from her husband, shall be her separate property. *Loring v. Stuart*, 79 Cal. 200.

The *California* act of March 9, 1870, which provides that while the wife lives separate and apart from her husband she shall have the sole use of her property, and may sue and be sued, etc., does not apply to a case where the wife is temporarily absent from her husband with his consent, but to cases where there has been an abandonment on the part of the husband or wife, or a separation which is intended to be final. *Tobin v. Galvin*, 49 Cal. 34.

2. *Riley v. Mitchell*, 36 Minn. 3. In this case an agreement between husband and wife that the latter should receive the compensation to be earned by her in nursing a boarder in the family, who paid the husband for his board, was held to vest in her any claim accruing on account of such nursing, and, there being no question of set-off or counterclaim, it was considered to be immaterial that the boarder did not know of such agreement.

Money Earned by Keeping Boarders.—If a husband consent that his wife may take boarders into the family, and that she shall have the gross proceeds for application on a contract which he has made with a third person for the purchase of real estate, and if the money so acquired by the wife be thus

labor of the wife for persons other than her husband, belongs to her,¹ and the fact that the husband acted as the wife's agent in contracting for the rendering of services by her, does not affect her individual claim for compensation.² But a wife's earnings in connection with her husband's property, by keeping boarders, selling butter, milk, etc., are his, not hers, and property bought with them may be reached by his creditors.³

(2) *Increase or Profits of Separate Estate*.—The profits, rents, increase, products and interest of statutory separate property are also separate property, whether the statute says so or not;⁴ and

applied, the money is hers, and not his. If, on completing payment, the wife takes a conveyance of the premises to herself from such third person, her title will prevail against a creditor of her husband who gave credit after the property was paid for, though the conveyance to her be of later date than the giving of such credit. *McNaught v. Anderson*, 78 Ga. 499.

1. *Allen v. Eldridge*, 1 Colo. 288; *Whiting v. Beckwith*, 31 Conn. 596; *Meriwether v. Smith*, 44 Ga. 583; *Larimer v. Kelley*, 10 Kan. 298; *Tunks v. Grover*, 57 Me. 586; *Fowle v. Tidd*, 15 Gray (Mass.) 94; *Burke v. Cole*, 97 Mass. 114; *Cooper v. Alger*, 51 N. H. 172; *Brooks v. Schwerin*, 54 N. Y. 343.

A wife can contract for her services, and sue alone on the contract, making her husband, if need be, garnishee. *Allen v. Eldridge*, 1 Colo. 288; *Meriwether v. Smith*, 44 Ga. 541; *Larimer v. Kelley*, 10 Kan. 298; *Tunks v. Grover*, 57 Me. 586; *Fowle v. Tidd*, 15 Gray (Mass.) 94; *Burke v. Cole*, 97 Mass. 114; *Cooper v. Alger*, 51 N. H. 172. But see *Gay v. Rogers*, 18 Vt. 342.

But the married woman's statutes do not impliedly authorize her to contract with her husband for her services, and she cannot recover from him for services rendered, unless contracts between husband and wife are by statute expressly authorized. *Shaeffer v. Sheppard*, 54 Ala. 244; *Hazelbaker v. Goodfellow*, 64 Ill. 238; *Grant v. Green*, 41 Iowa 88; *Mewhirter v. Halten*, 42 Iowa 288; 20 Am. Rep. 618; *Glover v. Alcott*, 11 Mich. 471; *Beau v. Kiah*, 4 Hun (N. Y.) 171; *Brooks v. Schwerin*, 54 N. Y. 343; *Reynolds v. Robinson*, 64 N. Y. 589.

2. *Seward v. Arms*, 145 Mass. 195.

3. *Hamill v. Henry*, 69 Iowa 752.

In *Missouri* services rendered by a wife for another, for compensation, are

both by statute and common law presumed to be performed on the husband's behalf. *Plummer v. Trost*, 81 Mo. 425.

Keeping Boarding House.—A wife may lawfully contract with a firm of which her husband is a member, to run a boarding house for it for a share of the profits, and the share so earned by her will be her separate estate. *Brickley v. Walker*, 68 Wis. 563.

4. *Hart v. Sorrell*, 11 Ala. 386; *Gans v. Williams*, 62 Ala. 41; *Ring v. Roswald*, 74 Ala. 346; *Carter v. Worthington*, 82 Ala. 334; *Sanford v. Atwood*, 44 Conn. 141; *Bongard v. Core*, 82 Ill. 19; *Langford v. Greirson*, 5 Ill. App. 362; *Montgomery v. Hickman*, 62 Ind. 598; *Stout v. Perry*, 70 Ind. 501; *Russell v. Long*, 52 Ind. 250; *Hanson v. Millett*, 55 Me. 184; *Hill v. Chambers*, 30 Mich. 422; *Williams v. M'Grade*, 13 Minn. 46; *Burnes v. Bangert*, 92 Mo. 167; *Hamilton v. Ross*, 23 Neb. 630; *Hutchins v. Colby*, 43 N. H. 159; *Merritt v. Lyon*, 3 Barb. (N. Y.) 114; *Knapp v. Smith*, 27 N. Y. 280; *Holcomb v. People's Sav. Bank*, 92 Pa. St. 338; *Wayne v. Lewis* (Pa. 1889). 16 Atl. Rep. 862; *Nelson v. Hollins*, 9 Baxt. (Tenn.) 553; *DeBlane v. Lynch*, 23 Tex. 25; *Stevens v. Fullington*, 59 Vt. 671; *Dayton v. Walsh*, 47 Wis. 113; 32 Am. Rep. 757. But see *Grand Gulf Bank v. Barnes*, 2 Smed. & M. (Miss.) 165; *Beatty v. Smith*, 2 Smed. & M. (Miss.) 567.

But in *Texas* the interest of money acquired by gift, devise, or descent, is held not to be property acquired by gift, devise, or descent, and consequently not the wife's separate property. *Braden v. Gose*, 57 Tex. 37.

In *Alabama*, under a statute giving the husband, as trustee of the statutory separate estate of the wife, the right to control it without liability to account to the wife for the rents, etc., but not subjecting such rents, etc., to his

this rule applies both to realty and to personalty.¹ Hence the wife can maintain replevin against any creditor of her husband, or against any officer who seizes the profits of her separate estate.² The wife's right to the profits is not affected by the fact that the husband assisted in earning them.³ In

debts, it was held that land purchased in the name of the wife with such rents could not be made liable for the husband's debts. *Long v. Eford*, 86 Ala. 267.

1. *Holcomb v. People's Sav. Bank*, 92 Pa. St. 238.

The *Minnesota* statute provides specially that the rents, profits and increase of real estate shall be the wife's property. It was held under this statute that the naming of the increase of realty did not exclude the increase of personalty. Said the court by Mc-Millan, J.: "As to real and personal property acquired by personal industry, or otherwise, before marriage, and the rents, profits, and income of real estate during coverture, there can be no doubt that the statute secures these to the wife as her separate property. The question here is whether it vests in her the profits and increase during coverture of her personal property. These are not expressly mentioned in the act. Are they embraced in it by implication? The rights to the profits and natural increase of tangible personal property is incident to, and results from, its ownership. The property mentioned in the act is vested in the wife during marriage to the same extent as before marriage; that is, the wife has the interest or estate in it after and during marriage as before. Before her marriage she would have the absolute title to such property, and, as incident thereto, to the profit and increase thereof. If, being the owner of tangible personal property in her possession, the wife is not entitled to the profits and increase thereof as her separate property, then it is not hers to the same extent after marriage as before. The absolute ownership of the personal property belonging to a *feme sole* being secured to her after coverture by the act under consideration, it follows that the incidents of this ownership are also secured to her, of which one is, as we have seen, the right to the natural increase of the property; it was therefore necessary to mention it expressly in the act. We are therefore of opinion that, under the statute referred to, the wife, during

coverture, holds the profits and natural increase of her personal property as her separate estate, both as against her husband and his creditors." *Williams v. M'Grade*, 13 Minn. 46, 53. But see *contra*, *Braden v. Gose*, 57 Tex. 37.

Manure accumulated in the course of husbandry from the occupation of a farm belonging to a wife is, as between husband and wife, a part of the land belonging to her, although his stock and his hay, brought upon the place while occupied by them, produced in part the accumulation. *Norton v. Craig*, 68 Me. 275.

The natural increase of domestic animals, forming part of the *corpus* of the statutory separate estate of a married woman, is the property of the wife. *Gans v. Williams*, 62 Ala. 41; *Walker v. Ivey*, 74 Ala. 475; *Sandford v. Atwood*, 44 Conn. 141; *Russell v. Long*, 52 Iowa 250; *Hanson v. Millett*, 55 Me. 184; *Hutchins v. Colby*, 43 N. H. 159.

The wife is entitled to the growing crops on land owned by her as against the judgment creditors of her husband. *Stout v. Perry*, 70 Ind. 501; *Hamilton v. Ross*, 23 Neb. 630; *De Blane v. Lynch*, 23 Tex. 25. And her right thereto is not affected by the fact that the crop was raised by her husband as her agent. *Langford v. Greirson*, 5 Ill. App. 362; *Russell v. Long*, 52 Iowa 240. Nor is it material that the land was bought by the wife on credit, and has not been paid for. *Dayton v. Walsh*, 47 Wis. 113; 32 Am. Rep. 757.

2. REPLEVIN, vol. 20, p. 1103; *Montgomery v. Hickman*, 62 Ind. 598; *Woodruff v. White*, 25 Neb. 745.

3. *Scott v. Hudson*, 86 Ind. 286; *Heartz v. Klinkhammer*, 39 Minn. 488; *Coddington v. Bowen*, 53 Hun (N. Y.) 631.

Where a husband helps to farm his wife's lands, the crops are presumed to be hers, not his. *Scott v. Hudson*, 86 Ind. 286. And so where a married woman owns and occupies a farm, the mere fact that her husband lives with her on the farm and assists in its cultivation and management, will not warrant an inference that the ownership of

some States the increase of statutory separate estate is provided for by statute.¹

(3) *Property Purchased with Wife's Money*.—The general rule is that property purchased with the wife's money belongs to the wife, and is not subject to the husband's debts.² This is especially true where the property was purchased out of the earnings of the wife prior to her marriage.³ Where the purchase was made with money acquired subsequently to the marriage, there are, in some States, qualifications of the rule,⁴ such as that the

the crops vested in him. *Heartz v. Klinkhammer*, 39 Minn. 488.

The fact that a business belonging to a married woman is profitable mainly through the labor, energy, and skill of her husband, who is its general manager, does not make the profits liable for his debts, so long as the parties are acting in good faith. *Codding v. Bowen*, 53 Hun (N. Y.) 631.

But in *Stennett v. Bradley*, 70 Wis. 278, which was an action for the conversion of certain crops and stock, where it was proved that the plaintiff and her husband had occupied her farm about four years, and that she let the farm to her husband, who carried it on, and sold and appropriated the products thereof, and used and disposed of the crops and stock raised and kept thereon, during that time, as his own, without interference from her; and where it was proved, also, that the wife admitted that her husband owned the property—these facts were held sufficient to warrant a finding that the products of the farm were the property of the husband.

An insolvent debtor carried on under his own name a saloon which had been purchased by his wife, who knew nothing of the business except what her husband told her. The proceeds of the business were used to purchase the fixtures of the saloon, and afterwards were applied to improvements on the wife's real estate. It was held that the fixtures and the realty, so far as the business profits were applied thereto, could be charged in equity with the debts of the husband. *Shay v. Dickson* (N. J. 1888), 15 Atl. Rep. 252.

1. *Sterrett v. Coleman*, 57 Ala. 172; *Milhouse v. Weeden*, 57 Ala. 502; *Williams v. M'Grade*, 13 Minn. 46; *Braden v. Gose*, 57 Tex. 37; *Bruce v. Thompson*, 26 Vt. 741.

Thus in *Alabama* a husband has full power thereover, and is not accountable to his wife for her rents and profits.

Sterrett v. Coleman, 57 Ala. 172; *Milhouse v. Weeden*, 57 Ala. 502; *Chambers v. Richardson*, 57 Ala. 89.

2. *Smith v. Whitfield*, 71 Ala. 106; *Wing v. Roswald*, 74 Ala. 346; *Carter v. Worthington*, 82 Ala. 334; *Daniel v. Hardwick*, 88 Ala. 557; *Charauleau v. Woffenden*, 1 Arizona 243; *Woffenden v. Charauleau*, 1 Arizona 346; *Black v. Black*, 74 Cal. 520; *Von Glahn v. Brennan*, 81 Cal. 261; *Jackson v. Torrence*, 83 Cal. 521; *Walsh v. Walsh*, 84 Cal. 101; *Van Dorn v. Leeper*, 95 Ill. 35; *Hoag v. Martin*, 80 Iowa 714; *Wiggins v. Johnson* (Ky. 1886), 1 S. W. Rep. 643; *Turner v. Short* (Ky. 1888), 7 S. W. Rep. 391; *Drumm v. Kleinman*, 31 La. Ann. 124; *Stratton v. Bailey*, 80 Me. 345; *Botts v. Gooch*, 97 Mo. 88; *Burnes v. Bangert*, 92 Mo. 167; *Deck v. Smith*, 12 Neb. 389; *Taggart v. Fowler*, 25 Neb. 152; *Callender v. Horner*, 26 Neb. 687; *Whitney v. Preston*, 29 Neb. 243; *Barrett v. Foley* (N. J. 1888), 14 Atl. Rep. 571; *Smyth v. Reber* (N. J. 1889), 18 Atl. Rep. 462; *Merritt v. Lyon*, 3 Barb. (N. Y.) 110; *Woodruff v. Bowles*, 104 N. Car. 197; *Tate v. Carney* (Pa. 1888), 14 Atl. Rep. 327; *Berry v. Teel*, 12 R. I. 267; *Nelson v. Hollins*, 9 Baxt. (Tenn.) 553; *Schuster v. Bauman Jewelry Co.*, 79 Tex. 179; *Cale v. Shaw*, 33 W. Va. 299.

3. *Knowles v. Knowles*, 86 Ill. 1; *Smyth v. Reber* (N. J. 1889), 18 Atl. Rep. 462.

Where real estate was bought by a woman with her own means, and before marriage conveyed to a trustee to hold for her, and to be conveyed upon her written request, such estate was held to be her separate property. *Knowles v. Knowles*, 86 Ill. 1.

4. *Bailey v. Gardner*, 31 W. Va. 94. In this case it was held that under the *West Virginia* law, where the wife during the marriage earned money by sewing and washing, and bought real property, the deed being made to her,

earnings must have been derived from an employment by a third person.¹ The fact that property is purchased in part with the wife's funds does not confer the entire ownership upon the wife,² although it seems that she will be considered to own such a proportion of the property bought as the funds furnished by her bear to the whole price;³ but if there is no way of distinguishing the property purchased by the wife, the whole is presumed to belong to the husband.⁴ Property bought with money lent by the wife to her husband belongs to the husband.⁵ The husband, as well as a third person, may act as the wife's agent in making a purchase of property.⁶ The right of the wife to her property is not affected

the husband's creditors have a right to subject such real property to the payment of their claims.

1. Thus in *Kentucky*, unless the wife's earnings are derived from an employment by a third person, such earnings belong to the husband, and lands purchased with them will be subject to the husband's debts. *Musgrave v. Parish* (Ky. 1889), 11 S. W. Rep. 464.

2. *Chambers v. Richardson*, 57 Ala. 85, in which it was held that where the husband mixed some of the income of his wife's statutory separate estate with moneys of his own, purchasing lands and taking the title to himself, this fact did not give the wife ownership in the property so purchased.

But where at the time of the marriage the wife contributed from her separate property all the stock and capital of the business, except a few goods put in by the husband, and the stock on hand at his death was less than the amount of her original investment, it was held that the stock was her separate property. *Walsh v. Walsh*, 84 Cal. 101.

3. *Jackson v. Torrence*, 83 Cal. 521; *Musgrave v. Parish* (Ky. 1889), 11 S. W. Rep. 464; *Thurber v. La Roque*, 105 N. Car. 301.

4. See *Liddell v. Miller*, 86 Ala. 343; *Meade v. Stairs*, 88 Ky. 66. In the former case it appeared that a stock of goods was purchased by a partnership, and a cash payment made with funds advanced by one of the members, and notes were given for the balance of the purchase money. Liddell participated in the purchase, asserting, however, that he was acting as his wife's agent, the notes being signed by him as agent, and his share of the cash payment being so charged to him. It appearing that the wife had not contributed from her separate estate towards

the purchase, until after a levy upon an interest in the partnership effects as the property of Liddell, and there being no way of distinguishing the goods purchased for cash from those bought on time, the levy was sustained.

5. *Pool v. Clifford*, 78 Cal. 371.

A lent money to her husband to do business on. He formed a partnership with B, A furnishing no more money until she bought B out, her husband then having the entire control and management of the business, and having an equal interest with her therein. After buying B out, she purchased certain goods, which were levied on upon an execution against the firm. It was held that she could not replevy the same as her individual property. *Clay v. Vanwinkle*, 75 Ind. 239.

In an action by a wife to recover from her husband money alleged to have been paid by her in building and furnishing their house, complainant testified that, when she gave defendant the money, she told him to pay it on their home. "He took the money and paid it out. It went into the house. It was for the purpose of paying the contractor." This was held to be inconsistent with the idea of a loan or trust. *Glegghorne v. Glegghorne*, 118 Pa. St. 383.

A loan of money by a married woman to her husband, prior to the *Illinois* married woman's act of 1861, would invest him with the ownership, and she would cease to have any interest therein; but a loan made after that act makes her simply her husband's creditor, and if he invests the money in land in his own name, no trust results in her favor. *Stewart v. Fellows*, 128 Ill. 480.

6. *Daniel v. Hardwick*, 88 Ala. 557; *Moore v. Jones*, 63 Cal. 12; *Neisler v. Harris*, 115 Ind. 560; *Van Dorn v. Leeper*, 95 Ill. 35; *Southard v. Plumer*, 36 Me. 84; *Gutsch v. McIlhargey*, 69

by the fact that it has been listed by the husband for taxation as his.¹ Property bought by a wife, in her name, after the institution of her suit for a divorce and separation of property, which were subsequently decreed in her favor, is presumed to be her separate property.²

(4) *Property Acquired by Gift*.—Acquisition by gift is quite generally enumerated in the statutes as one of the methods by which a statutory separate estate may be acquired;³ and where property is given to a wife, the presumption is that it was intended to be for her separate use.⁴ It has been held that "gift" has the same meaning as "gift or grant,"⁵ and that a gift of personalty may be by parol.⁶

(5) *Property Acquired by Conveyance*.—Real estate conveyed to a married woman is her separate legal property,⁷ and the in-

Mich. 377; *Abbey v. Deyo*, 44 Barb. (N. Y.) 374.

Where a husband makes a purchase for his wife and in her name as her agent, paying at her request out of her separate funds, such payment is in effect made by her. And the fact that the husband has commingled her money with that of others does not divest her of her separate rights therein and in the purchase made thereof. *Moore v. Jones*, 63 Cal. 12.

Competency of Witness.—Where the plaintiff's husband bought a carriage, paying partly in cash and partly in his own notes, she is incompetent to testify that her husband, now dead, was her agent in the purchase. *Richmond v. Brewster*, 2 N. Y. Supp. 400.

Where it appeared that at the time of a decree making a wife a *feme sole*, she owned no property at all, and that her husband subsequently bought goods and conducted business in her name, realizing large profits, it was held that the property was subject to the husband's debts. *Carter v. Martin* (Ky. 1891), 15 S. W. Rep. 663.

1. *Stanfield v. Stiltz*, 93 Ind. 249; *Deck v. Smith*, 12 Neb. 389; *Taggart v. Fowler*, 25 Neb. 152; *Callender v. Horner*, 26 Neb. 689.

2. *Drumm v. Kleinman*, 31 La. Ann. 124.

3. *Stewart's Husb. & W.*, § 220; *McCoy v. Hyatt*, 80 Mo. 130; *McDevitt v. Vial* (Pa. 1887), 11 Atl. Rep. 645.

In an action to quiet title it appeared that a husband purchased property with community funds, and then conveyed the premises to his wife as a gift; that subsequently he wished to sell the land, but the wife refused to join in a deed

unless he paid her one-half the proceeds of the sale; that they conveyed the premises by joint deed, and one-half the proceeds were paid to the wife by the husband's consent; that out of this money the wife purchased the premises in controversy. It was held that the proceeds paid to the wife, and the premises purchased with them, became her separate property. *Oaks v. Oaks* (Cal. 1892), 29 Pac. Rep. 330.

In *Massachusetts* a promissory note made payable to a married woman at the request of her husband, upon a consideration moving solely from him, is a voluntary gift from him, and she does not acquire a title to it as her sole property free from his control, and cannot maintain an action on it in her own name. *Towle v. Towle*, 114 Mass. 167.

4. *McDevitt v. Vial* (Pa. 1887), 11 Atl. Rep. 645.

A gift for the "sole" use of a woman is equivalent to a gift for her "separate" use, no technical words being requisite in such case. *Eastwick's Estate*, 13 Phila. (Pa.) 350.

5. *Libby v. Chase*, 117 Mass. 105.

6. *Tinsley v. Roll*, 2 Metc. (Ky.) 509. And compare *Walton v. Broadus*, 6 Bush (Ky.) 328; *Ewing v. Helm*, 2 Tenn. 368.

7. *Lippincott v. Mitchell*, 94 U. S. 767; *Wheeler v. Walker*, 64 Ala. 560; *Morgan v. Lones*, 78 Cal. 58; *O'Neil v. Percival*, 25 Fla. 118; *Dunbar v. Mize*, 74 Ga. 130; *Clawson v. Clawson*, 25 Ind. 229; *Bowser v. Bowser*, 82 Pa. St. 57; *Warren v. Freeman*, 85 Tenn. 513.

A woman before her marriage had a possessory title to, and was in possession of, certain public land. After her

strument need not contain words showing that the property was meant to be separate.¹ If the grantor is the husband the conveyance must not be to the prejudice of his creditors,² but the con-

marriage the United States government conveyed a tract of which said land formed a part, to a board of town trustees "in trust for the use and benefit of the occupants thereof." Subsequently thereto the husband made application for said land to be conveyed to the wife, which was done, and the required sum was paid by the husband. It was held that the wife, under the conveyance from the government, had an equitable interest, which was her separate property, and that it was not made community property by the husband's advancing money to obtain the legal title thereto. *Morgan v. Lones*, 78 Cal. 58.

Under a statute making all the property of a wife held by her previously to her marriage, or to which she becomes entitled after marriage, in any manner, her separate estate, not subject to the payment of the husband's debts, a conveyance "to the sole and separate use and behoof" of a married woman does not create in her a separate estate by contract in opposition to her separate estate by statute, where a large proportion of the purchase money paid was from her statutory estate. *Molton v. Martin*, 34 Ala. 651.

In *Alabama* where a deed conveys lands to a married woman, the estate granted not being otherwise limited by the terms of the deed, the lands become a part of her statutory separate estate, and subject to all the incidents and liabilities imposed by law on that estate; and when an action at law is brought against her and her husband to enforce such statutory liability, evidence cannot be received to change the character of her estate. *Wheeler v. Walker*, 64 Ala. 560.

Where a wife has purchased the real estate of her husband at a sale of the same by the sheriff, the title vests in her as her separate estate, though she had no estate before marriage, and none accrued to her from any source other than her husband or her own earnings during coverture. *Bowser v. Bowser*, 82 Pa. St. 57.

Under an ante-nuptial deed conveying to the wife a life estate in lands, with a reversion to her husband, the wife's interest becomes on her marriage a separate statutory estate. *Simms v. Kelly*, 70 Ala. 429.

A right in an undistributed estate existing at the time of marriage, is property owned or held at the time of marriage, though, when it comes into the wife's possession, it is also property acquired during coverture. See *Sharp v. Burns*, 35 Ala. 653; *Witsell v. Charleston*, 7 S. Car. 88; *White v. Waite*, 47 Vt. 502.

Real estate conveyed to a married woman is made her separate property by an ante-nuptial agreement providing that the property that she then owned or might thereafter acquire should be her separate property. *Klenke v. Koeltze*, 75 Mo. 239.

Land of the husband, sold on execution, was bought by A, a friend of the wife, for a small sum. A afterwards conveyed it to the wife for the price paid at the sale, and interest; a part of the land was afterwards sold by the husband and wife, and the proceeds used to pay A. It was held that the remainder of the land was the wife's separate property. *Zorn v. Tarver*, 57 Tex. 388.

1. *Stone v. Gazzam*, 46 Ala. 275; *Sims v. Ricketts*, 35 Ind. 181; 9 Am. Rep. 679.

Where the contrary has been held, it was due to the peculiar wording of the statutes. See *Hayt v. Parks*, 39 Conn. 357. As that the deed must be in terms to her separate use; *Merrill v. Bullock*, 105 Mass. 486; or that she can only acquire a separate estate when the instrument conveying it contains a power of disposition by deed, will, or otherwise. *Leighton v. Sheldon*, 16 Minn. 243.

2. *Smith v. Seiberling*, 35 Fed. Rep. 677; *Woodruff v. Bowles*, 104 N. Car. 197; *Barron v. Barron*, 24 Vt. 375; *Burdens v. Amperse*, 14 Mich. 91; *Ransom v. Ransom*, 30 Mich. 328.

A conveyance of land in *Missouri* from husband to wife will be regarded as for her sole and separate use, although the deed does not so state. *Smith v. Seiberling*, 35 Fed. Rep. 677.

In *North Carolina* where land was bought by the husband with the wife's money prior to the adoption of the constitution of 1868, and subsequently deeded by the husband to the wife, it cannot be sold to satisfy a judgment against the husband, there being proof

sideration must, as a rule, be advanced by the wife.¹ The words "gift" and "grant" in a statute allowing a married woman "to take by gift or grant" embrace all methods of acquiring land by deed,² and include leases³ and deeds of bargain and sale,⁴ and also apply equally to personalty.⁵

(6) *Property Acquired by Exchange*.—Property acquired by the wife by exchange is as much her separate estate as property acquired by purchase.⁶ Thus, personalty received in exchange for other separate property is itself separate property.⁷ Under this head may be put the conversion of the wife's lands into money, in which case the proceeds will be her separate estate,⁸ notwithstanding the lands may have been acquired by the wife during marriage, and before the passage of the Married Woman's Law.⁹

(7) *Property Acquired by Will or by Succession*.—Property acquired by a married woman by devise, bequest, descent, or distribution is her separate statutory estate.¹⁰ Under this head is

of a verbal agreement between husband and wife at the time of purchase that the land should belong to her, and there being no proof that the deed to the wife was made by the husband with intent to hinder, delay, or defraud his creditors. *Woodruff v. Bowles*, 104 N. Car. 197.

1. Thus, the mere recital in a deed from a husband to his wife that a valuable consideration has been paid to the use of the husband from money of her statutory separate estate, does not create in the wife a statutory estate in the land, unless the consideration was in fact paid as recited. *Hamaker v. Hamaker*, 88 Ala. 431.

Under the *Missouri* statute, however, where a sale of land has been made to a wife at the husband's instance, he furnishing the purchase money, an investment of the proceeds in other land for the wife gives the husband no interest therein, subject to his debts, though he receives such proceeds, and places them in bank in his own name, pending the purchase of the other land. *Gilliland v. Gilliland*, 96 Mo. 522.

Under the *California* law the fact that a deed of lands was made to a wife "for her separate estate," even if construed to mean that the consideration money was paid from her separate property only, creates a separate estate in her *prima facie*, and does not preclude one claiming under her husband from showing that the purchase money was paid from community funds, and hence that the lands are community

property. *McComb v. Spangler*, 71 Cal. 418.

Where land is conveyed to a married woman by deed expressing a consideration in money, such purchase money, if not shown to have been paid from the separate money of the wife, is presumed to have been the money of the husband. *Bucks v. Moore*, 36 Mo. App. 529.

2. *Huyler v. Atwood*, 26 N. J. Eq. 504.

3. *Darby v. Callaghan*, 16 N. Y. 71. Compare *Vandevoort v. Gould*, 36 N. Y. 639; *Dayton v. Walsh*, 47 Wis. 113; 32 Am. Rep. 757.

4. *McVey v. Green Bay, etc., R. Co.*, 42 Wis. 532.

5. *Spaulding v. Day*, 10 Allen (Mass.) 96; *Abbey v. Deyo*, 44 Barb. (N. Y.) 374.

6. *Elder v. Cordray*, 54 Ill. 244; *Fisk v. Wright*, 47 Mo. 352.

7. *Pike v. Baker*, 53 Ill. 163; *Ireland v. Webber*, 27 Ind. 256; *Welch v. Welch*, 63 Mo. 57; *Hutchins v. Colby*, 43 N. H. 159.

8. Sometimes this is provided for by statute. *Sumner v. McCray*, 60 Mo. 493; *Sloan v. Torry*, 78 Mo. 623.

9. *Brevard v. Jones*, 50 Ala. 221.

10. *Uhrig v. Horstman*, 8 Bush (Ky.) 172; *Troxler v. Colley*, 33 La. Ann. 425; *Vavasseur v. Mouton*, 34 La. Ann. 1044; *Kellogg v. Kellogg*, 63 Miss. 631; *White v. Waite*, 47 Vt. 502; *Alexander v. Alexander*, 85 Va. 353.

Where land was devised in trust for the sole, separate and exclusive use of a married woman and her children, she

included a distributive share which vested, before the wife's marriage, upon her father's death, but was not paid until after the marriage.¹

(8) *Property Held by Husband in Trust*.—Property conveyed to the husband in trust for his wife is her statutory separate estate.² Whenever a husband obtains possession of his wife's separate

to receive the rents, which were to be subject to her control and disposition as if she were a *feme sole*, it was held that her estate was not equitable but statutory. *Kellogg v. Kellogg*, 63 Miss. 631.

Where a testator in a devise to one daughter limited her right of disposition, and in a devise to another, gave her the right "to make whatever disposition of it she might think proper," it was held that this last devise did not create a separate estate, the testator's manifest intent being to show that the devise was absolute, as distinguished from the qualified devise to the other daughter. *Noland v. Chambers*, 84 Ky. 516.

In *Vermont* a farm and personal property given by will to a married woman without words excluding the husband's marital rights, is not her separate estate. *Hubbard v. Bugbee*, 58 Vt. 172.

1. *White v. Waite*, 47 Vt. 507. *Compare Smilie v. Siler*, 35 Ala. 88; *Sharp v. Burns*, 35 Ala. 653.

In *White v. Waite*, 47 Vt. 507, the court by Ross, J., said: "While the right to a distributive share in her father's estate became vested in the daughter immediately upon the father's decease, and she became possessed of an undivided portion of the property of the estate, subject to the rights of the administrator to use a part of the same for the payment of the debts and expenses of administration, yet, the particular property did not become absolutely vested in her until the decree of the probate court making distribution of the estate became absolute. Until distribution, she had no right as against the administrator, or other heirs, if such there were, to the specific personal property which she afterwards received from the estate. When the decree distributing the estate became absolute, she, in the language of the act, 'acquired' the specific articles of personal property decreed to her and the right to a personal action for the recovery of the sum of money ordered to be paid to her."

It has been held in *Texas* that the in-

terest of money acquired by devise, descent or gift belongs to the community, and is not the wife's separate property. Thus, where land was purchased for \$1,200, \$800 being money given the wife by her brother, and therefore her separate estate, and \$400 being interest accrued thereon, it was held that the \$400 interest belonged to the community, and therefore that an undivided interest of one-third of the land was subject to execution and sale to satisfy the debt of the husband. *Braden v. Gose*, 57 Tex. 37. But where a creditor of the husband, by vexatious proceedings, prevented the payment of a note given the wife in part payment for land, her separate estate, so that interest accrued thereon, he was not allowed to subject the interest to the payment of the husband's debt. *Carlisle v. Sommer*, 61 Tex. 124.

2. *Jordan v. Smith*, 83 Ala. 299; *Rogers v. Torbert*, 66 Ala. 547; *Bank of Louisville v. Gray*, 84 Ky. 565.

Evidence.—To support an allegation by the wife that certain lands were held in trust for her by the husband, the only evidence was the statements of the wife and her mother, from which it appeared that the legal title had for many years been in the husband; that during this time the wife had made no claim, and the husband no admission, of the trust; that prior to the husband's death he conveyed the land to his wife's mother, who immediately conveyed it to the daughter; that in the conveyance by the husband no reference to the trust was made; and that in subsequent proceedings to set aside the conveyance as in fraud of creditors, the wife interposed no defense of a trust, which was not set up until after the husband's death. It was held that this evidence was insufficient to establish the trust. *Stillwell v. Stillwell* (N. J. 1889), 18 Atl. Rep. 679.

Where money of a married woman was, in her husband's absence, invested in bank stock by a friend, the certificate being taken to the husband as her trustee, and he, on his return,

property, whether with or without her consent, he is deemed, in the absence of evidence that she intended to make him a gift of it, to hold it in trust for his wife.¹ Where the husband purchases property for the wife, the presumption is that the money invested is the wife's separate estate.² A husband who invests money received by the wife as a gift from her father, and takes title to the property so purchased in his own name, without her written consent, is merely a trustee for the benefit of his wife.³

(9) *Insurance Policy for Wife's Benefit*.—A policy of life insurance taken out by the husband for the benefit of his wife is, generally, under the statutes, her separate property.⁴

(10) *Choses in Action*.—Choses in action may form part of a

recognized the trust and paid over the dividends to her, it was held that the stock was her separate estate. *Bank of Louisville v. Gray*, 84 Ky. 565.

The wife acquires a statutory separate estate in property bought with her money, although the legal title is taken by the husband, if his declaration of trust alleges that it is for her benefit, and that the estate vested in her shall be an estate under the Married Woman's Law. *Jordan v. Smith*, 83 Ala. 299. But where lands are conveyed to the husband in trust for the wife, with contingent interests in the children which may be born of the marriage, the wife has, during the continuance of the marriage, while there is probability of other children being born, no separable interest which can be subjected to the payment of her debts. *Bell v. Watkins*, 82 Ala. 512.

1. *Stickney v. Stickney*, 131 U. S. 227, in which case it was held that even if there were a presumption, from the wife's allowing the husband to use her separate property, that a gift was intended, such presumption would be rebutted by evidence that she had repeatedly directed him to invest it in her name for her benefit.

2. *Goodbar v. Daniel*, 88 Ala. 583, in which case it was held that under the *Alabama Code of 1876*, §§ 2706, 2709, making a husband the trustee of his wife's statutory separate estate, and charging him with the duty of reinvesting the proceeds of its sale, he is the agent of the wife in making the investment, and any knowledge of the husband as to a fraudulent intent of the vendor, acquired while engaged in the transaction of the business as his wife's agent, is imputed to the wife as her knowledge.

3. *Broughton v. Brand*, 94 Mo. 169.

The *New York Married Woman's Act* (N. Y. Laws, 1849, ch. 375, § 2) provides that a trustee holding any property for a married woman may convey the same to her, on her written request accompanied by a certificate of the justice of the supreme court that he has examined the property and made due inquiry as to the capacity of the married woman to manage and conduct the same. It was held in *Genet v. Hunt*, 113 N. Y. 158, that this act was applicable only to a nominal trust, the sole object of which was to secure a married woman in the enjoyment of her separate estate.

4. An insurance policy taken out by a husband on his life, in the name of his wife as the sole beneficiary, and not by its terms excluding his marital rights, nevertheless vests in the wife as her separate estate upon the delivery of the policy. *Williams v. Williams*, 68 Ala. 405.

A policy of insurance for the benefit of a *feme covert*, though payable to her personally, if she survive a certain term of years, is within the purview of the *Rhode Island* statute, providing that any policy of insurance, not exceeding \$10,000, for the benefit of a married woman, shall inure to her separate use and benefit. *McQuitty v. Continental L. Ins. Co.*, 15 R. I. 573.

Under a similar statute in *New Hampshire*, the wife's interest in such a policy cannot be revoked by the party procuring the insurance, and assigned by him for his own benefit. *Stokell v. Kimball*, 59 N. H. 13.

See also *Evans v. Opperman*, 76 Tex. 293.

For a discussion of this subject, see *LIFE INSURANCE*, vol. 13, pp. 647, 653; *MARRIAGE SETTLEMENTS*, vol. 14, p. 532.

married woman's separate estate, and may be acquired in any of the ways enumerated; as, by purchase, exchange, etc.¹

(11) *Damages for a Tort*.—The statutes enlarging the rights of married women, and providing for their separate estate, are broad enough, generally speaking, to embrace damages arising out of torts to their persons or property.²

d. PROPERTY BROUGHT FROM ABROAD.—Where a wife owns separate property in one jurisdiction and moves with her husband into another, such property remains her separate estate.³ But in the absence of evidence of what is the law of the State from which the parties came, the common-law rules will be applied.⁴

2. Powers of Wife—*a. POWER TO TRANSFER*.—The legislature, in creating a statutory separate estate for the wife may, and usually does, provide the mode of its disposal.⁵ A provision that, as to such property, the wife should "have the same rights and powers

1. See *Fuller v. Naugatuck R. Co.*, 21 Conn. 557; *Gibson v. Gibson*, 43 Wis. 23; 28 Am. Rep. 527.

Under the *Virginia* statute (Code 1887, § 2284), providing that all real and personal estate of a married woman acquired by gift, grant, or purchase shall be her separate estate, a note assigned to her after marriage constitutes such estate. *Tate v. Perkins*, 85 Va. 169.

2. It is so in *Wisconsin* by *Wisconsin Laws* 1881, ch. 99; *Shanahan v. Madison*, 57 Wis. 276; although before the enactment of that statute it was held otherwise in *Gibson v. Gibson*, 43 Wis. 23; 28 Am. Rep. 527. The *New York* statute accords with that of *Wisconsin*. *Mann v. Marsh*, 21 How. Pr. (N. Y.) 372. The *Michigan* statute has been construed similarly. *Berger v. Jacobs*, 21 Mich. 215; *Leonard v. Pope*, 27 Mich. 145; and so has that of *Ohio*. *Stevenson v. Morris*, 37 Ohio St. 17. See also *Westlake v. Westlake*, 34 Ohio St. 633; 32 Am. Rep. 397. The *Illinois* rule is the same. *Chicago, etc., R. Co. v. Dunn*, 52 Ill. 260; *Hayner v. Smith*, 63 Ill. 430; 14 Am. Rep. 124; *Martin v. Robson*, 65 Ill. 137; 16 Am. Rep. 578; *Hennies v. Vogel*, 66 Ill. 401; *Hawver v. Hawver*, 78 Ill. 414; *Davenport v. Ryan*, 81 Ill. 218; and the rule is the same under the *Maryland* statute. *Clark v. Wootton*, 63 Md. 113.

3. *State v. Chatham Nat. Bank*, 80 Mo. 626.

Money brought to this country from another by a married woman, and used by her in trade as her individual property with her husband's consent, be-

comes her separate estate, together with the personalty in which it is vested. *State v. Smit*, 20 Mo. App. 50.

4. *Van Ingen v. Brabrook*, 27 Ill. App. 401; citing *Hanchett v. Rice*, 22 Ill. App. 442; *King v. O'Brien*, 33 N. Y. Super. Ct. 49. In the latter case a marriage had taken place in *England*. The parties subsequently coming to *New York*, the wife brought with her certain money, part of which belonged to her before marriage, and part had been acquired in *England* by her own labor subsequent to marriage. It was held that the title to, and property in, said money was to be governed and determined by the common law of *England*, in the absence of proof of any statutory enactment of that country on the subject, and that the statutory enactments of *New York* had no bearing on the question.

In *Hydrick v. Burke*, 30 Ark. 124, it was held that in order to protect a married woman in the enjoyment of property brought by herself and her husband into the State, she must show that she acquired a perfect title at the place of purchase, and that the instrument under which she claims was recorded either in the old State or under the laws of the new one.

5. In *Maryland* a married woman is not restricted in the disposal of her choses in action to a joint conveyance with her husband. *Trader v. Lowe*, 45 Md. 1. But in *Alabama* the wife cannot dispose of the corpus of her statutory separate estate except by an instrument in writing, signed by herself and husband, and attested or ac-

knowledge as required by law. Where the husband in her presence sold her property to another in payment of his debt, and she expressed herself as satisfied with the arrangement, she was not precluded from bringing an action of trover against such purchaser for the conversion of the property. *Williams v. Auerbach*, 57 Ala. 90; *Reeves v. Linam*, 57 Ala. 564.

A deed duly attested, executed and acknowledged by the husband and wife, without fraud in its execution, vests a legal title in the grantee notwithstanding the consideration is in part a debt due by the husband. *Connor v. Armstrong*, 86 Ala. 262. Where, at the time of the signing and acknowledgment of a deed by a married woman of her separate estate, the husband did not join, and a bill was filed before he signed and delivered the deed to subject the property to the payment of debts contracted by her, it was held that there was no alienation until after the bill was filed, and that the *lis pendens* began from the service of process on the wife. *Rooney v. Michael*, 84 Ala. 585.

Where a husband entered the confederate army in Texas in 1862, and after his discharge in 1865 continued to reside without the State until his death, his wife's deed of her separate property, executed in 1869, in which he did not join, and before a divorce was procured, was held valid; his absence authorizing her to convey her separate estate as a *feme sole*. *Clements v. Ewing*, 71 Tex. 270.

In *Bellesheim's Estate*, 1 N. Y. Supp. 276, the Surrogate held that under *New York Laws* 1890, ch. 90, providing that no conveyance of her separate property by a married woman "shall be valid without the consent of her husband" her grantee took a title valid as against all the world except the husband, although he did not consent.

In *California* it was held that the assent of the husband must be expressed by his signature to the conveyance, made by himself, and that he could not delegate another to subscribe his name to such conveyance by letter of attorney. *Meagher v. Thompson*, 49 Cal. 189. But he need not be a formal party to the deed. *Bray v. Clapp*, 80 Me. 277. In *Minnesota* it was held that his consent to a conveyance of real estate might, under the statute, be either oral or in writing, express or

implied. *Clague v. Washburn*, 42 Minn. 371.

Under ch. 248, *Laws of New York*, 1879, providing that a married woman may assign a policy of insurance in her favor "with the husband's written consent" it is sufficient for the husband simply to join with the wife in the execution of an assignment. *Anderson v. Goldsmidt*, 103 N. Y. 617.

In *Georgia* no contract of sale of a wife as to her separate estate with her husband or her trustee is valid unless allowed by the superior court of the county of her domicile. *Fulgham v. Pate*, 77 Ga. 454.

The statutes do not remove the disability of infancy, and a conveyance of a married woman of her statutory estate while yet an infant, though joined in by her husband, is voidable as to her. *Schafer v. Lavretta*, 57 Ala. 14.

Where a married woman assigned her separate property to a stock broker to secure her husband's gambling speculations in stocks on margins, it was held that she could maintain a suit in equity against the broker's assignee, with notice, to compel a retransfer to herself. *Tantum v. Arnold*, 42 N. J. Eq. 60.

Acknowledgment.—See ACKNOWLEDGMENT, vol. 1, p. 143. Where the statute requires that the deed shall be separately acknowledged by the wife, it will be void and pass no title unless the statute is fully complied with. *Coffey v. Hendricks*, 66 Tex. 676; *Davis v. Agnew*, 67 Tex. 206. And this is not affected by the fact that at the time of the conveyance she was living separate from her husband. *Danglarde v. Elias*, 80 Cal. 65. The testimony of the notary who took the acknowledgment is admissible to contradict the statements of his certificate, and to show that the wife did not know that the deed conveying the land included therein her separate property, although the certificate of acknowledgment shows on its face full compliance with the statute. *Mays v. Pryce*, 95 Mo. 603.

In *Arkansas*, under the constitution authorizing married women to convey their separate estate as if sole, the acknowledgment by a married woman of a deed conveying her separate property is not required in order to pass the title as between the parties. *Criscoe v. Hambrick*, 47 Ark. 235.

The interest inherited by a married woman from the community estate of

her deceased father or mother is not an exception to the *Texas* statute that allows a married woman's separate estate to be conveyed only by the joint deed of husband and wife, accompanied by a certificate of the privy examination and acknowledgment of the wife. *Stephens v. Shaw*, 68 Tex. 261.

Power of Attorney.—Where the statute requires a deed conveying the separate estate of a married woman to be signed by both husband and wife, a power of attorney executed by the wife alone, and acknowledged, confers no authority on her husband to sell such separate estate. *Cannon v. Boutwell*, 53 Texas 626; *Peak v. Brinson*, 71 Tex. 310; *Cardwell v. Rogers*, 76 Tex. 37; *Trimmer v. Heagy*, 16 Pa. St. 484; *Sexton v. Pickering*, 3 Rand. (Va.) 468; *Baxter v. Bodkin*, 25 Ind. 172; *Fowler v. Shearer*, 7 Mass. 14; 1 *Bishop's Law of Married Women*, § 593. Yet in *Green v. Swift*, 49 Cal. 261, it is only said that it is doubtful whether the husband can in such a case, by power executed by himself alone, delegate to an attorney in fact the power to sign his name for the conveyance of his wife's separate property.

But the *Pennsylvania* statutes relating to the rights and powers of married women over the control and disposition of their separate property do not affect the rights of married women whose husbands are non-resident aliens, and when such is the case a married woman may transfer property by power of attorney without the joinder of her husband. *Farmers', etc., Nat. Bank v. Loftus* (Pa.), 19 Atl. Rep. 347; 25 W. N. C. (Pa.) 459.

Covenants.—A married woman is bound by the covenants contained in her deeds, but only to the extent of her separate interest in the property conveyed. *Hemmiller v. Hatheway*, 60 Mich. 391. The remedy for a breach of such covenants is in equity. *Barlow v. Delany*, 36 Fed. Rep. 577.

Contracts to Convey—Specific Performance.—Under the *New Jersey* Revision, p. 637, § 5, a married woman may contract to sell her real estate, and specific performance thereof will be decreed, after her husband's death, against anyone who purchases with knowledge of, and expressly subject to the agreement. *Union Brick, etc., Mfg. Co. v. Lorillard*, 44 N. J. Eq. 1; and see *Parks v. Barrowman*, 83 Ind. 561. But in *Alabama* it has been held

that the power conferred by the Code, § 2373, upon a married woman to convey land belonging to her separate estate implies a power to rescind the contract of sale for her own protection. *Scott v. Griggs*, 49 Ala. 185. But see *Knox v. Childersburg Land Co.*, 86 Ala. 180.

Exchange.—A married woman may make a valid exchange of her statutory separate property, provided it is conveyed in the manner required by law. *Parker v. Parker*, 88 Ala. 365; *Pollak v. Graves*, 72 Ala. 347; *Woods v. Dunlap*, 73 Ala. 169.

Estoppel.—See MARRIED WOMEN, vol. 14, p. 637.

The representation by the grantor in a deed that she was a single woman, will not estop her from setting up her coverture to avoid such deed because not executed by her husband, where the grantee paid no consideration, and incurred no liability therefor. *Nell v. Dayton*, 43 Minn. 242.

Where a husband acquires land in his own name with the consideration paid by a purchaser of his wife's separate estate, who acquires no title, the deed being void as to her, and the wife during coverture brings suit against her husband and others to assert her right to such land, reciting in her pleading that she had executed such deed to such first purchaser and had received the consideration, and a decree was obtained giving her such land, and declaring it her separate estate, that will not estop her or such second purchaser from recovering the land from the first purchaser or his vendee. *Central Land Co. v. Laidley*, 32 W. Va. 134.

Under the laws of *Colorado* a married woman has the power to do what she will with her own property, and where upon notice that condemnation proceedings by which her property is sought to be effected are wholly void, a wife voluntarily accepts a sum of money equal to the amount of a void award as compensation for her property, she must be regarded as acting wholly independently of such proceedings, and cannot thereafter recover possession of the premises nor further compensation for the taking. *Colorado, etc., R. Co. v. Allen*, 13 Colo. 229.

Where a married woman is allowed by statute to dispose of an insurance policy taken on her husband's life, for her benefit, if she has no child, and she assigns such policy while her child is living, the assignment will be operative

as if unmarried," has been held to give her power to convey and dispose thereof freely without the husband's consent, save only that to pass his curtesy he must join in the deed.¹ But provisions that it should "be under her sole control, and be held, owned, possessed, and enjoyed by her the same as though she were sole and unmarried," or that it should "continue hers as fully after marriage as before," have been held not to give her the power of disposal without the husband's assent,² though she could execute a lease thereof for a term of years.³

b. POWER TO CHARGE—(1) By Contract Generally.—As a general rule a married woman may charge her statutory separate estate with her debts and contracts made in reference thereto,⁴ and the

against her after the death of the child. *Brick v. Campbell*, 54 N. Y. Super. Ct. 305.

1. *Beal v. Warren*, 2 Gray (Mass.) 447; *Albin v. Lord*, 39 N. H. 196; *Davis v. Herrick*, 37 Me. 397; *Collen v. Kelsey*, 39 Me. 298; *Blood v. Humphrey*, 17 Barb. (N. Y.) 660; *Colver v. Curry*, 22 Barb. (N. Y.) 371; *Roper v. Roper*, 29 Ala. 247; *Hooper v. Smith*, 23 Ala. 639; *McCroam v. Pope*, 17 Ala. 612; *Cooke v. Husbands*, 11 Md. 492; *Maiben v. Bobe*, 6 Fla. 381.

2. *Cole v. Van Riper*, 44 Ill. 58; *Bressler v. Kent*, 61 Ill. 426; 14 Am. Rep. 67; *Scott v. Scott*, 13 Ind. 225; *Walker v. Reamy*, 36 Pa. St. 410; *Mahon v. Gormley*, 24 Pa. St. 80; *Moore v. Cornell*, 68 Pa. St. 320.

Such terms give only the *jus tenendi* and not the *jus disponendi*. The power to own and enjoy is entirely different to the power to dispose, and the latter is not necessary to the exercise of the former. *Cole v. Van Riper*, 44 Ill. 58; *Naylor v. Field*, 29 N. J. L. 287; *Armstrong v. Ross*, 20 N. J. Eq. 109.

The power of a married woman to sell real estate without the concurrence of her husband cannot be implied, but must be given in direct terms. *Bressler v. Kent*, 61 Ill. 426. And the main object of such provisions seems to be not so much to declare the rights of the wife, as to negative those of her husband in regard to her property; not to enable her, but to disable him and his creditors. *Pelzer v. Campbell*, 15 S. Car. 581; 40 Am. Rep. 705.

3. *Parent v. Callender*, 64 Ill. 97.

Under the Code of *Alabama*, which makes the husband the trustee of the wife's statutory separate estate, and provides that it can be sold only by a joint deed of husband and wife, the

power given the husband to manage and control the land will include the power to make a lease thereof for a year or less. A lease for a greater period is a species of sale, which must be in writing and signed by the wife to make it valid; though such a lease by the husband alone would still be good for a year. *Chandler v. Jost*, 81 Ala. 411.

4. *McCord v. Blackwell*, 31 S. Car. 125.

An agreement by a married woman to pay for the board of her husband and son with her earnings is binding on her, though her earnings are her separate property. *Sellmeyer v. Welch*, 47 Ark. 485. And she will be held bound by a compromise, consented to by her and authorized by her husband, where it subjects her separate property to the payment of her separate debts. *Thornhill v. State Nat. Bank*, 34 La. Ann. 1171.

A contract to build a house on her land is one in reference to her separate property, and when signed by herself and husband she will be liable upon her acceptance of an order drawn upon them jointly by the contractor. *Pierce v. Kittredge*, 115 Mass. 374. But a contract between herself and husband that she will support their family out of her own means in consideration of his acting as her agent in the management of her separate estate, is void as to her creditors. *Third Nat. Bank v. Guenther*, 1 N. Y. Supp. 753. And where a wife sued to recover the proceeds of a check belonging to her separate estate, and placed by her husband in defendant's hands and by him collected, the defendant was allowed to show, under the plea of payment, that it was received in payment for goods sold and delivered to the husband and

intent to charge may be inferred from the surrounding circumstances, a specific agreement not being always necessary.¹ In some States she must have a separate estate in order that her contracts may be enforced against her.² She may be liable upon her contracts, though not charged upon the separate estate, where they

wife, though the articles were not of a class for which her separate estate was liable. *Jeffries v. Castleman*, 68 Ala. 432.

Where married women are allowed by statute to engage in business, the reception of profits by a married woman executrix, is not such an engaging in business as to render her separate estate liable for the firm debts, she being protected by coverture from any demand against her as partner. *Brasfield v. French*, 59 Miss. 632. And where it appeared that the person from whom a married woman ordered dresses for herself and children knew that she was married and lived with her husband and was not engaged in separate business, and the husband had paid bills previously contracted by the wife, the fact that she ordered her name put at the head of the list was not sufficient evidence that the debt was contracted on her special promise. *Kegney v. Ovens*, 50 Hun (N. Y.) 600.

No change in a statutory separate estate existing and liable for a debt at the time it was contracted, can defeat proceedings instituted to subject it to the payment of the debt. *Cheatham v. Newman*, 59 Ala. 547; and by no contract between husband and wife can her statutory estate be converted into an equitable one with power in her to charge it in a manner not allowed by the statute. *Loeb v. McCullough*, 78 Ala. 533; *overruling Turner v. Kelly*, 70 Ala. 85. But the contracts of a married woman are enforceable only against her separate estate owned at the time of entering into the engagement. *Crockett v. Doriot*, 85 Va. 240.

In an action to enforce a contract against a married woman, the burden is upon the plaintiff to show that she was capable of making the contract. *Brown v. Thomson*, 31 S. Car. 436. In *New York* if the contract creates no express charge upon the separate estate, the plaintiff must show that it was for the benefit of such estate or about the trade or business carried on by her. *Nash v. Mitchell*, 71 N. Y. 199; 27 Am. Rep. 38. Property acquired since the passage of a married woman's act

making it her separate estate cannot be charged with a liability contracted prior to the passage of the statute. *Fallis v. Keys*, 35 Ohio St. 265.

Where the husband is required to join in the contract to make it chargeable upon the separate estate, in case of his insanity, confinement in State's prison, or final separation from the wife, she may bind it by her sole contract. *Davis v. Saladee*, 57 Tex. 326; *Shin v. Bosart*, 72 Ind. 105; *Carstens v. Hanselman*, 61 Mich. 426; *Armstrong v. Ross*, 20 N. J. Eq. 109.

1. *Conlin v. Cantrell*, 64 N. Y. 217.

But it has been held that the intent must appear. *Harshberger v. Alger*, 31 Gratt. (Va.) 52.

In the absence of evidence to the contrary, it will be presumed that money borrowed by a married woman on a post-dated check, she having a separate estate, carrying on business in relation thereto, and keeping a bank account in her own name, was borrowed for the benefit of her separate estate, and she will be held liable therefor. *Nash v. Mitchell*, 8 Hun (N. Y.) 471.

Where a butcher refused to give further credit to a husband, and the wife, who conducted the household affairs and had a separate estate liable to be charged with her debts, though she carried on no separate business, said in reply to his remark that if they wanted to run a bill he would charge it to her, "You will not get cheated out of it. If you do, I will see you paid," it was held not to be a sufficient indication of an intent to charge the separate estate, and the butcher could not recover. *Salmon v. McEnany*, 23 Hun (N. Y.) 87. And see *Strong v. Moul*, 51 Hun (N. Y.) 644.

2. And if the record of a judgment does not disclose the fact that she has a separate estate that is liable for her debts, the judgment is void. *Canal Bank v. Partee*, 99 U. S. 325.

A conveyance of land jointly to the husband and wife does not create in her a sufficient separate estate to enable her to charge it with the payment of her debts. *Baker v. Lamb*, 11 Hun (N. Y.) 519.

inure to her benefit or that of the estate,¹ or are for necessities

1. *Armstrong v. Ross*, 20 N. J. Eq. 109; *Schnabel v. Betts*, 23 Fla. 178; *Winternitz v. Porter*, 86 Pa. St. 35; *Allen v. Graham*, 12 Phila. (Pa.) 176; *Dial v. Agnew*, 28 S. Car. 454; *Eisenlord v. Snyder*, 71 N. Y. 45; *Noel v. Kinney*, 106 N. Y. 74; 60 Am. Rep. 423; *Patteson v. Whitlock*, 14 Daly (N. Y.) 497; *Shacklett v. Polk*, 51 Miss. 378.

A vendor's lien is enforceable against the separate property of a married woman. *Sample v. Cochran*, 84 Ind. 594.

Whenever she buys goods on credit, she benefits her separate estate to the extent of the purchase, if she had no separate estate before she acquired one by the purchase. *Speck v. Gurnee*, 25 Hun (N. Y.) 644. And it seems that a married woman must be deemed to have benefited her separate estate by the performance of all the contracts she makes, and that she is liable to have them enforced against her. *Murphy v. Carpenter*, 22 Hun (N. Y.) 15.

In *Pennsylvania* she may bind her separate estate for services necessary in harvesting, housing and marketing a crop. *Botts v. Knabb*, 116 Pa. St. 28; and her recorded contract for supplies for her separate plantation binds the crops grown that year. *Forrester v. Mann*, 30 La. Ann. 542.

Services rendered in procuring a loan of money to remove a mortgage from the separate estate is one for its benefit. *Patrick v. Littell*, 36 Ohio St. 79; 38 Am. Rep. 552. The fact that a married woman received money on her promise to repay it, and gave a bond and mortgage executed upon her land, is sufficient evidence that it was borrowed for the benefit of the separate estate. *Williamson v. Duffy*, 19 Hun (N. Y.) 312. So also where she paid money borrowed by her to the mortgagee of her real estate, who afterwards discharged the lien, it was held sufficient to support a finding by a referee that the loan was made for the benefit of the separate estate. *Patteson v. Graham*, 1 N. Y. Supp. 2. A purchase of groceries to be used for the family, upon an express promise to pay for the same, and a statement that she owns real estate and will pay for what she gets, is a benefit to the estate and she will be bound to pay the purchase price. *Von Mallen v. Furhmann*, 56 Hun (N. Y.) 402.

A contract for the employment of an agent to overlook the tenantry and gather in her portion of the products, or money rent, is binding and satisfaction may be had out of the separate estate. *Allen v. Johnson*, 48 Miss. 413. Before recovery can be had on the distribution of the separate estate of a married woman, it must be shown that the repairs, to make which the money was borrowed, were necessary; *McMullen's Appeal*, 107 Pa. St. 90. Where she represents the articles purchased to be for the use of her separate estate, she is estopped to deny that they were so used, and the burden of proof is upon her to show that the plaintiff knew at the time of the purchase that they were not to be used as represented. *Brown v. Thomson*, 31 S. Car. 436.

The mere fact that horses are owned by a married woman is not sufficient to charge her on an implied promise to pay for feed furnished on the credit of her husband. *Stevens v. Mayberry*, 82 Me. 65, nor is a contract for insurance on her separate property one for the betterment of her estate. *American Ins. Co. v. Avery*, 60 Ind. 566. Money borrowed for repairs on the separate estate, and actually applied to that purpose, cannot be recovered, though had the contract been with the materialmen the estate would have been liable. *Sellers v. Heinbaugh*, 117 Pa. St. 218. The sale of stocks, deposited by a married woman as collateral for the payment of a loan on a promissory note, made by herself and husband, accompanied by a written authority to sell without notice to the pledgors on non-payment of the note, cannot be restrained or the return of the stocks compelled, though the money was not paid for necessities nor for the improvement of the separate estate. *Dando's Appeal*, 94 Pa. St. 76.

The separate estate of a married woman cannot be made liable on a mechanic's lien for improvements not authorized by her. *Warren v. Smith*, 44 Tex. 245; though a lien may be created by an oral contract, *Wadsworth v. Hodge*, 88 Ala. 500; or may be acquired under a contract with an authorized agent. *Youngblood v. McAnally*, 88 Ala. 512.

The contract may be made by the husband as her agent, with her knowl-

furnished the family.¹ She may charge it by contracts of surety-

edge and approval. *Garwin v. Watkins* (Fla. 1892), 10 So. Rep. 818; and the fact that she was present and saw the work done, made no objection, consulted with her husband concerning the improvements, and cautioned the workmen about placing stones in her garden, is sufficient evidence of an implied promise to pay for the repairs and materials, though the contract was made by the husband who swears that defendant did not authorize him to have the improvements made, *Mackey v. Webb*, 53 Hun (N. Y.) 638. But if the husband, without authority ordered the work done, and there was no evidence of any ratification by the wife, and it appeared that the credit was given to the husband, and all payments were received from him, she could not be held liable; *Bannen v. McCahill* (Supreme Ct.), 8 N. Y. Supp. 916; though where a statute allows the husband to contract for the erection or repair of buildings situated on lands forming part of the wife's separate estate, the consent of the wife is not necessary for the lien of a mechanic or materialman to attach. *Ex parte Schmidt*, 62 Ala. 252.

The husband is entitled, upon the dissolution of the community, to be paid from the estate of the wife the amount of the enhanced value of her separate estate resulting from improvements placed thereon by him; *Succession v. Roth*, 33 La. Ann. 540; and where a wife had trouble with her husband and expelled him from the home, he was held entitled to recover the expenses incurred by him in making improvements on her estate, and the same could be made a charge on the premises in his favor. *Finlayson v. Finlayson*, 17 Oregon 347. But where a statute provided that no trust should result in favor of a person paying the consideration where the title was taken in the name of another, and the husband purchased land in the name of his wife, and after the conveyance leased the same, he was not allowed to recover for improvements made thereon without a promise on the part of the wife to reimburse him. *Gould v. Gould* (Supreme Ct.), 3 N. Y. Supp. 608. It does not establish a promise to pay for improvements, as having been beneficial to her, where a wife, after the death of her husband, told his administrator that she was willing to do what

was right in regard to certain improvements made by her husband on her property which they had occupied together, and was willing to allow \$500 for them, which proposition was not accepted, and no promise on the part of the wife is implied from her knowledge that work was being done, to pay her husband for materials furnished and improvements made on premises belonging to her and occupied by them together. *Norton v. Norton* (Supreme Ct.), 1 N. Y. Supp. 552.

Though a married woman has no power under the statute to borrow money, yet if the money, or any part of it, is used for the benefit of her separate estate, she is liable for the amount used. *Shocklett v. Polk*, 51 Miss. 378. Where a married woman authorized her husband to contract in matters relating to, and for the benefit of her separate estate, and in executing such contract to use the name of a firm ostensibly composed of herself and husband, she was held liable upon an obligation so executed, and this without regard to the question as to whether such a firm in fact exists, or as to whether, as matter of law, they were capable of assuming the relation of co-partners. *Noel v. Kinney*, 106 N. Y. 74; 60 Am. Rep. 423.

1. *Doss v. Peterson*, 82 Ala. 253; *Gayle v. Marshall*, 70 Ala. 522; *Jordan v. Smith*, 83 Ala. 299; *Krouskop v. Shontz*, 51 Wis. 204; 37 Am. Rep. 817; *Hayden v. Rogers*, 22 Ill. App. 557; *Brown v. Thomson*, 27 S. Car. 500; *Warren v. Freeman*, 85 Tenn. 513; and see *Schneider v. Garland*, 1 Mackey (D. C.) 350.

In *Alabama*, the estate is liable where the articles are purchased by the husband whether authorized by the wife or not. *Lewis v. Dillard*, 66 Ala. 1; but the articles must be such as the necessities of the family require and appropriated to the family use. *Mitchell v. Dillard*, 57 Ala. 317.

The following have been held not to be such articles of necessity, or for the comfort and support of the household, as will charge the wife's separate estate: Goods supplied to a married woman for the purpose of running a boarding house, though the family derived their support therefrom, *Clark v. Hay*, 98 N. Car. 421; services rendered to a wife concerning her separate estate, *Lee v. Winston*, 68 Ala.

ship, unless disqualified by statute,¹ and, if the statute gives her

402; a smokehouse, carriage house and fencing, *Lee v. Campbell*, 61 Ala. 12; a reaping machine. *McCormick v. Muth*, 49 Iowa 536; gutters, spouts, stovepipes, *Ridley v. Hereford*, 66 Ala. 261; nor groceries furnished her son and his family, living by themselves, *Hart v. Goldsmith*, 51 Conn. 479; but necessary clothing for her minor children, though at the time away at school, are necessities within the statute for which the wife's estate will be liable, *Wright v. Strauss*, 73 Ala. 227; and also the funeral expenses of her mother, who lived and died in the household, leaving no estate, *Bair v. Robinson*, 108 Pa. St. 247; 56 Am. Rep. 198; also meat used in the family, though purchased on the husband's credit, *Watkins v. Mason*, 11 Oregon 72. But in such suit facts must be averred and shown sufficient to bring the case within the statute, *Smith v. Sherwin*, 11 Oregon 269; house rent, if necessary for the family and suitable for their degree and condition in life will be charged on the separate estate, *Wright v. Merriweather*, 85 Ala. 183; and servants necessarily employed and residing in the family are part of the household, and necessities purchased for them can be charged upon the statutory separate estate. *Pippin v. Jones*, 52 Ala. 161. Whether or not a cooking stove is a necessary is a question of fact for the jury, *Berry v. Henderson*, 102 N. Car. 525; and under the *Mississippi* Code allowing a wife to contract for supplies for her plantation, is included whatever was meant by necessities in the former statute, and whether an article comes within the class is to be determined by the agricultural usage. *Wright v. Walton*, 56 Miss. 1.

The fact that the husband contracted the debt in his own name and gave his note for it with sureties, and that the creditor recovered judgment on the note against him and his sureties, does not affect the liability of the wife's statutory separate estate, *Wright v. Rice*, 56 Ala. 43; and the acceptance of a note given by the husband for family supplies is a mere change in the form of the debt and not a payment, and the wife may be held liable though the goods were originally charged to the husband. *Black v. Sippy*, 15 Oregon 574.

Where a husband kept an account

with a merchant running through several years, some of the articles purchased being such as the statutory estate of the wife was liable for, and each year made payments with the rents of his wife's estate, such payments extinguished so much of the debt as was first incurred, without regard to the articles of which it was composed; and if, after such payments, any part of the balance was composed of articles for the support and maintenance of the family, the wife's estate would be liable for the amount of such necessities. *Lee v. Tannenbaum*, 62 Ala. 501.

In order to charge an estate it should have had an existence at the making of the contract, and have continued up to the institution of the suit; *Pippin v. Jones*, 52 Ala. 161; and where a married woman was declared "a free dealer with the right to sue and be sued, and to manage her own estate," by a private act of the legislature, it destroyed her husband's trusteeship and exempted her estate from liability for necessities of the household, though it was otherwise as to articles furnished before the enactment. *Halliday v. Jones*, 57 Ala. 525.

Where a husband has paid for family expenses and supplies for a wife's plantation, for which her statutory estate is liable, he cannot claim to be reimbursed out of her estate. *Gilkey v. Pollock*, 82 Ala. 503.

In order to subject the wife's separate estate to a sale, it must be based on a judgment in a suit against both husband and wife, or preceded by a judgment against the husband, *O'Connor v. Chamberlain*, 59 Ala. 431. The transcript of the record need not state that they were furnished on the credit of her separate estate, *Fenstermacher v. Xander*, 116 Pa. St. 41; and there can only be a sale of the wife's estate after a personal notice to her. *Cauly v. Blue*, 62 Ala. 77.

The liability of a wife's statutory separate estate for contracts for necessities being statutory, does not extend to contracts made and performed in another State, where the contracting parties are domiciled. *Judge v. Wright*, 73 Ala. 324.

1. *Woolsey v. Brown*, 74 N. Y. 82.

But in *Georgia* and *Indiana* she is disqualified by statute. *Saulsbury v. Weaver*, 59 Ga. 254; *Security Company v.*

the general power to contract, it will, of course, include the power to confess a judgment.¹ The separate property will be charged with the costs of a suit brought by the wife in respect to it,² and she may bind it by an agreement to pay attorney's fees.³

(2) *By Promissory Notes.*—As a general rule in those States in which the rule of the common law respecting the power of a married woman to bind herself by contract, has been modified by statute, a promissory note made by a married woman as principal or surety, or indorsed by her, is binding upon her separate property.⁴ And the same is true of a note indorsed for her accommodation,⁵ or executed by her for the accommodation of her

Arbuckle, 119 Ind. 69; though in *Indiana* if at the time of making the contract of suretyship she represents the engagement to be for her own benefit, her separate estate will be bound. *Rogers v. Union Central Ins. Co.*, 111 Ind. 343; 60 Am. Rep. 701.

A married woman cannot bind herself as surety on a recognizance entered into by her without any benefit arising therefrom to her separate estate, or, if capable under the enabling acts, she can only bind her separate estate, and that she does so must be expressed in the instrument. *People v. Williams*, 8 Daly (N. Y.) 264; *Gosman v. Congie*, 69 N. Y. 87.

1. *Real Estate Invest. Co. v. Roop*, 132 Pa. St. 406. But see *White v. Wood*, 49 Hun (N. Y.) 381.

2. *Askew v. Renfro*, 81 Ala. 360; *Haney v. Lundie*, 58 Ala. 100; *Balkum v. Kellum*, 83 Ala. 449; *Lee v. Ryall*, 68 Ala. 354.

3. *Porter v. Haley*, 55 Miss. 66; 30 Am. Rep. 502. But not in *Indiana* prior to the acts 1879, p. 160. *Pierce v. Osman*, 79 Ind. 259; *Stonecipher v. Watson*, 92 Ind. 17; nor will it be liable for services rendered in procuring her a divorce unless she contracted to pay for the services or undertook to charge the estate. *Pfirshing v. Falsh*, 87 Ill. 260.

4. *Orange Nat. Bank v. Traver*, 7 Sawy. (U. S.) 210; *Williams v. King*, 13 Blatchf. (U. S.) 282; *Doss v. Peterson*, 82 Ala. 253; *Marlow v. Barlew*, 53 Cal. 456; *Rothschild v. Raab*, 93 Ind. 488; *Mathes v. Shank*, 94 Ind. 501; *Arnold v. Engleman*, 103 Ind. 512; *Dailey v. Singer Mfg. Co.*, 88 Mo. 301; *State Sav. Bank v. Scott*, 10 Neb. 83; *Messer v. Smyth*, 58 N. H. 298; *Cashman v. Henry*, 44 N. Y. Sup. Ct. 100 note; *First Nat. Bank v. Hurlbut*, 22 Hun (N. Y.) 310; *Knowles v. Toone*, 96 N. Y. 534; *Bowery Nat. Bank v.*

Sniffen, 54 Hun (N. Y.) 394; *Arrington v. Bell*, 94 N. Car. 247; *Williams v. Urmston*, 35 Ohio St. 206; *overruling* *Levi v. Earl*, 30 Ohio St. 147, and *Rice v. Columbus, etc., R. Co.*, 32 Ohio St. 380; *Dial v. Agnew*, 28 S. Car. 454; *Howard v. Kitchens*, 31 S. Car. 490.

A married woman is not bound as a surety on a note, unless it appears that she became such with the intention to bind her separate estate. *State Sav. Bank v. Scott*, 10 Neb. 83.

In *Indiana*, the rents and profits of a married woman's separate estate cannot be subjected to the payment of a note executed by her, where, by the note itself, she agreed to pay from her own separate property the amount stated therein. *Richards v. O'Brien*, 64 Ind. 418.

In *Virginia*, the contracts of a married woman, including her promissory notes, are enforceable only against her separate estate owned at the time of entering into the agreement. *Crockett v. Doriot*, 85 Va. 240.

Although a note given by a wife for her husband expressly binds the wife's separate estate, a policy of insurance on her husband's life is not covered thereby, since, until the death of her husband, she has no such interest in the policy as can be the subject of a charge. *Milhous v. Johnson*, 51 Hun (N. Y.) 639.

Where a married woman indorsed upon a promissory note: "I hereby charge my separate and personal estate for the payment of the within note," the instrument was held not to be a mortgage, in any sense, but simply a personal security, which a national bank is not prohibited from taking. *Third Nat. Bank v. Blake*, 73 N. Y. 260.

5. *Scott v. Otis*, 25 Hun (N. Y.) 33; *Nelson v. McDonald* (Wis. 1891), 50 N.

husband.¹ The rule includes also a note made by her jointly with her husband,² unless it appears that she signed the note only because her husband asked her to, and without knowing the use to be made of it.³ In some jurisdictions, however, the rule prevails that a married woman's promissory note, in order to be valid, must be for the benefit of her business or estate,⁴

W. Rep. 893. In the former case it was held that a married woman is liable to an indorser of her note, which he has been obliged to pay, the note having been indorsed for her accommodation, and for the purpose of being used for the benefit of her separate estate or in her separate business and whether it was in fact so used or not, was considered immaterial.

1. *Bowery Nat. Bank v. Sniffen*, 54 Hun (N. Y.) 394; *Queens Co. Bank v. Leavitt*, 56 Hun (N. Y.) 426. These cases both hold that where promissory notes are executed by a wife to her husband as mere accommodation paper, they do not constitute contracts between them; and that under the *New York* statute giving to married women the power to contract as if they were unmarried, and making them and their separate estate liable on their contracts, whether they relate to such separate estate or not, but excepting from the provisions of the act all contracts between husband and wife, the bank which discounts such notes for the husband is entitled to recover thereon against the wife.

2. *Alexander v. Bouton*, 55 Cal. 15; *Baird v. Bruning*, 84 Ky. 645; *Fairlie v. Bloomingdale*, 38 Hun (N. Y.) 220; *Avery v. Vansickle*, 35 Ohio St. 270.

A married woman, to secure her husband's debt, joined with him in a note and in a mortgage upon her separate property, induced by his representations that she became liable only to the extent of such property. The mortgagee took a collateral agreement from others, to which the woman and her husband were not parties, to secure any deficiency beyond the value of the property mortgaged. It was held that the wife was bound as principal, and that her liability was not restricted by the understanding with her husband, or by the collateral security taken. *Alexander v. Bouton*, 55 Cal. 15.

A judgment against the husband, upon the joint promissory note of himself and wife, does not merge the right to charge the wife's separate estate with the payment of the note in a sub-

sequent action. *Avery v. Vansickle*, 35 Ohio St. 270.

It has been held in *Missouri* that where a woman, who has a separate estate, joins with her husband in a promissory note and in a deed of trust of lands, in which they have a homestead, as security for the note, the fact that she signed such deed is proof of an intention not to charge her separate estate, which accordingly is not liable for the amount of the note. *Seifert v. Jones*, 84 Mo. 591.

3. *Schlatterer v. Nickodemus*, 51 Mich. 626, where it was decided that a married woman is not bound by a promissory note which she signs jointly with her husband for the amount of a judgment against both, if it appears that she signed only because he asked her to, and without knowing the use to be made of it. This was considered only to make her a surety for her husband, and not to connect her with the consideration in such a way as to reach her separate property.

4. *Saratoga Co. Bank v. Pruyn*, 90 N. Y. 250; *Jordon v. Keeble*, 85 Tenn. 412.

A wife, although separate in property, cannot be held on her mortgage note, where the holder of the note fails to show that she was authorized by the judgment to make the mortgage, and fails to show that her pretended agent, who made the mortgage, was empowered by her to do so, and also fails to show that the consideration of the note inured to her separate benefit. *Nugent v. Stark*, 30 La. Ann. 492.

Where a promissory note made by a married woman and payable to the order of her husband, is indorsed and presented by him to a bank for discount, no implication or presumption can be drawn from the form of the note, or from the fact that she gave it to her husband to be discounted, that she is to be benefited by it in her business or estate; and to give it vitality it must be shown that the note was made for such purpose. *Saratoga Co. Bank v. Pruyn*, 90 N. Y. 250.

A person asked to buy a note in-

or must have been made with reference to her separate property.¹

When a married woman is not allowed by law to enter into a contract with her husband, a note given to him is not binding on

dorsed by a married woman refused until she had answered in writing certain questions. Her answers, which were dated three days after the date of the note, were to the effect that she considered her separate estate bound for it, and that she deemed herself liable to pay it if the maker failed so to do. It was held that the note and answers were to be taken as parts of the same contract, and that accordingly the wife's estate was bound. *Knowles v. Toone*, 96 N. Y. 534; *rev'd* 10 Daly (N. Y.) 388.

A married woman, separated in property from her husband and administering her own affairs, is liable on her note, without proof that it inured to her individual benefit. *Cormier v. De Valcourt*, 33 La. Ann. 1168.

Where a married woman bid in her husband's law books at an execution sale, and gave her promissory note for the amount of his claim to the judgment creditor, in an action to subject the wife's separate estate to the payment of said note, held that, as the note itself did not charge the wife's separate estate, and as the law books were never conveyed to the wife's sole and separate use, and were never settled upon her in any way, her separate estate could not be charged with the payment of the note. *Jordon v. Keeble*, 85 Tenn. 412.

1. *Stowell v. Grider*, 48 Ark. 220; *Johnson v. Sutherland*, 39 Mich. 579; *Booker v. Wingo*, 29 S. Car. 116; *Gwynn v. Gwynn*, 31 S. Car. 482; *Barnum v. Young*, 10 Neb. 309. But it has been held that the fact of the wife's signing a joint note with her husband, is *prima facie* evidence of her intention to charge her separate estate. *Nelson v. McDonald* (Wis. 1891), 50 N. W. Rep. 893. So, where a married woman acquires the title to property by purchase, and executes her promissory note therefor, an implication arises, in the absence of proof of a different understanding, that she thereby intended to charge her separate estate with its payment, and such implication is not affected by the fact that she, with her husband, executed a mortgage of the property purchased, to secure the payment of such note. *Avery v. Van-*

sickle, 35 Ohio St. 270. And so again, where a married woman, having a separate estate, executes a promissory note, as surety for the principal maker, a presumption arises that she thereby intends to charge her separate estate with its payment. *Williams v. Urnston*, 35 Ohio St. 269; *overruling Levi v. Earl*, 30 Ohio St. 147, and *Rice v. Columbus, etc., R. Co.*, 32 Ohio St. 380.

Where it appeared from the evidence, in an action against a married woman on a promissory note, made by herself and her husband jointly, that she had signed the note at her husband's request, and that the consideration for it was merchandise sold to various members of her husband's household, upon no especial arrangement by the vendor with her, it was held that it could not be therefrom inferred that it was her intention to charge her separate estate by the execution of the note. *Stowell v. Grider*, 48 Ark. 220.

A note given by the wife, for a debt of her husband with a stipulation that it is taken by the payee "on the credit" of her separate estate, will bind her separate estate. *Orange Nat. Bank v. Traver*, 7 Sawy. (U. S.) 210.

In a promissory note by a married woman to pay a certain sum "from my personal estate," these words have been construed to mean her separate estate. *First Nat. Bank v. Hurlbut*, 22 Hun (N. Y.) 310.

Estoppel.—A statement in a note given by a married woman, and secured by mortgage on her separate estate, that "this note is made with reference to my separate estate, and is intended to be a charge upon the same," is not such a representation, that the money borrowed was for the use of her separate estate, as will estop her from denying it. *Gwynn v. Gwynn*, 31 S. Car. 482. But where a married woman executes a negotiable note for the price of property, secured by mortgage on her real estate, and gives to the payee an affidavit that the note and mortgage are executed for the property purchased by her, she is estopped, as against an innocent purchaser for value of the note who relied on the representations in the affidavit, from bringing

her statutory separate estate;¹ and when she is not empowered to make a contract of suretyship, she cannot be held liable upon her indorsement given to secure the debt of another.²

sult to cancel the mortgage on the grounds that the note was executed as surety of her husband, and that the affidavit was obtained by the fraud and collusion of the husband and payee of the note. *Lanemm v. Schlemmer*, 114 Ind. 206.

In *Kentucky* a married woman's separate property may be subjected to the payment of a note, executed by husband and wife, which recites that it is for materials furnished at the special instance of the wife, "to be used in the necessary repair of her house." *Baird v. Bruning*, 84 Ky. 645.

The *South Carolina* statute does not authorize a married woman to give a note for money expended on account of her child, at her request. *Howard v. Kitchens*, 31 S. Car. 490.

In *Tennessee* a promissory note in the usual form, made by a married woman, which contains nothing about the separate estate of the wife, does not constitute a charge upon the wife's personal estate, and parol evidence is not admissible to prove that the note was intended as a charge. *Jordan v. Keeble*, 85 Tenn. 412.

The *Alabama* statute creating the separate estate of a married woman does not render valid a promissory note given by her for the debt of her husband. But if partial payments have been made the wife on her note with money belonging to her equitable separate estate, or derived as income from her statutory estate, such payments cannot be reclaimed by her. *Dacus v. Streety*, 59 Ala. 183.

Where a married woman's note expressed a consideration on its face, parol evidence is inadmissible to show a different consideration, and the expressed consideration, to be valid, must concern her separate estate. *Johnson v. Sutherland*, 39 Mich. 579.

Instruction.—In *South Carolina*, in an action on the promissory note of a married woman, a charge as follows: "You are to say whether . . . in the execution of this note . . . she undertook to create a separate estate. If she did, . . . she is bound to pay for it;" followed by the qualification, "If the transaction was a roundabout way of assuming liability upon the part of

Mrs. Agnew for the benefit of her husband, she is not bound,"—is a proper instruction. *Dial v. Agnew*, 28 S. Car. 454.

Recital.—In a note executed by husband and wife for borrowed money, a recital "that said sum is procured for the use and benefit of said Sarah (the wife); and for the payment of this claim, when called for, she pledges her own individual estate," will not estop the wife from showing that the loan was to her husband, and not for the benefit of herself or her estate. *Kilbourn v. Brown*, 56 Conn. 149. But a married woman is estopped as against a *bona fide* holder before maturity to assert the falsity of a statement in a note signed by her that it was given for the benefit of her separate estate. *Nott v. Thomson* (S. Car.), 14 S. E. Rep. 940.

1. *Herron v. Frost*, 9 Mont. 308; *Cozzens v. Whitney*, 3 R. I. 79; *Angell v. McCullough*, 12 R. I. 47; *Fallon v. McAlonen*, 15 R. I. 223. Thus in the latter case it was decided that a married woman cannot by an unsealed and unacknowledged written agreement with her husband create a lien or charge on her separate statutory estate for the repayment of money borrowed of him.

2. *Russel v. People's Sav. Bank*, 39 Mich. 671; 33 Am. Rep. 444.

Power to Charge by Bond.—In *Pennsylvania* a married woman has no power to bind herself by a bond for borrowed money, and it is immaterial that the money was borrowed for and applied to the improvement of her separate estate. *Vandyke v. Wells*, 103 Pa. St. 49. In *New York* if she has no separate estate she is not competent to enter into the contract which the bond contains, and this although she falsely represents herself to have separate estate. *Wilson Sewing Machine Co. v. Fuller*, 60 How. Pr. 480; for "a married woman cannot give herself a legal capacity to contract by falsely representing that she has such capacity." *Baker v. Lamb*, 11 Hun (N. Y.) 522. If a bond, secured by a mortgage, is given for her husband's debt, she must expressly charge her separate estate. *McKeon v. Hagan*, 18 Hun (N. Y.) 65.

(3) *By Mortgages*.—A mortgage executed by the wife upon her statutory separate estate is binding;¹ but in some States with the qualification that it must have been given to secure debts contracted for her own benefit or for the benefit of her estate.² Where a husband and wife join in a mortgage, the wife's separate estate is similarly bound.³ In those States in which a married

1. See MORTGAGES, vol. 15, p. 741; MARRIED WOMEN, vol. 14, pp. 604, 628; *Stephen v. Beall*, 22 Wall. (U. S.) 329; *Marlow v. Barlew*, 53 Cal. 456; *Eaton v. Nason*, 47 Me. 132; *Bartlett v. Bartlett*, 4 Allen (Mass.) 440; *Thacher v. Churchill*, 118 Mass. 108; *Albin v. Lord*, 39 N. H. 196; *Batchelder v. Sargent*, 47 N. H. 262; *Messer v. Smyth*, 58 N. H. 298; *Thompson v. Ela*, 58 N. H. 490. Compare *Semple v. British Columbia Bank*, 5 Sawy. (U. S.) 394.

A married woman may mortgage her land to secure her husband's debt; if, however, she gives her note for the debt, and gives a mortgage to secure the note, the note being void, the mortgage cannot be enforced. *Sperry v. Dickinson*, 82 Ind. 132.

Where a married woman inserted in her mortgage a declaration that she "hereby makes a payment of the moneys, hereby secured, a charge upon her other sole and separate estate," it was held that her other separate estate was not thereby charged as against one afterwards purchasing it in good faith and for value. *Rourke v. Murphy*, 12 Abb. N. Cas. (N. Y.) 402.

2. *Jones v. Wilson*, 57 Ala. 122; *Fawcner v. Scottish American Mortgage Co.*, 107 Ind. 555; *Ward v. Berkshire L. Ins. Co.*, 108 Ind. 301; *Jouchert v. Johnson*, 108 Ind. 436; *Brown v. Prevost*, 28 S. Car. 123. Compare *McDougal v. People's Sav. Bank*, 62 Miss. 663.

In *Alabama*, a married woman's statutory separate estate can be incumbered only for "articles of comfort and support" furnished to the family. A mere recital in a mortgage that the debt secured was the wife's debt for "supplies furnished," constituting "a proper claimant against her separate estate," is sufficient. *Jones v. Wilson*, 57 Ala. 122.

In an action by a married woman to set aside a mortgage on her separate real estate on the ground that it was given to secure the price of mules bought by her husband, it appeared that the plaintiff mortgaged the mules

the next day after they were purchased, to secure another debt of her own. The evidence being conflicting, the court refused to disturb a finding that the plaintiff purchased the mules. *Fant v. Brown*, 29 S. Car. 598.

The defendant, a married woman, executed to the plaintiff a note, secured by mortgage, for \$500, borrowed money which was paid into her own hands, the loan having been transacted with her in person. She afterwards delivered the money to her husband, and a few days later took from her husband his note for \$500, and a mortgage on his land to secure it. It was held that the evidence justified the finding that the defendant, in executing the mortgage to the plaintiff, intended to, and did, charge her separate estate. *Law v. Lipscomb*, 31 S. Car. 504.

In *Mississippi*, a married woman cannot charge her separate estate by a deed of trust executed jointly with her husband to indemnify the surety on a recognizance of her son. *Chandler v. Morgan*, 60 Miss. 471.

A married woman borrowed money from a bank to pay two debts, one of which she had legal capacity to contract, and the other of which was a charge on her separate property. To secure the loan she executed a trust deed on her separate property. Default having occurred, the trustee sold and bought at the sale for a fair price, something less than the amount of the debts. No objection was made until several years after, when the married woman brought a bill to avoid the sale, on the ground that one of the debts was beyond her power to contract. The sale, however, was upheld on the ground that the contract embraced in the trust deed had been fully executed. *McDougal v. People's Sav. Bank*, 62 Miss. 663.

3. *Jouchert v. Johnson*, 108 Ind. 436; *Jones v. Merritt*, 23 Hun (N. Y.) 184; *Avery v. Vansickle*, 35 Ohio St. 270.

Where land mortgaged by a husband and wife had been acquired by the wife as a gift from her husband, and the money borrowed on the mortgage had

woman is not allowed by law to charge her separate estate for the benefit of her husband, a mortgage given for a debt of the husband is necessarily void.¹

(4) *By Agency of Husband.*—A married woman may manage her separate estate as well by agent as in person, and may appoint her husband agent.² She will be liable for any debts or charges incurred by him in the management of the estate,³ but the authority must be shown.⁴

c. *WILLS OF SEPARATE PROPERTY.*—The power of a married woman to will her statutory separate property is usually regu-

been used in paying off a former purchase money mortgage on the land, the mortgage should be enforced against the land to the extent that the borrowed money was thus applied. *Noland v. State*, 115 Ind. 529.

If a husband and wife purchase lands, taking title in her name, making partial payment of the purchase money with funds belonging to her statutory separate estate, and executing a mortgage on the lands to secure the unpaid balance, such mortgage is in equity a valid security for the debt, and, in the absence of fraud or collusion between the husband and the vendor, the wife cannot be permitted to repudiate the transaction, and charge the lands with the reimbursement of her moneys expended in the purchase. *Smith v. Doe*, 56 Ala. 456.

Res Judicata.—A judgment in an action to foreclose a mortgage executed by husband and wife, to secure the payment of the wife's promissory note, constitutes no bar to a subsequent action to subject the separate estate of the wife to the payment of a deficiency arising upon the sale of the property mortgaged. *Avery v. Vansickle*, 35 Ohio St. 270.

In *Dakota*, a married woman, who, with her husband, executes a mortgage upon her land, with covenants of seisin, quiet possession, and warranty, as security for a loan, is estopped from setting up title acquired after a foreclosure sale thereunder, though the mortgage is a mere lien conveying no estate in the land. *Yerkes v. Hadley*, 5 Dakota 324.

1. *Salinas v. Turner*, 33 S. Car. 231.

2. *Brown v. Thomson*, 31 S. Car. 436; *Baxter v. Maxwell*, 115 Pa. St. 469.

3. *Hickey v. Thompson*, 52 Ark. 234; *Wolf v. Duvall* (Ark. 1890), 13 S. W. Rep. 728; *Heustis v. Kennedy*, 23

Ill. App. 42. But if he exceeds the authority the wife will not be bound; *Arnett v. Glenn*, 52 Ark. 253. And a general power to manage her separate estate does not authorize him to bind her by drawing bills of exchange, the power to draw which must be expressed. *Folger v. Peterkin*, 39 La. Ann. 815. But if the wife knows that her husband has exceeded his authority, she is bound to notify third persons dealing with him. *Bergen v. Keiser*, 17 Ill. App. 505.

4. *Wallace v. Monroe*, 22 Ill. App. 602; *Wadsworth v. Hodge*, 88 Ala. 500; *Porter v. Staten*, 64 Miss. 421; *Hamblet v. Steen*, 65 Miss. 474.

The separate estate of a married woman cannot be charged with the debts of a company, to the amount of stock standing in her name, where the stock was entered on the books of the company by the authority of her husband, a director, who voted and represented it, and it did not appear that she had authorized or ratified his acts, or claimed any interest in the stock, or received any dividends therefrom. *Longdale Iron Co. v. Pomeroy Iron Co.*, 34 Fed. Rep. 448; and it is a question for the jury whether upon the evidence the agency was authorized. *McCord v. Blackwell*, 31 S. Car. 125.

A party who credits the husband individually may charge the wife on discovering his agency. *Miller v. Watt*, 70 Ga. 385.

If a wife avails herself of the result of her husband's fraud, while acting as agent in reference to her separate property, she is liable therefor as though unmarried. *Rush v. Dilks*, 43 Hun (N. Y.) 282; and where he knowingly leased her real estate for the unlawful sale of liquor, it was held that the State had a lien thereon for the fines imposed on the seller. *Hardten v. State*, 32 Kan. 637.

lated by the statutes creating the estate, most of the separate property acts giving her the authority to do so.¹

3. Liability for Husband's Debts.—As a general rule, it may be said the statutes of the various States exempt the wife's statutory separate estate from liability for the debts of the husband,² and,

1. See MARRIED WOMEN, vol. 14, p. 598; WILLS.

In 2 Jarm. Wills (5th Am. ed.), 38, is given a list of the States in which married women may dispose of general property by will.

The provisions of the *New Hampshire* Laws of 1845, 46 and 60, permit a married woman, only with her husband's consent, to dispose by will of property not held under the law of 1846 for her sole and separate use; but see now Gen. Laws 1878, ch. 183, p. 435; *Sanborn v. Batchelder*, 51 N. H. 426. The *Illinois* Rev. Sts. 1845, ch. 109, conferred upon married women the power to dispose of their separate estate, both real and personal, by will; and where a wife, during coverture, executed a will devising real estate which she inherited previous to her marriage in 1860, it was held that the statute of 1861, providing that "all property belonging to any married woman as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, shall be and remain during coverture her sole and separate property," and be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried," enlarged the meaning of the term "separate estate" so as to embrace property owned by her at the time of marriage, and that the devise was valid. *Emmert v. Hays*, 89 Ill. 11.

In *Mississippi* a devise by a married woman, to her brother, of separate real estate which had been occupied by herself and husband as a homestead, was held valid. *Kelly v. Alfred*, 65 Miss. 495.

2. Stimson's Am. St. Law, § 6410, 6420; *Bibb v. Pope*, 43 Ala. 190; *Bowman v. Kaufman*, 30 La. Ann. 1021; *Corning v. Lewis*, 54 Barb. (N. Y.) 51; 36 How. Pr. (N. Y.) 425; *Salinas v. Turner*, 33 S. Car. 231; *Lobman v. Kennedy*, 51 Ala. 163; *McElvin v. Taylor*, 30 La. Ann. 552.

Not even where the separate property consisted of store fixtures and other utensils which she permitted her husband to use in his business. *Mink v. Crilly*, 22 Ill. App. 542; *Leinkauf*

v. Barnes, 66 Miss. 207. But where she gives her husband the use of her farm and the personalty thereon, his creditors may attach hay severed by him from the land before the license is revoked. *Plaisted v. Hair*, 150 Mass. 275. And where a married woman went into business with a stock of goods purchased with her separate means, and bought on credit and in her husband's name, and replenished the stock from time to time, and so continued for several years, and it could not be shown how much of capital and how much of profits were used by her in keeping up the stock of goods, it was subjected to her husband's debts. *Smith v. Bailey*, 66 Tex. 553. And so, also, where land was purchased in the wife's name with the husband's money after a debt accrued on which a judgment was founded. *Merrill v. Jose*, 81 Me. 22.

In *Alabama* the wife can neither sell nor mortgage her separate property for the payment of her husband's debts. *Bibb v. Pope*, 43 Ala. 190.

In *Louisiana* a married woman may bind her separate estate by an engagement to pay the debt of her husband, by complying with the *Louisiana* statute enabling married women to contract debts. *Keller v. Ruiz*, 21 La. Ann. 283. But a married woman, even though separate in property, cannot be held liable for a debt contracted by her husband, unless it be affirmatively shown that it inured to her separate benefit. *Bowman v. Kaufman*, 30 La. Ann. 1021.

Where a husband purchased lands with moneys belonging to the *corpus* of his wife's statutory estate and took the title in his own name, the wife was not allowed to enforce her equity against a judgment creditor who had no notice prior to the levy, nor against a *bona fide* purchaser from the husband without notice. *Preston v. McMillan*, 58 Ala. 84. And where the husband converted property transferred to him by his wife's bailee, her right to the funds in the hands of a receiver appointed on her petition, though held superior to that of the bailee, was not held superior to the rights of general creditors prov-

in the absence of fraud, his creditors have, as a usual thing, no rights whatever against her property.¹ The husband may labor thereupon as her agent, or even make improvements thereupon, without, in the absence of actual fraud, making it in any way liable for his debts.² In some States the wife cannot even charge

ing their demands before distribution. *Rieper v. Rieper*, 79 Mo. 352.

Money Paid for Entering Horses at a Fair.—Money was paid by a wife for the purpose of entering horses belonging to her as contestants for premiums offered by an agricultural society. The horses were entered in the name of her husband, there being no rule of the society requiring the horses to be entered in the name of the real owner. Such entrance money was returnable by the rules of the society. It was held that the wife was entitled thereto, and that the money was not subject to a garnishment by a judgment creditor of the husband. *McArthur v. Garman*, 71 Iowa 34.

Property Bought on Credit.—When a married woman, having a separate estate, buys property on the credit of such estate, she can hold the property against her husband's creditors, and in an action of trespass brought by her against a sheriff for seizing the property on a judgment against her husband, evidence is admissible to show her ownership and that the property was bought by her on the credit of her separate estate. *Sixbee v. Bowen*, 91 Pa. St. 149.

Pleading.—Where the wife seeks by bill to enjoin a creditor of her husband from selling property by virtue of a judgment and execution against her husband, upon the ground that it is her separate property, she must allege in her bill whether it is her equitable or her legal separate estate; and if the property be claimed by purchase, she is held to full and strict proof that it was paid for with her money, and in the absence of such proof, the property is presumed to have belonged to the husband. *Storrs v. Storrs*, 23 Fla. 274.

Where a piano bought by the wife and mortgaged for the purchase money was attached as her husband's and the mortgagee brought replevin, it was held that he could only enforce his remedy in equity. *Kimball v. Silvers*, 22 Mo. App. 520.

1. *Martin v. Papall*, 6 R. I. 96.

2. *Nance v. Nance*, 84 Ala. 375; *Cas-*

well v. Hill, 47 N. H. 414; *Webster v. Hildreth*, 33 Vt. 457; 78 Am. Dec. 632; *White v. Hildreth*, 32 Vt. 265; *Miller v. Peck*, 18 W. Va. 75. The time of a debtor is his own and he may do with it as he pleases, and his creditors cannot complain if he renders his labor gratuitously to his wife, for they have no claim upon his services. As they have no right to compel him to work and earn money for their benefit, they are not defrauded if he chooses to donate his services to another. *Eilers v. Conradt*, 39 Minn. 242.

But if the husband is indebted at the time he places improvements on his wife's land, the value of such improvements may be reached through appropriate proceedings in chancery, and the amount thereof applied to the payment of claims existing against him at the time of the investment. If in such case, the estate cannot be successfully apportioned in partition, chancery will decree a sale of it and a division of the proceeds according to the rights of the respective parties. *Kirby v. Bruns*, 45 Mo. 234; 100 Am. Dec. 376. And the creditor of an insolvent husband who had used his own means to erect a building on his wife's premises, was allowed to attach the proceeds of a sale of the property to the extent of its enhanced value, without a previous return of *nulla bona* against the husband. *Collins v. Slade* (Ky. 1888), 9 S. W. Rep. 245. But the creditors of the husband cannot charge the wife's separate estate for materials furnished by him for improvements thereon, which were exempt from execution in his hands. *Nance v. Nance*, 84 Ala. 375.

Where a statute permits a levy on the products of a married woman's real estate for labor or material furnished upon, or for the cultivation or improvement thereof, and the husband built a house on his wife's land, and the house and land were afterwards sold and a farm bought in the wife's name with the proceeds, it was held that hay grown upon this farm could not be levied on for the husband's debt for materials used in building the house. *Ackley v. Fish*, 55 Vt. 18.

her separate estate for the husband's benefit,¹ although in others she may do so.² The wife's property not being liable for the husband's debts, it is *a fortiori* not liable for his torts.³

4. **Suits Concerning Statutory Separate Property.**—See MARRIED WOMEN, vol. 14, p. 650.

5. **Rights and Liabilities of the Husband.**—The husband has no power to make a transfer of, or create a charge upon, his wife's statutory separate property,⁴ and if he assumes control of it, will be accountable to her for the principal, together with the income and profits.⁵

6. **Effect of Separate Property Acts on Husband's Curtesy.**—Where the statute creating the separate estate in a married woman gives her power to hold, convey and devise as fully as if a *feme sole*, the husband's curtesy will be defeated if she makes such conveyance or devise;⁶ but if she dies intestate, not having conveyed

1. *Salinas v. Turner*, 33 S. Car. 231.

2. See *supra*, this title, *By Mortgage, By Promissory Note, etc.*; *Keller v. Ruiz*, 21 La. Ann. 283.

3. *Corning v. Lewis*, 54 Barb. (N. Y.) 51; 36 How. Pr. (N. Y.) 425.

4. One cannot, even as to his curtesy, dedicate his wife's lands to a public use unless she joins in and acknowledges the deed. *Marshall v. Anderson*, 78 Mo. 85; nor where the statute securing to the wife a separate estate gives the husband power to manage it, can he indorse her name on notes payable to her order and make a valid transfer of the same. *Kempner v. Comer*, 73 Tex. 196.

Where the statute makes a husband the trustee of his wife's statutory separate estate, she cannot divest him of his authority by contracting with one to whom she lends money that he is to pay it to her and not to the husband, the husband not being a party to the agreement. *Hall v. Creswell*, 46 Ala. 460. Nor can she recover from her husband, or resume the administration of her separate dotal property without a decree of dissolution of the conjugal association unless she shows waste or dissipation of it by the husband, especially where she has voluntarily abandoned him without cause. *Martinez v. Lucero*, 1 N. Mex. 208; *Chavez v. McKnight*, 1 N. Mex. 147.

Compare *supra*, this title, *Property Held by Husband in Trust*.

It was held in *Alward v. Alward* (Supreme Ct.), 2 N. Y. Supp. 42, that a husband could recover in an equitable action money advanced for the benefit of his wife's separate estate,

and could have such advances declared a lien upon such separate estate.

In *Pfiffner v. Pfiffner* (Pa. 1888), 16 Atl. Rep. 72, where he allowed her to retain property purchased with his money for twenty years, he could not after her death have a trust declared in his favor.

5. *Wood v. Chetwood*, 44 N. J. Eq. 64; *Oliver v. Chance* (Ga.), 11 S. E. Rep. 655.

In *New Jersey*, though the husband is bound to account for the principal of his wife's estate, he is not bound to account for such part of her income as he receives and spends with her knowledge and without objection. *Jones v. Davenport*, 44 N. J. Eq. 33. But in *North Carolina*, where the statute provided that the husband should not be liable to account for the income of his wife's separate estate for any greater period than one year next preceding an action therefor, it was held not to apply where he occupied the land and received the rents upon an express agreement to account, which was afterwards embodied in notes for the amount. *Battle v. Mayo*, 102 N. Car. 413.

In *New York*, the husband, who is not a tenant by the curtesy, has no interest in the lands of his wife during coverture, and if he remains in possession or control after the wife's death, he is liable to the heirs of the wife for rents. *Carter v. Stork* (Sup. Ct.), 18 N. Y. Supp. 470.

6. See CURTESY, vol. 4, p. 967; *Tong v. Marvin*, 15 Mich. 60; *Mason v. Johnson*, 47 Md. 357; *Neelly v. Lancaster*, 47 Ark. 175.

the property, it would seem that the husband will take for his life as tenant by the curtesy, to the exclusion of the heirs of the wife.¹

SEPARATION (HUSBAND AND WIFE)—(See also ABSENCE, vol. 1, p. 35; DIVORCE, vol. 5, p. 745; HUSBAND AND WIFE, vol. 9, p. 789; MARRIED WOMEN, vol. 14, p. 589; MARRIAGE SETTLEMENTS, vol. 14, p. 538; PARENT AND CHILD, vol. 17, p. 331).

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I. DEFINITION—1. *In General*.—By separation of husband and wife is meant their voluntary marital dissociation; a cessation of cohabitation by mutual consent.²

2. *Separation Deeds*.—Separation deeds are mutual deeds of arrangement between husband and wife, generally executed for the purpose of avoiding unpleasant exposures of marital infelici-

In *Billings v. Baker*, 28 Barb. (N. Y.) 371, Potter, J., citing *Hearle v. Greenbank*, 3 Atk. 695, said: "Where it is the evident intent in making a settlement of an estate upon a married woman that she shall hold it as a *feme sole*, the husband cannot have curtesy," and in *Poole v. Blakie*, 53 Ill. 495, it was held that the husband could not have curtesy of real estate conveyed to his wife for her sole and separate use, with power of disposal, and who has so disposed of it.

The *Pennsylvania* statute giving a married woman power to dispose of her property by . . . will in the same manner as if unmarried, was held to mean that the wife might execute the will in the same manner as if single and to only do away with a few forms previously required in the execution of a will by a married woman. *Teacle's Estate*, 132 Pa. St. 533. The court in this case lays stress upon the fact that the act provided that a married woman should not convey or mortgage her real estate without the consent of her husband, but the *Maryland* statute also provides that the wife can only convey by a joint deed with her husband, and

yet *Mason v. Johnson*, 47 Md. 357, decided that by giving her power to devise as if a *feme sole*, the husband's curtesy was defeated.

Power given a married woman to "hold, own, possess and enjoy" her property the same as though she were sole and unmarried, gives her only the *jus tenendi* and not the *jus disponendi*, and therefore does not affect the husband's curtesy. *Cole v. Van Ripper*, 44 Ill. 58. But this case intimates that where the wife is given power to convey as a *feme sole*, the husband's curtesy is destroyed.

1. See CURTESY, vol. 4, p. 967, note 3. *In re Winne*, 2 Lans. (N. Y.) 21; *Neelly v. Lancaster*, 47 Ark. 175.

2. Black's L. Dict. Only colloquially is the word to be applied to a mere casual, temporary absence. See 1 Bishop's Mar. Div. & Sep., §§ 1203, *et seq.*; *Arnold v. Allen*, 2 Daly (N. Y.) 198. It is also widely distinguishable from abandonment or desertion, although sometimes the agreement results therefrom. *Bryan v. Bryan*, 34 Ala. 516. It is also clearly distinguishable from divorce *a mensa*, although involving sufficient principles in com-

ties, and of more effectually providing for consequent altered circumstances.¹

II. SEPARATION DEEDS—1. Historical View; Validity.—In *England*, such deeds, in the form of articles of separation, were once held to be *contra bonos mores*, and courts of equity refused to carry them into effect.² But judicial opinion has undergone a change, and it is now well settled in *England* that such deeds are not

mon therewith to be considered cognate thereto. See *DIVORCE*, vol. 5, p. 747; *ALIMONY*, vol. 1, p. 467.

1. See *MARRIAGE SETTLEMENTS*, vol. 14, p. 567; *Eversley's Dom. Rel.* (ed. 1885), p. 466; *Shelford's Mar. & Div.*, p. 608; *Peachy's Mar. & Fam. Set.*, p. 618; *Vaizey's Set. Prop.*, p. 1438; *Cord's L. & Eq. R. Mar. W.* (2d ed.), § 114a; *Fraser's Husb. & W.*, p. 1498; 2 *Bright's Husb. & W.*, p. 313; *Lush's Husb. & W.*, p. 364.

The purpose of such deed is "to arrange decently for the maintenance of wife and offspring, and for a just mutual disposition of property rights." *Schouler's Dom. Rel.* (4th ed.), § 217.

The deed may be "pactional *quoad* the grantors, though testamentary *quoad* beneficiaries," and therefore not revocable by the one grantor after the death of the other. *Hogg v. Campbell*, 1 Sc. Ct. Sess. (3d series) 647.

2. It is true that in *Guth v. Guth*, 3 Bro. C. C. 614, there was a decree for specific performance of a separation deed made without intervention of a trustee. But in *St. John v. St. John*, 11 Ves. 532, the court, by Lord Eldon, Chanc., said: "This is the only instance in which the court did enforce the deed. . . . I feel, with Lord Rosslyn, all his doubts upon that case" (expressed in *Legard v. Johnson*, 3 Ves. 361). "Lord Thurlow expressed great difficulties upon this point. His difficulty upon enforcing the covenant between the trustee and the husband . . . was that the covenant was to enforce that which the ecclesiastical law did not permit. He doubted, therefore, whether covenants with such objects ought to be the foundation either of action or specific performance. . . . If this were *res integra*, untouched by *dictum* or decision, I would not have permitted such a covenant to be the foundation of an action, or a suit in this court. But if *dicta* have followed *dicta*, or decision has followed decision, to the extent of settling the law, I cannot, upon any doubt of mine as to what ought originally to have been the

decision, shake what is the settled law upon the subject. It is better that the case should go to the House of Lords than that the law should remain in this state, upon a point connected with the very well-being of society." In this case, Lord and Lady St. John, having lived apart under articles of separation, a reconciliation took place, and another instrument was executed by them and two trustees, providing that she might at any future time, with the trustees' assent, separate and take away her children, and thereupon revive the former articles. The suit, which was to have the articles delivered up, ended by compromise.

In *Worrall v. Jacob*, 3 Meriv. 268, Sir Wm. Grant, M. R., quoted the foregoing views of Lord Eldon with approval, holding that while a court of equity would not execute articles of separation, it would enforce engagements between the husband and the trustee, though originating out of the separation and relative thereto.

In the case above cited by Lord Eldon (*Legard v. Johnson*, 3 Ves. 352), it was held that since in *England*, the spiritual court has exclusive cognizance of the rights and duties arising from the state of marriage, a court of equity has no jurisdiction upon a contract for separation between husband and wife simply; much less where it will affect a purchaser or creditor; but the jurisdiction holds in special cases, as where a third party covenants to indemnify the husband against the wife's debts; or a fortune accrues to the wife after separation; or the property is the subject of a trust. And therein, *Loughborough, Chanc.*, said: "Upon the general abstract question, I have met with no case, except the late case of *Guth v. Guth*, 3 Bro. C. C. 614, to entitle the court to hold such jurisdiction. Before I should decide according to that case, I should wish for a further account of it, for my opinion inclines against it."

It was decided that a deed of separation did not relieve the wife from the

against public policy.¹ Thus is presented the anomaly, that while "separations *in pais* or in court are not to be sanctioned except on proof of a dereliction legally defined and declared sufficient," never on the consent of the parties,² nevertheless, as the wife may bring, defend, and settle divorce suits, she may make an agreement whereby suit is avoided.³

disabilities of coverture. *Marshall v. Rutton*, 8 T. R. 545. Also that such deed could not be pleaded in bar of a suit for restitution of conjugal rights. *Mortimer v. Mortimer*, 2 Hagg. Consist. 310.

In *Earl of Westmeath v. Countess of Westmeath*, Jac. 126, it was discussed, but not directly decided, whether a covenant in such deed not to sue for restitution was binding, and if not, whether the rest of the deed could stand. An injunction to restrain proceedings at law for recovering an annuity secured to the wife by such deed, not containing any covenant to indemnify the husband from her debts was refused.

In *Whorewood v. Whorewood*, 2 Cas. Chanc. 250, where a decree had been made by Cromwell's Commissioners (a substitute for the ecclesiastical court), that the husband pay to his wife £300 until they again cohabit, and after six years had elapsed without his paying, he petitioned for cessation of the annuity, and tendered cohabitation—the court, by Lord Keeper Finch, said: "I shall not continue the alimony to the wife, if she will not cohabit, nor decree the wife to cohabit, but shall not discharge the alimony or sentence, but keep it in suspense. But she shall return to her husband, who shall maintain and use her as a gentleman and good husband ought to do, wherein if he fails, I will hear the wife's complaint with favor and lay on the decree again as cause shall appear; but now suspend it, saving to her the arrears. But she shall immediately return, and if not, she shall have no benefit of the alimony till she do so, but take her remedy in the court ecclesiastical."

In *Evans v. Evans*, 4 Eng. Eccl. 310, 1 Hagg. Consist. 35, the court by Lord Stowell, said: "When people understand that they must live together, except for a very few reasons known to the law, they learn to soften, by mutual accommodation, that yoke which they know they cannot shake off. They become good husbands and

good wives, for necessity is a powerful teacher."

The ecclesiastical court refused to recognize a private agreement between husband and wife to live apart. *Nash v. Nash*, 1 Hagg. Consist. 142; *Beeby v. Beeby*, 1 Eccl. 789; *Mortimer v. Mortimer*, 2 Hagg. Consist. 318; *Smyth v. Smyth*, 4 Hagg. Eccl. 509.

The chancery court also refused to establish an agreement between a man and his wife to live separate. *Wilkes v. Wilkes*, 2 Dickens Ch. Cas. 791.

1. *Wilson v. Wilson*, 1 H. L. Cas. 538; *Marshall v. Marshall*, 5 P. Div. 19. In *Besant v. Wood*, 12 Ch. Div. 620, the court by Jessel, M. R. said: "It is impossible to say what the opinion of a man or judge might be as to what public policy is. For a great number of years, both ecclesiastical judges and lay judges thought it was something very horrible, and against public policy that the husband and wife should agree to live separate, and it was supposed that a civilized country could no longer exist if such agreements were enforced by courts of law, whether ecclesiastical or not. But a change came over judicial opinion, as to public policy; other considerations arose and people began to think that, after all, it might be better and more beneficial for married people to avoid in many cases the expense and scandal of suits of divorce by settling their differences quietly by the aid of friends out of court, although the consequence might be that they would live separately, and that was the view carried out by the courts when it became once decided that separation deeds, *per se*, were not against public policy."

2. *Powell v. Powell*, 80 Ala. 595; *Haverty v. Haverty*, 35 Kan. 438.

3. A husband and wife may, without intervention of a trustee, contract to live apart in consideration of their agreeing not to take legal proceedings one against another; *e. g.*, for assaults. Such consideration being executed, she may recover (as for "money paid at the defendant's request") at the rate fixed by the verbal agreement, even

In some of the *United States* also it has been held that articles of separation between husband and wife, whether entered into before or after the separation, are against law and public policy, and therefore void.¹ But in almost all the States, such deed is good as to provisions for maintenance, but not as a bar to cohabitation.²

2. Modern Legislation.—Statutes of some States inhibit any change of marital rights and obligations other than by judicial act.³ The effect of separation articles, especially as to third persons, often turns upon the extent to which the legislature has enabled the wife to contract.⁴ The statutory provisions, therefore, as also those for voluntary separation, are very unlike.⁵ An

assuming it one not to be performed within one year under the Statute of Frauds. *McGregor v. McGregor*, 20 Q. B. Div. 529.

In *Wennhak v. Morgan*, 20 Q. B. Div. 635—in holding that a husband's communicating a libel to his wife was not publication, after the plaintiff's counsel had cited the Married Woman's Property Act of 1882—the court, by Manisty, J., said: "The maxim and principle acted on for centuries is still in existence—namely, that, as regards this case, husband and wife are in point of law one person. . . . It is, after all, a question of public policy, or, as it has been well called, social policy. No doubt that principle has been interfered with by judge-made law. Public opinion has altered in some circumstances, and no better illustration of that can be given than the change of view as to deeds of separation between husband and wife."

1. In *North Carolina*, so held, in 1867—namely, in *Collins v. Collins*, Phil. Eq. (N. Car.) 153; 93 Am. Dec. 606.

But that court is not now of that opinion. See *Sparks v. Sparks*, 94 N. Car. 527.

In *Indian*, in 1820, the old English ecclesiastical view prevailed, and separation deeds were disapproved, and only sustained in an exigency for the wife's maintenance. *Reed v. Beazley*, 1 Blackf. (Ind.) 97. This decision Chancellor Kent has commended. 2 Kent Com. 177.

In *Kentucky*, the court refused to enforce by decree a contract for separation, saying it was against public policy. *McCrocklin v. McCrocklin*, 2 B. Mon. (Ky.) 370.

In *South Carolina*, in *Converse v. Converse*, 9 Rich. Eq. (S. Car.) 535—a

case showing fiendish brutality of the husband—the court refused to change the name of the wife to that of her first husband; the court, by Dargan, Ch., saying: "How do I know that these parties may not become reconciled?"

2. See MARRIAGE SETTLEMENTS, vol. 14, p. 567.

3. The *Iowa* Code, although allowing conveyances between husband and wife, inhibits their relinquishing dower to each other. *Linton v. Crosby*, 54 Iowa 478.

In *Louisiana*, "every voluntary separation of property is null both as respects third persons and the husband and wife between themselves." *Louisiana* Rev. Civil Code, 1889, § 242.

A woman owning slaves, married in Louisiana, and was removed by her husband to Kentucky, where she sued for alimony. *Held*, that a compromise of the suit by professed agents of the parties, not made the decree of the court, whereby part of the slaves were surrendered to the husband, was ineffectual, both at law and in equity, to divest her title. *Beard v. Basye*, 7 B. Mon. (Ky.) 133.

4. See MARRIED WOMEN, vol. 14, p. 614; SEPARATE PROPERTY OF MARRIED WOMEN, vol. 21. See also *infra*, this title, *Effect*.

5. *Alabama*.—Upon "voluntary separation," the court of chancery may, on petition of one party, and twenty days' notice to the other, permit the father or the mother to have the custody and control of the children, and to superintend and direct their education, having regard to the prudence, ability and fitness of the parents and the age and sex of the children." *Alabama* Code, 1886, § 2368.

Her voluntary abandonment of him against his consent is not a "voluntary separation." *Bryan v. Bryan*, 34 Ala. 516. The assent of both may be implied, though not expressed. *Anonymous*, 55 Ala. 428. His wish for her to go may be indicated by cruel treatment. *Hardin v. Hardin*, 17 Ala. 250; 52 Am. Dec. 170.

Arizona.—"No matrimonial agreement shall be altered after the solemnization of the marriage." *Arizona Rev. Stat.* 1887, § 2099.

Arkansas.—As to the husband's trust settlement for the wife's support, see *Pillow v. Wade*, 31 Ark. 678.

California.—A husband is not liable for the support of his wife "when she is living separate from him by agreement, unless such support is stipulated in the agreement." *California Civil Code*, 1885, § 175. The mutual consent is a sufficient consideration for the agreement to separate. § 160.

As to a wife's stipulation in a separation deed without trustee to convey certain realty to children, see *Joyce v. McAvoy*, 31 Cal. 273; 89 Am. Dec. 172. Deed with trustee sustained. *Wells v. Stout*, 9 Cal. 479. Wife may recover on note executed to her by her husband during coverture. *Wilson v. Wilson*, 36 Cal. 447.

Colorado.—Procurement by fraud will invalidate the agreement. *Daniels v. Daniels*, 9 Colo. 133. As to their contracts with each other, see *O'Connell v. Taney*, 16 Colo. 353.

Connecticut.—In *Nichols v. Palmer*, 5 Day (Conn.) 52—an action against the trustee in a separation deed—the court by Baldwin, J., said: "The legislature has, in a few extraordinary cases, without dissolving the marriage, enforced a separation; yet I cannot admit that our laws have, in these ways, provided for all cases in which a separation may be proper, nor that it is always advisable to resort to them."

A separation deed stipulating that the wife should bring a petition for divorce at the husband's expense, was disapproved. *Goodwin v. Goodwin*, 4 Day (Conn.) 343. As to the validity of gifts and contracts directly between them, see *Deming v. Williams*, 26 Conn. 226; 68 Am. Dec. 386.

The Dakotas.—The husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree in writing to an immediate separation, and may make provision for the

support of either of them and of their children during such separation. *Dakota Comp. L.* 1887, § 2591. The mutual covenants constitute a sufficient consideration for the deed. § 2592.

Florida.—As to the *Spanish* law, see *Florida Dig. L.* 1881, p. 754, § 2.

Georgia.—The contracts of a married woman are generally void. *Georgia Code*, 1882, § 2730.

As to the right of the wife's administrator to recover upon a bond to a trustee conditioned to pay the annuity called for in the separation deed, see *McLaren v. Bradford*, 52 Ga. 648. Deed with trustee sustained. *Chapman v. Gray*, 8 Ga. 341. As to an agreement for alimony pending a suit for divorce, see *Venable v. Craig*, 44 Ga. 437.

Idaho.—As to marriage settlements, etc., see *Idaho Rev. Stat.* 1887, § 2500.

Illinois.—As to the wife's contract, see *Illinois Rev. Stat.* 1891, 791, § 6. She cannot abandon her husband without his consent, to acquire separate income. *Douglas v. Gausman*, 68 Ill. 170. Equity will compel him to pay promissory notes given upon a separation to secure her support, but fraudulently gotten possession of by him. *Marlow v. Marlow*, 77 Ill. 633. Her agreement to return and cohabit will support his agreement to pay money to a trustee for her use. *Phillips v. Meyers*, 82 Ill. 67; 25 Am. Rep. 295. Procurement by undue stress upon an invalid wife vitiates the deed. *Willetts v. Willetts*, 104 Ill. 122. See *Crum v. Sawyer*, 132 Ill. 443.

Indiana.—The wife of an absentee has all the rights of a *feme sole*. *Indiana Rev. Stat.* 1881, § 2234.

A parol agreement for separation without intervention of any trustee was sustained in *Dutton v. Dutton*, 30 Ind. 452.

Iowa.—A separation deed will be sustained as to the maintenance and mutual disposition of property rights. *Robertson v. Robertson*, 25 Iowa 350.

Kansas.—As to her contracts, etc., see *Kansas Gen. Stat.* 1889, §§ 3753, 3757.

Compromise of divorce case by the attorneys disapproved for undue influence. See *Haverty v. Haverty*, 35 Kan. 438. Husband and wife may contract with each other so as to pass title. *Going v. Orns*, 8 Kan. 85.

Kentucky.—As to right of wife of a non-resident to contract, see *Kentucky Gen. Stat.* 1887, p. 727, § 10.

A contract for separation with no trustee will not be enforced. *Simpson v. Simpson*, 4 Dana (Ky.) 140. But one's contract to support his wife, made in view of an immediate separation, is valid; otherwise, if of one not immediately future. *Gaines v. Poor*, 3 Metc. (Ky.) 503.

A recital in a separation deed that she had abandoned him "without legal cause for dower or alimony," was held ground to refuse dower after his death. *Loud v. Loud*, 4 Bush (Ky.) 453. As to her testamentary power when separate, see *Hiram v. Griffin*, 8 Bush (Ky.) 262.

Louisiana.—As to suit for separation of property, see *Bird v. Duralde*, 23 La. Ann. 319; *Ford v. Kittredge*, 26 La. Ann. 190; *Vickers v. Block*, 31 La. Ann. 672.

Maine.—"A married woman may release to her husband the right to control her property." *Maine Rev. Stat.* 1883, p. 524, § 2. Divorced wife may recover on note executed to her by her husband during coverture. *Webster v. Webster*, 58 Me. 139; 4 Am. Rep. 253.

Maryland.—As to her contracts, see *Maryland Pub. Gen. L.* 1888, pp. 800, 802. Only by causes that show an absolute impossibility to discharge the marriage duties can separation be justified. A wife living separate from her husband, unjustifiably and without his consent, cannot be allowed maintenance out of her inherited legal estate. *Schindel v. Schindel*, 12 Md. 294.

In case of a separation deed not providing for indemnity against the wife's debts, the court will not compel the husband to aid in giving title to land she has assumed to convey. *Lippy v. Masonheimer*, 9 Md. 310.

A separation deed was recognized in *Helms v. Franciscus*, 2 Bland Ch. (Md.) 544; 20 Am. Dec. 402, characterized as "a case of a very singular complexity." A separation deed signed by the wife's attorney and not by herself, was held invalid. *Wallingsford v. Wallingsford*, 6 Har. & J. (Md.) 485. A separation deed with trustee, for support, protects the husband, while complaint against a claim for necessities furnished the wife. *Brown v. Brown*, 5 Gill (Md.) 249.

As to the effect of a husband's post-nuptial deed to a trustee, surrendering property acquired by the marriage, to be disposed of as she might direct "during coverture," where he survived

her and she died, see *Hutchins v. Dixon*, 11 Md. 29. A separation deed disposing of a fund as to survivor, children and representatives, was enforced after death of both. *McCubbin v. Patterson*, 16 Md. 179.

Massachusetts.—A husband and wife cannot transfer property to each other. *Massachusetts Acts*, 1884, ch. 132.

A bond between them is not void as against public policy. *Winn v. Sanford*, 148 Mass. 139. Deeds wherein the husband, in contemplation of immediate separation, agrees to pay a trustee money for the wife's support, are not against public policy. *Fox v. Davis*, 113 Mass. 255; 18 Am. Rep. 476. Payment of arrears thereunder may be enforced after her death. *Holbrook v. Comstock*, 16 Gray (Mass.) 109.

The title to a note handed to her on separation, held to remain in him. *Carley v. Green*, 12 Allen (Mass.) 104. A note and mortgage executed by a husband in 1853 to a trustee to secure the wife for payment of his debts from her own funds, held invalid. *Phillips v. Frye*, 14 Allen (Mass.) 36.

Michigan.—As to a married woman's separate property, she may contract, convey and bequeath as if unmarried. *Michigan Annot. Stat.*, 1882, § 6295. "All contracts made by persons in contemplation of marriage shall remain in full force after marriage takes place." § 6299.

One's written agreement, in consideration of his wife's discontinuing a divorce suit and recohabiting, to pay her from his estate \$500 thirty days after his death, held to be valid and not a mere promise to make a gift. *Reithmaier v. Beckwith*, 35 Mich. 110. See *Randall v. Randall*, 37 Mich. 563; *infra*, this title, *Enforcement*.

Minnesota.—See *Minnesota Stat.* 1891, § 3866. Except as to real estate, she may contract with her husband as if sole; they shall be held to have notice of each other's contracts and debts, wherever rights of creditors come in question. § 3687. She may alone release dower in lands of a former husband. *Minnesota Gen. L.*, 1891, ch. 82.

Mississippi.—"The common law, as to the disabilities of married women, and its effect on the rights of property of the wife, is totally abrogated." *Mississippi Rev. Code*, 1880, § 1167. "Husband and wife may sue each other." § 1168.

A separation deed is void without, but valid with a trustee. *Stephenson*

v. Osborne, 41 Miss. 119; 90 Am. Dec. 358 (Ellett, J., *distinguishing* *More v. Ellis*, Bunbury 205; and *Brighton v. Chapman*, 2 Anstr. 345; and *disapproving* *Hutton v. Hutton*, 3 Pa. St. 100). *Compare* *Carter v. Carter*, 14 Smed. & M. (Miss.) 59; *Tourney v. Sinclair*, 3 How. (Miss.) 324. There must be mutual intent to separate. *Garland v. Garland*, 50 Miss. 694.

As to her contract rights, see *Missouri* Rev. Stat., 1889, § 6864. Trust companies may "accept from and execute trusts for married women, in respect to their separate property." § 2836.

Deed no bar to a divorce. *Stokes v. Stokes*, 1 Mo. 320. In *Gonsalis v. Douchouquette*, 1 Mo. 666—in 1826, in deciding that after a separation contract, "dissolving the marriage," and dividing the community property, real property conveyed to the woman could not be held against the husband's right of possession—the court, by Wash, J., said: "Although the English courts of chancery have, of late, gone great lengths in lending their aid to the execution of such contracts, we feel no disposition to follow their example at present, and sincerely hope that the time is far distant, when the condition of society may make it proper for American courts to do so. But see *Durrett v. Piper*, 58 Mo. 551.

Montana.—"A married woman may make contracts, oral or written, sealed or unsealed, and may waive or relinquish any right or interest in any real estate, either in person or by attorney in the same manner, to the same extent, and with the like effect as a married man may do." *Montana* Comp. Stat., 1887, § 1448.

Nebraska.—"A married woman shall not be bound by any covenant in a joint deed of herself and husband." *Nebraska* Comp. Stat., 1889, p. 651, § 48. See also p. 566, § 2.

The wife may recover on a note executed to her by her husband during coverture. *May v. May*, 9 Neb. 16; 31 Am. Rep. 399.

Nevada.—"A husband and wife . . . may agree to an immediate separation, and may make provision for the support of either of them and of their children during such separation." *Nevada* Gen. Stat., 1885, § 518. The mutual consent is a sufficient consideration therefor. § 519.

New Hampshire.—The wife of an alien may, after six months' residence,

hold and convey real property as if sole, and have exclusive custody of her minor children living with her. *New Hampshire* Gen. Laws, 1891, p. 499, § 8.

Under the statute of 1860, giving the wife control of her separate property she may, it seems, contract with her husband thereon. *Perkins v. George*, 45 N. H. 453. A note and mortgage executed by the husband with a view to a divorce, held void. *Cross v. Cross*, 58 N. H. 373.

New Jersey.—The wife may contract as if sole, except as accommodation indorser, guarantor or surety. *New Jersey* Rev., 1877, p. 637, § 5.

A deed not signed by the trustee, held not operative except as an agreement to live separate. *Emery v. Neighbour*, 7 N. J. L. 142; 11 Am. Dec. 541.

The husband's conveyance to a trustee for the use of his wife on executing articles of separation, will not be set aside for her subsequent adultery while living apart. *Dixon v. Dixon*, 23 N. J. Eq. 316.

New York.—A married woman may contract as if unmarried. This provision does not apply to any contract between husband and wife. *New York* Rev. Stat. (Banks') 1889, p. 1404, §§ 28, 29.

In certain cases, cruelty, conduct rendering cohabitation unsafe and improper, abandonment, neglect to provide for the wife, an action may be maintained for separation "from bed and board, forever, or for a limited time." *Id.*, page 887, § 21.

As to the wife's power under the acts of 1848, 1849 and 1860, see *Wallace v. Bassett*, 41 Barb. (N. Y.) 92, sustaining a separation deed. *Compare* *Griffin v. Banks*, 37 N. Y. 621; *Carpenter v. Osborn*, 102 N. Y. 552.

For other *New York* decisions upon separation deeds, see *infra*, this title, *Requisites, Effect*, etc., notes. A leading and reviewing case, sustaining a separation and a mortgage conditioned on fulfillment of the stipulations for the wife's maintenance, is *Calkins v. Long*, 22 Barb. (N. Y.) 97; but therein the court, by Mason, J., shares the doubt, as to public policy, etc., expressed by Walworth, Ch., in *Carson v. Murray*, 3 Paige (N. Y.) 500.

As to construction and effect of conditions relating to annuities, see *Cranston v. Plumb*, 54 Barb. (N. Y.) 59; *Magee v. Magee*, 67 Barb. (N. Y.)

487; *Champlin v. Champlin*, 1 Hoff. Ch. (N. Y.) 55.

North Carolina.—A woman living apart under a registered deed of separation, may be a free trader. *North Carolina Code*, 1883, § 1831. "No contract between a husband and wife made during coverture shall be valid to affect or change any part of the real estate of the wife, or the accruing income thereof, for a longer time than three years. . . ." § 1835. Contracts between husband and wife, not forbidden by the preceding section and not inconsistent with public policy are valid. § 1836. As to *North Carolina* ideas of "public policy," see *supra*, this title, *Historical View*, note. *Collins v. Collins*, Phil. Eq. (N. Car.) 153; 93 Am. Dec. 153. Commenting on this case in *Sparks v. Sparks*, 94 N. Car. 531, the court, by Smith, C. J., said: "It may admit of question, in view of subsequent changes in the law of marriage in respect to the property rights of the woman, whether the proposition, in its unlimited extent, can now be upheld. A voluntary separation, under some circumstances, is recognized as a legal condition, out of which may arise certain powers to be exercised over her estate."

Ohio.—"A husband or wife may enter into any engagement or transaction with the other, or with any other person, which either might if unmarried; subject, in transaction between themselves, to the general rules which control the actions of persons occupying confidential relations with each other." *Ohio Rev. Stat.*, 1890, § 3112. "A husband and wife cannot by any contract with each other alter their legal relations, except that they may agree to any immediate separation, and may make provision for the support of them and their children during the separation." § 3113. (Act of 1887.)

Articles, with trustee, for separation and the wife's maintenance are not against public policy. *Bettle v. Wilson*, 14 Ohio 257; *Crooks v. Crooks*, 34 Ohio St. 610. So also even without a trustee. *Garver v. Miller*, 16 Ohio St. 527.

A post-nuptial agreement, appropriating property to her separate use, though void at common law, will be sustained in equity. *Wood v. Warden*, 20 Ohio 518. Compare as to an oral agreement, *Thomas v. Brown*, 10 Ohio St. 247.

Oklahoma.—Same provision for a

separation agreement as that of *Nevada*. *Oklahoma Stat.*, 1890, §§ 2987-8.

Oregon.—Conveyance by husband or wife to the other is valid. *Oregon Annot. Laws*, 1892, § 2871. They may contract with each other. Note to § 2869.

Pennsylvania.—By "the married persons' property act" of 1887, B. P. Dig. *Pennsylvania L.*, p. 2236, the wife may, without a trustee, acquire, hold, use, and dispose of her property as if she were a *feme sole*. Her covenant in a separation deed made in 1833, not to "claim any jointure, dower, or thirds," held to preclude her from receiving the \$300 allowed widows by the *Pennsylvania* act of 1851. *Dillinger's Appeal*, 35 Pa. St. 357. Compare *Speidel's Appeal*, 107 Pa. St. 18.

As early as 1846 the doctrine was deemed well settled that separation deeds "are valid and effectual, both at law and in equity, provided their object be actual and immediate, and not a contingent or future separation." *Hutton v. Hutton*, 3 Pa. St. 104; *Com. v. Richards*, 131 Pa. St. 209.

Rhode Island.—As to her contract rights, see *Rhode Island Pub. Stat.* 1882, p. 423, § 6. In absence of express provision to the contrary, a separation deed is no bar to a divorce. *Fosdick v. Fosdick*, 15 R. I. 130.

South Carolina.—"Instruments in the nature of marriage settlements," to be good against creditors, must be registered within forty days of execution. *S. Car. Stat.*, 1882, § 2039.

A bond to a trustee, reciting agreement to live separate, and conditioned to pay an annual sum for the use of the wife, is valid; and it may be shown by parol evidence that a separation had previously taken place, and that the bond was given to compromise a suit for alimony. *Buckner v. Ruth*, 13 Rich. (S. Car.) 157.

Tennessee.—"Married women over the age of twenty-one years, owning the fee or other legal or equitable interest or estate in real estate, who have abandoned their husbands, or whose husbands may be *non compos mentis*, insane, or of unsound mind; or whose husbands may fail or refuse to cohabit with or have abandoned them, shall have the same powers of disposition by will, deed, or otherwise as are possessed by unmarried women." *Tennessee Code*, 1884, § 3346. The husband's concurrence therein is not necessary.

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act enabling a married woman to contract as if sole as to her separate property, may, in absence of contrary proviso, apply to articles entered into with her husband; such statute must be liberally construed.¹

3. Requisites—*a.* FORM.—No particular form is prescribed for the deed, either by statute or usage.²

The husband may be estopped by a separation bond from claiming any portion of the wife's estate. *Goodrich v. Bryant*, 5 Sneed (Tenn.) 325. As to cancellation of a separation bond by the fact of reconciliation, see *Keys v. Keys*, 11 Heisk. (Tenn.) 425.

Texas.—"The wife may contract debts for necessities furnished herself or children, and for all expenses which may have been incurred by the wife for the benefit of her separate property." *Texas Civil Stat.*, 1889, § 2854. For such debts the husband and wife shall be sued jointly. § 1205.

That the wife continue to live with her husband is not a valid consideration for a post-nuptial obligation executed by him; *e. g.*, a note making her brother payee. *Roberts v. Frisby*, 38 Tex. 219. Compare the wife's fraud as to the note in *Ximines v. Smith*, 39 Tex. 49.

Utah.—The separate property of each spouse "may be held, managed, controlled, transferred, and in any manner disposed of by the spouse so owning or acquiring it, without any limitation or restriction by reason of marriage." *Utah Comp. L.*, 1888, § 2528.

By the Edmunds-Tucker Law of 1887 (dissolving the incorporation of the Mormon church), § 18, "a widow shall be endowed of a third part of all lands whereof her husband was seised of an estate of inheritance at any time during the marriage."

Vermont.—An agreement of separation, signed by the husband and the wife's father, as her agent, was held to be a good defense to her petition for a divorce for acts of cruelty occurring before the agreement. *Squires v. Squires*, 53 Vt. 208; 38 Am. Rep. 668.

Virginia.—A married woman may contract as if sole in respect to her trade, services or separate estate. *Virginia Code*, 1887, § 2288.

A separation deed executed under apprehension of a suit for divorce for the wife's adultery was held invalid. *Switzer v. Switzer*, 26 Gratt. (Va.) 574.

As to the validity of separation deeds

in *Virginia* in general, see *dicta*—question undecided—in *Harshberger v. Alger*, 31 Gratt. (Va.) 52.

Washington.—"The earnings and accumulations of the wife and of her minor children living with her, or in her custody while she is living separate from her husband, are the separate property of the wife." *Washington Gen. Stat.*, 1891, § 1403.

West Virginia.—A wife may control her separate property, but not dispose of her real estate without her husband's consent, unless she be living apart from him or he be *non compos mentis*. *West Virginia Code*, 1891, p. 620, § 2. If by an ante-nuptial agreement or otherwise he has acquired any of her separate property, he shall be liable for her ante-nuptial debts contracted for its value. § 10. There are five classes of debts for which she may charge her separate property. § 12.

Wisconsin.—The wife's separate property and earnings shall not be subject to her husband's control. *Wisconsin Annot. Stat.*, 1889, §§ 2341-3.

A mutual agreement for each to release all interest in the property of the other (not in view of separation)—held void. *Leach v. Leach*, 65 Wis. 284.

Construction of the terms of the agreement in regard to her dwelling place. *Houghton v. Milburn*, 54 Wis. 554.

1. *Wells v. Caywood*, 3 Colo. 493.

2. In *Hitner's Appeal*, 54 Pa. St. 110, the preamble recited that whereas irreconcilable differences had arisen.

For precedents, see *Barker v. Barker*, 2 Adams 285; *Bettle v. Wilson*, 14 Ohio 257; *Bratton v. Massey*, 15 S. Car. 281; *Emery v. Neighbour*, 7 N. J. L. 142; 11 Am. Rep. 541. For the case of a tripartite deed, see *Loftus v. Penn*, 1 Swan (Tenn.) 445; *Burkholder's Appeal*, 105 Pa. St. 31; *Dillinger's Appeal*, 35 Pa. St. 357.

A mere parol contract for separation may be valid. *Nichols v. Palmer*, 5 Day (Conn.) 47.

For a precedent for bond to the trustee, see *Buckner v. Ruth*, 13 Rich. (S. Car.) 157. For bond to the wife to

b. **ESSENTIALS.**—It is evident from what has been said above, and from the principle of the matter, that the rights of the public are not to be ignored in a voluntary marital separation; wherefore it follows that a bargain for a future separation is invalid, while, a separation having once taken place, a provision looking to the wife's maintenance is valid and proper.¹

c. **CONSIDERATION.**—As between the parties, the husband's duty to support his wife is a sufficient consideration for his promise to pay her an allowance.² She must have some valuable consideration for the release of her rights.³ There must also be some valuable consideration against existing creditors, as, for instance, a third party's promise to indemnify him against her debts.⁴

Mutual consent may be, perhaps of itself alone, a sufficient consideration for the contract; certainly, if so declared by statute.⁵ Conciliation and the family's highest interests are deemed as weighty as any mere pecuniary consideration.⁶ The trustees' indemnifying the husband against the wife's future debts is a valuable consideration, and takes the conveyance out of the statute of fraudulent conveyances.⁷

secure note executed to a third party for her use, see *Goodrich v. Bryant*, 5 Sneed (Tenn.) 326.

1. *Vaizey's Set. Prop.*, p. 1438; *Shelford's Mar. & Div.* 608; *Bishop's New Com. Mar., D. & S.*, § 1312; *Schouler's Dom. Rel.* (4th ed.), § 217; *Carpenter v. Osborn*, 102 N. Y. 552; *Fox v. Davis*, 113 Mass. 255; 18 Am. Rep. 476; *Robertson v. Robertson*, 25 Iowa 350.

2. *Jones v. Clifton*, 101 U. S. 225; *Phillips v. Meyers*, 82 Ill. 67; 25 Am. Rep. 295; *Horder v. Horder*, 23 Kan. 391; 33 Am. Rep. 167.

There need be no consideration as between the husband and the trustee. *Griffin v. Banks*, 37 N. Y. 621.

3. *Robertson v. Robertson*, 25 Iowa 350. Compare *Switzer v. Switzer*, 26 Gratt. (Va.) 574.

Release of marriage rights may be a valid consideration. *Hobbs v. Hull*, 1 Cox 445. So also release of a claim for alimony. *Bratton v. Massey*, 15 S. Car. 277.

4. *Wells v. Stout*, 9 Cal. 479; *Dupre v. Rein*, 56 How. Pr. (N. Y.) 228. Compare *Harshberger v. Alger*, 31 Gratt. (Va.) 52.

In *England* a deed in consideration of separation alone has been held to be voluntary, and not good against existing creditors. *Fitzer v. Fitzer*, 2 Atk. 511; *Clough v. Lambert*, 10 Sim. 174.

A covenant that the wife take an annuity in full satisfaction for support, is

in substance a covenant to indemnify the husband against her debts. *McDonnell v. Murphy*, Fox & S. 279.

In a deed under seal a recital that divers unhappy differences exist, was held to import a sufficient consideration. "There may have been circumstances that justified the wife in applying for a divorce *a mensa et thoro*." *Clough v. Lambert*, 10 Sim. 174.

In *Randall v. Randall*, 37 Mich. 573, the court, by Cooley, C. J., said: "The legal presumption is that her services and the comfort of her society are of a worth to him fully equal to all the obligations which the law imposes upon him because of the marital relation."

Forbearance not to sue for a divorce has been held to be a good consideration. *Angier v. Angier*, Gibb. Eq. 152. Or for a nullity of marriage. *Wilson v. Wilson*, 1 H. L. Cas. 538. One's compromise of a misdemeanor has been held to be a good consideration. *Elworthy v. Bird*, 2 Sim. & Stu. 372.

5. See *supra*, this title, *Modern Legislation*, the statutes of *California, Dakota, Nevada and Oklahoma*.

6. *Jodrell v. Jodrell*, 9 Beav. 45. As to the effect of a reconciliation immediately after execution of the deed in the question of consideration, see *Kehr v. Smith*, 20 Wall. (U. S.) 33.

7. *Stevens v. Olive*, 2 Bro. C. C. 90; *Hargroves v. Meray*, 2 Hill Eq. (S. Car.) 222.

d. TRUSTEES.—Formerly it was deemed absolutely necessary that the property of which the wife was to have exclusive use be vested in trustees for her benefit; and that the husband's agreement should be made with such trustees, or at least with somebody capable of contracting with him for her benefit.¹ This is still customary and proper, but is not indispensable.²

e. PROVISION FOR CHILDREN.—Ordinarily, the law gives the father the custody of the children.³ The courts, however, look

On a separation in a deed executed between the husband and wife and the trustees of their marriage settlement, she charged her separate property with payment of an annuity to him, and he covenanted to permit her during and notwithstanding the coverture, to receive and enjoy to her own sole and separate use all the property to which she, or he in her right, was or at any time might be entitled. On a bill filed after her decease for arrears of the annuity, held, that his release of his marital right in her future-acquired property was a good consideration to support his claim to the annuity. *Logan v. Birkitt*, 1 M. & K. 220.

1. In *Marshall v. Rutton*, 8 T. R. 545, the court, by Lord Kenyon, C. J., said: "From the incapacity of a married woman to contract, or to possess personal property which may be the subject of contract, men and their wives desirous of living separate have found it necessary to have recourse to the intervention of trustees, in whom the property, of which it is intended she shall have the disposition, may vest uncontrolled by the rights of her husband, and with whom he may contract for her benefit; but in such property the woman herself acquires no legal interest whatsoever. Of such trusts, courts of equity alone can take notice." Compare *Harvey v. Harvey*, 1 P. Wms. 125; *Burton v. Pierpont*, 2 P. Wms. 79; *Peacock v. Monk*, 2 Ves. 190; *Worrall v. Jacob*, 3 Mer. 256.

In *Mississippi*, in 1857, intervention of a trustee was held necessary. *Mills v. Richards*, 34 Miss. 77.

In *New York* so also, as late as 1878. *Dupre v. Rein*, 56 How. Pr. (N. Y.) 228.

2. See Story Eq. Jur. (13th ed.) 1380; *Garver v. Miller*, 16 Ohio St. 527; *Wilson v. Wilson*, 1 H. L. Cas. 538; *Dillinger's Appeal*, 35 Pa. St. 357.

Before the present law extending the property rights of married women, it had been held, in a case often cited in

this connection, that, to enable a *feme covert* to dispose of her real estate, in equity, it is not necessary that the legal estate be vested in trustees. A mere agreement entered into before marriage that she should have power to dispose of her real estate, during coverture, will enable her to do so. *Bradish v. Gibbs*, 3 Johns. Ch. (N. Y.) 523. But compare *Cropsey v. McKinney*, 30 Barb. (N. Y.) 47; *Beach v. Beach*, 2 Hill (N. Y.) 260; 38 Am. Dec. 584; *Marshall v. Rutton*, 8 T. R. 547; *Legard v. Johnson*, 3 Ves. 352.

Mediumship of a trustee, and an agreement for an immediate separation, and separate allowance for the wife's support, were upheld in *Carson v. Murray*, 3 Paige (N. Y.) 483; *Carter v. Carter*, 14 Smed. & M. (Miss.) 59; *Bettle v. Wilson*, 14 Ohio 257.

In *Randall v. Randall*, 37 Mich. 572, after citing *Walker v. Beal*, 9 Wall. (U. S.) 743, and other decisions that "have settled the law beyond further controversy" in favor of separation deeds generally, the court by Cooley, C. J., said: "In some of these cases the articles have been enforced against the husband or his estate, and in others against the wife or her estate, and although a trustee for the wife has been usually provided for by the articles in whose name suits on her behalf might be brought, it was long ago determined that this was wholly unnecessary, and that equity, whenever it became needful, would give effect to provisions on her behalf by adjudging the husband to be her trustee, and requiring him to account accordingly." And he thereupon cited *Wallingsford v. Allen*, 10 Pet. (U. S.) 583; *Garver v. Miller*, 16 Ohio St. 527; *Houghton v. Houghton*, 14 Ind. 505; 77 Am. Dec. 69.

3. See PARENT AND CHILD, vol. 17, p. 364, *et seq.*; *Fraser's Par. and Child* (2d ed.), p. 65; *Torrington v. Norwich*, 21 Conn. 543; *State v. Libbey*, 44 N. H. 321; *People v. Mercein*, 8 Paige (N. Y.) 47; *rev'd* 25 Wend. (N. Y.)

to the child's welfare as paramount,¹ and award the custody to that parent who is most proper, fit and able to promote the same.² If not prejudicial to this, any family arrangement in the deed as to custody, visits, etc., will be sustained.³ Under the present English law,⁴ a provision as to children is construed wholly with regard to their welfare.⁵

64; 3 Hill (N. Y.) 399; 38 Am. Dec. 644.

He may revoke a parol transfer of this right. *Squire v. Whipple*, 1 Vt. 72.

After such transfer he may regain possession by *habeas corpus*. *Reg. v. Smith*, 16 Eng. L. & Eq. 221.

For a valuable case (embarrassed by the mother's adultery, etc.), see *Kremelberg v. Kremelberg*, 52 Md. 553.

1. *State v. Baird*, 21 N. J. Eq. 384; *Trimble v. Trimble*, 15 Tex. 18; *Petition of Smith*, 13 Ill. 138; *Wand v. Wand*, 14 Cal. 512; *McBride v. McBride*, 1 Bush (Ky.) 15; *In re Besant*, L. R., 11 Ch. Div. 508; *State v. Smith*, 6 Me. 462; 20 Am. Dec. 324.

2. *In re Welch*, 74 N. Y. 299; *People v. Turner*, 55 Ill. 280; 8 Am. Rep. 645; *Garner v. Gordon*, 41 Ind. 92; *Drumb v. Keen*, 47 Iowa 435; *Green v. Green*, 52 Iowa 403; *Rowe v. Rowe*, 28 Mich. 353; *State v. English*, 31 N. J. Eq. 543; *McKim v. McKim*, 12 R. I. 462; 34 Am. Rep. 694; *Ward v. Roper*, 7 Humph. (Tenn.) 111; *Ex parte Hewitt*, 11 Rich. (S. Car.) 326.

3. *Besant v. Wood*, 12 Ch. Div. 605; *Hamilton v. Hector*, L. R., 13 Eq. 511; *Duryea v. Bliven*, 122 N. Y. 567; *Allen v. Affleck*, 64 How. Pr. (N. Y.) 380.

4. 36 Vict., ch. 12, § 2. As to the effect of the Talfourd Act allowing the mother access to infant children, see *In re Elderton*, 25 Ch. Div. 220.

5. In the deed of a medical officer in the British army, having four children, the eldest eleven and the youngest three years old, he stipulated that after his approaching absence in India, he should resume their entire custody, the wife to be accorded full and free access to them, to the extent, at least, of her having the opportunity of spending one day in every fortnight with them. Four years afterwards he was ordered to Egypt, and proposed to take the first child, a daughter, and the third one, a son, with him. On her application for an injunction—held, that the deed did not preclude him from taking them; there being no proof that his purpose was to prevent her having access to them. *Hunt v. Hunt*, 28 Ch. Div. 606.

Where the husband had indecently conducted himself towards his female child seven years old, a stipulation in the deed giving the wife the sole care, protection, and management of the children, was held not to be contrary to public policy. *Swift v. Swift*, 4 De G. J. & S. 710; 34 Beav. 266.

In *McAllister v. McAllister*, 10 Heisk. (Tenn.) 345—where the husband had used personal violence against the wife and she appealed from an award of referees under the separation deed—the court by McFarland, J., said: "The most embarrassing question we have had to consider is in regard to the custody of the children. This is a right we would interfere with with the greatest delicacy and caution. We cannot foresee the probable course of future events sufficiently to enable us to form an opinion as to how the interests of the children will best be promoted. . . . Their tender age makes it probable that for the present the complainant [mother] should have their custody. . . . But we cannot say that this will continue so. . . . We doubt not that he has affection for them that should be respected, and his rights regarded." He was allowed "full liberty to visit them."

Hope v. Hope, L. R., 3 P. & M. 326, and *Vansittart v. Vansittart*, 4 K. & J. 62, led to enactment of 36 Vict. 12, declaring the deed not invalidated by its providing for the father's giving up custody of an infant to the mother; and leaving enforcement discretionary with the court.

Trivial breaches of a husband's covenants in the deed will not debar him from getting enjoined an action by the wife for restitution of conjugal rights; *e. g.*, after covenanting to allow an infant child to remain with her, his concurring as next friend in a petition under the infant's Custody Act (36 Vict., ch. 12) for its removal from her custody, ordered by the court; this not being an actual breach. *Besant v. Wood*, 12 Ch. Div. 605.

In a separation agreement, the wife stipulated to hold certain land for

4. **Avoidance.**—The ordinary grounds for avoiding a contract apply to a separation deed; *e. g.*, procurement by fraud or undue stress, etc.,¹ except, sometimes, in case of infancy and coverture.² Resumption of cohabitation, restoring the former relations, will also avoid the deed.³

The fact that before the marriage the wife had had illicit intercourse with another than the husband, and induced him to execute the deed in contemplation of a renewal thereof, would be ground for its avoidance.⁴

benefit of herself and children, and convey a part to them when they should become of age. *Held*, that the whole title, both legal and equitable, vested in the mother and children; and in an action to determine an adverse claim the court would protect the children's title. *Joyce v. McAvoy*, 31 Cal. 273; 89 Am. Dec. 172.

1. See *RESCISSION*, vol. 21, p. 24.

See also *Daniels v. Daniels*, 9 Colo. 133; *Willetts v. Willetts*, 104 Ill. 122; *Price's Appeal*, 2 Mon. Supr. Ct. Cas. (Pa.) 554. Compare *Kesler's Estate*, 143 Pa. St. 386; 24 Am. St. Rep. 557.

A decree of divorce obtained for a pre-existing cause was held not to avoid the deed. *Clark v. Fosdick*, 13 Daly (N. Y.) 500.

An agreement was held to be irrevocable without the wife's consent. *Mann v. Hulbert*, 38 Hun (N. Y.) 27.

One's conveyance of all his property to his wife and daughter on condition that she discontinue her pending suit for a limited time was held void as to existing creditors. *Morgan v. Potter*, 17 Hun (N. Y.) 403.

The distinction between executed and executory arrangements for separation seems to have been swept away by *Wilson v. Wilson*, 1 H. L. Cas. 538.

2. In *England*, in 1826, in *Stamper v. Barker*, 5 Madd. 157—where a wife who was an infant, and entitled to a present interest in certain personal property, and to a contingent interest in certain other property, had entered with her husband and her father into a deed of separation, agreeing that she retain her present interest, and her husband have a share in the contingent property if it fall into possession—the court (Leach, Vice Ch.), in holding that upon her survivorship the deed was a nullity as to her, said: "It is true that the law of this court permits a father or a guardian of a female infant to contract, before marriage, on her part, with her intended husband, as

to her personal estate, because otherwise it would become his property; and as to her jointure, because her benefit and the convenience of families requires it. But there is no principle or authority for stating that after marriage a parent or guardian can bind the interest of an infant *feme covert* by contract with her husband."

3. *Mercein v. People*, 25 Wend. (N. Y.) 97; 35 Am. Dec. 653; *Wells v. Stout*, 9 Cal. 498; *Garland v. Garland*, 50 Miss. 694; *Bateman v. Ross*, 1 Dow. 235; *Zimmer v. Settle*, 124 N. Y. 37; 21 Am. St. Rep. 638; *James v. James*, 81 Tex. 373.

A casual intercourse of three days may not be proof of permanent reconciliation. *Heyer v. Burger, Hoffm. Ch.* (N. Y.) 1.

A mere cessation of sexual intercourse is not such separation as will sustain the deed. *Hindley v. Westmeath*, 6 B. & C. 200; 13 E. C. L. 141.

Mere communication by letters may not import reconciliation. *Slatter v. Slatter*, 1 Y. & C. 28.

In *Walker v. Beal*, 3 Cliff. (U. S.) 155, an agreement for separation was held not to be suspended during reconciliation.

4. *Evans v. Carrington*, 2 De G. F. & J. 481. Compare *Schpley v. Goodman*, 8 Moore 350.

Where the husband had lived in adultery, and the wife, instead of suing for a divorce, consented to a deed of separation providing for her maintenance, it was held not to be fraudulent as against his creditors. *Hobbs v. Hull*, 1 Cox 445.

An intention to facilitate divorce proceedings will invalidate the deed. *Frampton v. Frampton*, 4 Beav. 293.

A mere provision for a future and prospective separation is invalid. *Cocksedge v. Cocksedge*, 14 Sim. 244; *Westmeath v. Salisbury*, 5 Bligh N. R. 339.

The husband's conveyance to a trustee for the wife's use, made on execution of separation articles, will not be set aside for her subsequent adultery while living apart.¹

Whether a deed making the separation depend on consent of a third person be valid is doubtful. *Cocksedge v. Cocksedge*, 14 Sim. 244; *Proctor v. Robinson*, 15 W. R. 138. A clause therefor was formerly held good. *Rodney v. Chambers*, 2 East 283.

1. *Dixon v. Dixon*, 23 N. J. Eq. 316. Compare *Sidney v. Sidney*, 3 P. Wms. 269; *Baynon v. Batley*, 8 Bing. 255; 21 E. C. L. 295; *Jee v. Thurlow*, 2 B. & C. 547; 9 E. C. L. 174; 4 Dowl. & R. 17; *Field v. Serreo*, 4 B. & P. 121; *Sloan v. Cox*, 4 Hayw. (Tenn.) 75, this case under former Tennessee law. See *infra*, this title, *Husband's Liabilities, etc.*, and *Compulsory Statutes*.

Adultery may be a ground for forfeiture of dower, but not of a jointure. *Seagrave v. Seagrave*, 13 Ves. 439.

In *Converse v. Converse*, 9 Rich. Eq. (S. Car.) 555, the court, by Dargan, Ch., said: "It is well settled that where the wife, under a general power of disposition, bestows her separate estate upon her husband, although the prescribed forms of conveyance be punctiliously observed, the court will regard the transaction with jealousy and look into it with a rigid scrutiny, under an apprehension that the gift to the husband may have been extorted by an abuse of the marital power and authority. And if it appears that the gift has been wrung from her by undue means or influence, the deed will be set aside."

A deed executed under the wife's apprehension of the husband's suit for divorce on the ground of her adultery, and wherein she conveyed to a trustee \$12,000 worth of real estate, for him and the two children—he to deliver to the trustee annually certain provision for her support—held invalid. *Switzer v. Switzer*, 26 Gratt. (Va.) 574.

In *England*, it has been held, that a deed made between husband and wife and a trustee, with a covenant by the husband to pay the trustee an annuity, in case she live apart from him, is void, as contemplating a future separation at her pleasure, and therefore against marriage policy. *Durant v. Titley*, 7 Price 577.

In *Rodney v. Chambers*, 2 East 283; in commenting on *Gawden v. Draper*, 2 Vent. 217, the court, by Lord Ellen-

borough, C. J., said: "That case was a provision for a separate maintenance until such time as the parties, by a certain instrument, should declare their assent to live together again. The question raised by the plea was, whether an actual cohabitation afterwards by consent, without its being so signified, and a covenant to retain the provision before stipulated to be paid by the husband during such cohabitation, were a good plea in bar of the first covenant? But at least it shows that the first covenant was good in law; for otherwise the court could never have given judgment for the plaintiff on the covenant declared on."

In *Chambers v. Caulfield*, 6 East 253, the court by Lawrence, J., restricted the foregoing decision (*Rodney v. Chambers*, 2 East 283) as follows: "In that case, the court only decided that a covenant for separation and separate maintenance with the consent of the trustees was good; not that a covenant was good generally that a wife might separate herself from her husband whenever she pleased; for that would be to make the husband tenant at will to the wife of his marital rights."

Where a deed stipulated that the husband should not visit the wife without her consent, his visit to her with her consent and passing one night in her chamber was, in absence of any other evidence of reconciliation, held not to avoid the deed. *Hitner's Appeal*, 54 Pa. St. 110.

The wife's covenant not to disturb the husband is not broken by her instituting suit for judicial separation. *Thomas v. Everard*, 6 H. & N. 448; *Williams v. Baily*, L. R., 2 Eq. 731. Compare *Brown v. Brown*, L. R., 3 P. & M. 202.

When and to what extent one's breach of a covenant will exonerate the other covenantor, see *Fearon v. Aylesford*, 12 Q. B. Div. 539. (In this case, it seems that the wife's covenant not to disturb the husband was not broken by her committing adultery, though it resulted in the birth of a child.)

One's mere trifling breach of a covenant will not disentitle him to a specific

5. Enforcement.—If the consideration be apparent, the arrangement fair, and the trustees' duties clearly defined, equity will enforce a deed made in continuation of a separation, or in contemplation of an immediate separation;¹ and, sometimes, a post-nuptial contract containing stipulations void at law.²

performance of the deed. *Crouch v. Waller*, 4 De G. & J. 302; *Besant v. Wood*, 12 Ch. Div. 605.

The deed may not import that the parties shall live in chastity; yet gross misconduct of the husband may prevent his relying on the deed as against the wife's insisting on the bargain for maintenance. *Gandy v. Gandy*, 7 P. Div. 168.

1. *Walker v. Beal*, 9 Wall. (U. S.) 743; *Fox v. Davis*, 113 Mass. 255; 18 Am. Rep. 476; *Reithmaier v. Beckwith*, 35 Mich. 110.

As to enforcement of nuptial agreements in general, see *HUSBAND AND WIFE*, vol. 9, p. 792.

Enforcement has been refused where no separation actually took place as contemplated. *Bindley v. Mulloney*, L. R., 7 Eq. 343; *Hindley v. Westmeath*, 6 B. & C. 200; 13 E. C. L. 141; *Jodrell v. Jodrell*, 9 Beav. 45.

So also where the wife returned and cohabited fourteen days. *Fletcher v. Fletcher*, 3 Bro. C. C. 619, note; 2 Cox 98.

Enforcement of a stipulation to live separate was refused in *Wilkes v. Wilkes*, 2 Dickens 791.

Equity will enforce one's stipulation not to molest his wife. *Sanders v. Rodway*, 16 Beav. 207.

Equity will enjoin the wife's suit for restitution of conjugal rights. *Besant v. Wood*, 12 Ch. Div. 605.

On one's breach of a covenant not to sue for restitution of conjugal rights, the other covenantor may plead the separation deed by way of equitable defense. *Marshall v. Marshall*, 5 P. D. 19. Formerly, however, the remedy was by injunction. *Hunt v. Hunt*, 4 De G. F. & J. 221; *Flower v. Flower*, 25 L. T. N. S. 902.

The covenants may not be interdependent; but it seems that acts of one party wholly inconsistent with the objects of the deed, will exonerate the other from liability thereunder. *Fearon v. Aylesford*, 12 Q. B. Div. 539.

A bond executed by the husband to secure payment of an annuity provided in the deed will support a suit by the trustee, notwithstanding the wife's sub-

sequent divorce *a vinculo*, and marriage to another. *Blaker v. Cooper*, 7 S. & R. (Pa.) 499.

In *Jones v. Waite*, 5 Bing. N. Cas. 341; 35 E. C. L. 130, the court by Denman, C. J., said: "That the husband himself may derive protection against debts incurred by his wife while living apart from him, by showing that he had agreed with a trustee to provide adequate funds for her maintenance, and had in fact provided them, is clearly established by several cases," particularly by that of *Nurse v. Craig*, 2 N. R. 148; 5 B. & P. 153.

Compensation for breach of the covenant may be assessed at a pecuniary sum. *Fearon v. Aylesford*, 12 Q. B. Div. 539.

A tripartite deed not executed by the trustee, will not be enforced in equity. *Smith v. Knowles*, 2 Grant's Cas. (Pa.) 413.

2. *Duffy v. Mechanics', etc., Ins. Co.*, 8 W. & S. (Pa.) 413; *Garlick v. Strong*, 3 Paige (N. Y.) 440; *Pinney v. Fellows*, 15 Vt. 525; *Elms v. Hughes*, 3 Desaus. (S. Car.) 158; *Crooks v. Crooks*, 34 Ohio St. 610.

The court will enforce the legal covenants, regardless of the illegal ones. *Hamilton v. Hector*, L. R., 13 Eq. Cas. 511.

A separation deed without a valuable consideration is not enforceable at law. *Beach v. Beach*, 2 Hill (N. Y.) 260; 38 Am. Dec. 584; *Griffin v. Banks*, 37 N. Y. 621.

A deed professing to be a mutual settlement may stand as a good will of one of the spouses, though it be invalid as to the other from defect of execution. *Millar v. Birrell*, 4 Sc. Ct. Sess. (4th series) 87. Compare *Lang v. Brown*, 5 Sc. Ct. Sess. (3d series) 789.

An agreement for the husband and wife's parting, and for his returning her portion, £160, to her father, and for the father's indemnifying him from her maintenance and debts, was established by a decree, although the husband offered to receive her back and maintain her. *Seeling v. Crawley*, 2 Vern. 385.

Where the husband wrote to the

6. Effect—*a*. IN GENERAL.—At common law a married woman could not contract and be sued as a *feme sole*, even though living apart from her husband and having a separate maintenance

wife's father, agreeing to pay her an annuity quarterly, so long as they continue separate, this was decreed on her suit to recover arrears, although it did not appear that the deed contained any indemnity against her debts. *Head v. Head*, 3 Atk. 547.

In *Pennsylvania*, equity will not enforce an agreement to live separate, but will recognize the wife's acquirement of separate property under a separation deed. *McKenna v. Phillips*, 6 Whart. (Pa.) 571.

In *Ohio*, an agreement for separation, wherein the wife stipulated to renounce dower and to support three of the children, in consideration that the husband would convey to her in fee simple a specified part of the farm, was enforced after his death by decree enjoining partition and ordering conveyance. *Thomas v. Brown*, 10 Ohio St. 247.

In *Michigan*, in an action between a husband and wife on a contract between them, equity will, if needful, adjudge him to be her trustee, and require him to account accordingly. *Randall v. Randall*, 37 Mich. 563.

In *Iowa*, a wife's petition for alimony (without divorce) was granted, although in consideration of the husband's having given her \$500 worth of personal property, she had orally agreed at the separation to release all further claim on him; she being, at the trial of the case, desirous to reconvert with him. *Farber v. Farber*, 64 Iowa 362.

In *Missouri*, a separation contract so framed as to take effect only on condition that a divorce is granted without alimony, even though with trustee and in escrow, will not be enforced. *Speck v. Dausman*, 7 Mo. App. 165.

In *Vermont*, courts of equity (and not of probate) must enforce both antenuptial and post-nuptial contracts. *Mann v. Mann*, 53 Vt. 48; *Graves v. Wakefield*, 54 Vt. 313.

A, on separation from his wife, executed to B a bond conditioned to pay her, at B's house, 5s. during A's life, and let her be separate and go where and with what friends she thinks fit. She discontinued to reside in B's family, and lived in adultery with C. Thereupon B, with A's consent, burnt

the bond. *Held*, that, nevertheless, the contract should be enforced, Sir Wm. Grant, M. R., saying: "At common law, dower was not forfeited by adultery." *Seagrave v. Seagrave*, 13 Ves. 439.

Therein the Master of the Rolls cited *Blount v. Winter*, 3 P. Wms. 276, n., where, on behalf of trustees and children, execution of marriage articles was decreed against the husband, notwithstanding the wife's living in adultery.

Adultery of the wife after separation is no answer to an action on a covenant to pay a trustee a separate maintenance for her. *Baynon v. Batley*, 8 Bing. 256; 1 M. & S. 339; 21 E. C. L. 295.

A caused B to be indicted for beating and imprisoning B's wife, who was A's daughter. On return of a verdict of guilty, and at instance of justices, the counsel of the parties executed an agreement that a deed of separation be executed by B to A as trustee to pay her a certain annuity quarterly, A to indemnify B against Mrs. B's debts and B not to be molested by her, all actions pending against any person for criminal conversation with her to be discontinued. B refused to execute the deed. *Held*, that specific performance should be decreed, and that the compromise of prosecution was not against public policy. *Elworthy v. Bird*, 2 Sim. & Stu. 372.

A separation deed executed as a compromise of a divorce suit may be made an order of the court as to payment of costs. *Smythe v. Smythe*, 18 Q. B. Div. 544.

In *England*, a court of chancery will enforce specific performance of an agreement for a separation deed and for compromise of a suit in the divorce court, without infringing the Judicature Act, prohibiting proceedings pending in another branch of the court; and this though it provided for the wife's having custody of the children. The term, "usual covenants," does not apply to a *dum casta* clause therein; the term will be construed with reference to surrounding circumstances; her alleged adultery not proven will not be considered. *Hart v. Hart*, 18 Ch. Div. 670.

secured to her by deed.¹ But this rule has been largely modified by statute.²

1. In *Marshall v. Rutton*, 8 T. R. 545 (assumpsit against a married woman living apart, for goods sold her), the court, by Lord Kenyon, C. J., said: "The agreement to live separate is supposed to be made between two parties, who, according to the text of Littleton, § 168, being in law but one person, are on that account unable to contract with each other; and if the foundation fail, the consequence is that the whole superstructure must also fail. This difficulty meets the plaintiff *in limine*. If it did not, and the parties were competent to contract at all, it would then become material to consider how far a compact could be valid, which has for its object the contravention of the general policy of the law in settling the relations of domestic life, and which the public is interested to preserve; and which, without dissolving the bond of marriage, would place the parties, in some respects, in the condition of being single, and leave them in others subject to the consequences of being married, and which would introduce all the confusion and inconvenience which must necessarily result from so anomalous and mixed a character. It may be asked . . . how any power short of the legislature can change that which, by the common law of the land, is established as the course of judicial proceedings?" Compare an earlier case, deciding that the husband must be joined in a suit against a *feme covert* sole trader. *Beard v. Webb*, 2 B. & P. 93.

2. In *Pennsylvania* one's stipulation that the wife "shall exercise all the rights of a *feme sole*, wholly freed and discharged from all his power and authority"—held to empower her to bequeath her earnings. *Wagner's Estate*, 2 Ashm. (Pa.) 448.

In *New York*, in a separation deed between husband and wife and trustee, he covenanted that she might prosecute suits and he not interfere, but ratify her proceedings. Two years after separation, she instituted in both of their names, an action for slander. Held, that his release of the cause of action was a good bar to a recovery. *Beach v. Beach*, 2 Hill (N. Y.) 260; 38 Am. Dec. 584.

As to the effect under later *New York* statutes, see *Griffin v. Banks*, 37

N. Y. 621; *Carpenter v. Osborn*, 102 N. Y. 552.

After articles of separation wherein the husband agreed to pay the wife \$200 annually, she to surrender all claim to support and dower, a decree of divorce from bed and board was rendered in which she accepted a gross sum of \$1,100, "in lieu of alimony and of all claims for her separate support and maintenance forever." Held, that as he failed to pay the annuity, the articles were ineffectual as to dower. *Day v. West*, 2 Edw. Ch. (N. Y.) 592.

In *Maryland*, one's covenant, in a separation deed, voluntarily and with full knowledge of the wife's adultery, executed with her and her father, to pay for her personal support and maintenance a certain sum annually during the husband's life, was held not to be avoided by a divorce *a vinculo matrimonii* obtained at the husband's instance. In such case, the custody and care of the children may properly be awarded to the father. *Kremelberg v. Kremelberg*, 52 Md. 553.

A husband and wife's entering into a written agreement for a separation, in contemplation of a divorce, under which specific articles of personal property were agreed to be held by each, respectively, but which contained nothing evidencing an intention on his part to abandon his rights to all the property she might thereafter acquire and die possessed of, in case there was no divorce, was held to give title, nor would the fact that she was indebted at the time of her death give her creditors the right to administer; and this, though he be insolvent or out of the State. *Willis v. Jones*, 42 Md. 422.

In *Maryland* it has been held that the husband's compliance with a provision in the deed to support the wife exonerates him from paying a claim for necessities. *Brown v. Brown*, 5 Gill (Md.) 249.

In *Tennessee* it was held that after the husband's death, the wife might elect between holding property conveyed to the trustee in the separation deed or taking her dower or distributive share. *Watkins v. Watkins*, 7 Yerg. (Tenn.) 283; *Parham v. Parham*, 6 Humph. (Tenn.) 287.

In *England* it has been held that the

b. AS TO DIVORCES.—A deed of separation is generally no bar to a suit for a divorce.¹

III. SEPARATION WITHOUT DEED—1. Rights in General.—By the common law of *England* and of many of the States, and by the statutes of some States, he who has abandoned his wife without provision for her support is presumed to have waived his right to her acquisitions as a sole trader, and she may sue and be sued, contract and convey, as a *feme sole*; in many instances, however, an ordinary protracted absence being distinguished from that of his imprisonment, exile, or other civil death. The subject can be comprehended only by an historic and comparative view.²

general reputation of separation and allowance for support is sufficient to protect the husband against a claim for necessities. *Todd v. Stoakes*, 1 Salk. 116. But in a case where the allowance was only 5s. per week, it was held otherwise. Lord Mansfield however, dissenting. *Nurse v. Craig*, 5 B. & P. 148. Compare *Cragg v. Bowman*, 6 Mod. 147; *Corbet v. Poelnitz*, 1 T. R. 5.

1. *Beeby v. Beeby*, Hagg. Consist. 143, n.; 1 Eccl. 789; *Anderson v. Anderson*, 1 Edw. Ch. (N. Y.) 380; *Fosdick v. Fosdick*, 15 R. I. 130; *Stokes v. Stokes*, 1 Mo. 320; *J. G. v. H. G.* 33 Md. 401; 3 Am. Rep. 183; *Kremelberg v. Kremelberg*, 52 Md. 553.

In *Squires v. Squires*, 53 Vt. 208; 38 Am. Rep. 668, it was held otherwise, but the weight of authority seems to be against this *Vermont* decision.

In *Miller v. Miller*, 1 N. J. Eq. 386, it was held that in the circumstances the deed was no bar to the wife's claim for alimony. A similar conclusion was reached in *Wilson v. Wilson*, 40 Iowa 230.

See *Besant v. Wood*, 12 Ch. Div. 605; *Thomas v. Thomas*, 2 S. & T. 113; *Rowley v. Rowley*, L. R., 1 H. L. Sc. 63; *Barker v. Barker*, 2 Addam's Eccl. 285; *Coode v. Coode*, 1 Curtels 757; *Morrall v. Morrall*, 6 P. Div. 98.

Brown v. Brown, 5 Gill (Md.) 249, has been cited as an authority to show that in *Maryland* a voluntary deed of separation between the parties is a bar to an application for divorce, but the court in *J. G. v. H. G.*, 33 Md. 401, said that it did not so interpret that decision.

In *Matthews v. Matthews*, 1 S. & T. 499, it was held that the lapse of nine years, when taken in connection with a separation deed made three years before the bringing of a suit for divorce, showed a want of good faith and therefore the petition was dismissed. This

decision was followed in *Williams v. Williams*, 35 L. J. Rep. M. C. 85.

In *Hunt v. Hunt*, 31 L. J. Ch. 161, it was held that a deed of separation would afford ground for enjoining a suit by the husband, for a restitution of conjugal rights.

In *England*, articles of separation were, in the House of Lords, held to form an insuperable bar to the special interposition of the legislature, on an application for a divorce. *Esten's Divorce*, 33 Hans. Parl. Hist. 1306.

The deed may, by express stipulation, bar a suit for restitution of conjugal rights. *Hunt v. Hunt*, 31 L. J. Ch. 161; *Besant v. Wood*, 12 Ch. Div. 605; *Marshall v. Marshall*, 5 P. Div. 19.

2. See 1 Bl. Com. (Sharswood ed.) 443; 2 Kent Com. (13th ed.), 146, 154. Compare COMMUNITY PROPERTY, vol. 3, p. 350. HUSBAND AND WIFE, vol. 9, p. 798. MARRIED WOMEN "TRADERS," vol. 14, p. 667; SEPARATE PROPERTY OF MARRIED WOMEN. *Supra*, this title, *Modern Legislation*, and *infra*, *Compulsory Statutes*.

In *England*, the law was declared in a case (temp. 2 Anne) the total report whereof is as follows: "An ordinary working man married a woman of like condition; after cohabitation for some time he left, and during his absence she worked; and this action being brought for her diet, it was held that the money she earned should go to keep her." *Warr v. Huntley*, J. Holt 102 (*sub nom.* *Warr v. Huntley*, 1 Salk. 118).

For the current of adjudication concerning the rights and liabilities of the husband, upon his return, see *Walford v. Pienne*, 2 Esp. 554; *Kay v. De Pienne*, 3 Camp. 123; *Deerly v. Mazarine*, 1 Salk. 116 (*sub nom.* "Deery," etc., 1 Ld. Raym. 147); *Newsome v. Bowyer*, 3 P. Wms. 37; *Carrol v. Blencow*, 4 Esp. 27; *De Gaillon v. L'Aigle*, 1 B. & P. 357; *Marsh v.*

Hutchinson, 2 B. & P. 226; Farrer v. Count de Grenard, 11 East 301; De Wahl v. Braune, 1 H. & N. 178.

These decisions were not wholly uniform. Moreover a distinction was drawn between the husband's liabilities in equity and at law. Clayton v. Adams, 6 T. R. 605. It was also held that a wife eloping and running in debt, could not be sued alone. Hatchett v. Baddeley, 2 W. Bl. 1079. Nor did a divorce *a mensa* restore her capacity as a *feme sole*. Falthorne v. Blaquiere, 6 M. & S. 73.

As to the liability of a second husband (taken after the civil death of the first) see Corbett v. Poelnitz, 1 T. R. 5.

As to the effect of bankruptcy of a convict's wife, see *Ex parte* Franks, 7 Bing. 762; 20 E. C. L. 323.

Where, after an order had been made for payment of the wife's life income of a fund in court, he deserted her, and became bankrupt, it was held that two-thirds of the income should be paid to herself, and one-third to his assignees. Vaughan v. Buck, 3 Eng. L. & Eq. 135.

Where, during the husband's imprisonment, the wife carried on a business on her own account, it was held that he was liable for articles furnished her therein after his insolvent discharge, with his knowledge, although the invoices and receipts were in her name, and she paid the poor rates. Petty v. Anderson, 3 Bing. 170; 11 E. C. L. 84. Compare Lovett v. Robinson, 7 How. Pr. (N. Y.) 105.

It was also held that a wife living apart could not contract as a *feme sole* when having a settled provision. Marshall v. Rutton, 8 T. R. 545; Hyde v. Price, 3 Ves. 437. Also that a woman divorced for her adultery could not so contract. Lewis v. Lee, 3 B. & C. 291; 10 E. C. L. 84. Also that her ante-nuptial debts survived against her upon his death or divorce. Woodman v. Chapman, 1 Camp. 189. (Compare Waul v. Kirkman, 13 Smed. & M. (Miss.) 599; Clarke v. Windham, 12 Ala. 798.) Also that if a husband deserts his wife, he is liable to a tradesman for necessities obtained (she alive) by another woman falsely by him represented to be his wife. Robinson v. Nahon, 1 Camp. 245.

In Alabama, where the husband remained at Georgia, permitting the wife to go with their children into Alabama and there carry on business, it was held that his assent to her indorsing

bills and notes in her own name must be presumed. Roland v. Logan, 18 Ala. 307. (Citing Story on Bills 91.) Also that if he has abjured the State, she may sue and be sued as a *feme sole*. Arthur v. Broadnax, 3 Ala. 557; 37 Am. Dec. 707; James v. Stewart, 9 Ala. 855. After he has deserted her, she can be proceeded against at law for a debt which she owed before marriage. Clarke v. Windham, 12 Ala. 798.

In California, his protracted absence removes her disability to contract as a *feme sole*, and neither he nor his creditors can claim her acquisitions meanwhile made. Lawrence v. Spear, 17 Cal. 421; Loring v. Stuart, 79 Cal. 200.

In Arkansas, otherwise. Rogers v. Phillips, 8 Ark. 366; 47 Am. Dec. 727.

In Idaho, by statute, the earnings of the wife when living separate, and also those of the minor children with her, are her own property. Idaho Rev. Stat. 1887, § 2502. (For somewhat similar provisions of other States, see *infra*, this title, *Compulsory Statutes*.)

In Illinois, by statute, a deserted spouse may prosecute and defend any action as might the deserter. Ill. Rev. Stat. 1891, p. 1790, § 3. As to the effect, upon the wife's agency, of the statute making both spouses responsible for family expenses, see Gaffield v. Scott, 40 Ill. App. 380; Woodyatt v. Connell, 38 Ill. App. 477; Lipe v. McClevy, 41 Ill. App. 59; Hazelbaker v. Goodfellow, 64 Ill. App. 238. As to the earlier law, see Love v. Moynahan, 16 Ill. 277; 63 Am. Dec. 306.

In Kentucky, it has been held that after the wife's divorce or death, the husband is not liable for her debts contracted *dum sola*, unless they have been reduced to judgment against him. Morrow v. Whitesides, 10 B. Mon. (Ky.) 411.

In Maryland, the common-law doctrine of England has prevailed. Worthington v. Cooke, 52 Md. 297.

In Massachusetts, in 1818, it was held that a *feme covert*, whose husband had deserted her in a foreign country, and who had thenceforth maintained herself a *feme sole*, and for five years had lived in Massachusetts (he never being in the United States), was competent to sue and be sued as a *feme sole*, and her release was a valid discharge of a judgment recovered by her. Gregory v. Paul, 15 Mass. 31 (Citing Belknap's Case, Co. Lit. 132a; Wilmot's Case, Moore, 851; Dubois v.

Hale, 2 Vern. 614; Portland v. Rogers, 2 Vern. 104; Derry v. Mazarine, 1 Ld. Raym. 147). This decision was quoted with approval in Rhea v. Rhenner, 1 Pet. (U. S.) 108. See also Cox v. Kitchin, 1 B. & P. 338; Gregory v. Pierce, 4 Met. (Mass.) 478.

In *Massachusetts*, moreover, it was early held that a wife whose husband is an alien or non-resident, is restored to her capacity to contract as a *feme sole*. Abbott v. Bayley, 6 Pick. (Mass.) 89. So also after her divorce *a mensa*. Dean v. Richmond, 5 Pick. (Mass.) 461.

In *Mississippi*, upon the wife's divorce or death, the husband is not liable for the wife's contracts *dum sola*, even upon his promise thereafter made to pay, if made with no new consideration. Waul v. Kirkman, 13 Smed. & M. (Miss.) 599. His desertion will not invest her with power to make a will. Cain v. Bunkley, 35 Miss. 119.

In *New York*, upon his temporary absence, circumstances may raise a presumption that she is his authorized superintending agent. Church v. Landers, 10 Wend. (N. Y.) 79. And in case of his absence for seven years, under circumstances raising a presumption of his death, she may sue and be sued as a *feme sole*. King v. Paddock, 18 Johns. (N. Y.) 141.

In *Pennsylvania*, the fact that the wife has been decreed a *feme sole* trader, does not exempt the husband from liability for necessities. Markley v. Wartman, 9 Phila. (Pa.) 236. Otherwise, as to her shop-keeping debts, he residing in the same city. Jacob v. Featherstone, 6 W. & S. (Pa.) 346. If he has long deserted her, she may dispose of her acquisitions as her own. Starrett v. Wynn, 17 S. & R. (Pa.) 130; 17 Am. Dec. 654. So held also, in the case of the wife of a mariner, absent two years, without leaving her any support. Valentine v. Ford, 2 Browne (Pa.) 193. Compare Mackinley v. McGregor, 3 Whart. (Pa.) 369; Walker v. Simpson, 7 W. & S. (Pa.) 83; 42 Am. Dec. 216; Hultz v. Gibbs, 66 Pa. St. 360. Upon his deserting her, she cannot be held liable as a *feme sole* trader unless she has been decreed such. Hentz v. Clawson, 34 Leg. Int. (Pa.) 5; Cleaver v. Scheetz, 70 Pa. St. 496. She cannot become surety, unless it be necessary in prosecuting her business or profession. Cochran v. Garrettson, 1 Leg. Gaz. (Pa.) 218.

There, moreover, her renunciation of conjugal intercourse deprives her of

the right of administration on his estate. Odiorne's Appeal, 54 Pa. St. 175; 93 Am. Dec. 683; Hettrick v. Hettrick, 55 Pa. St. 290; Platt's Appeal, 80 Pa. St. 501. (Otherwise if he is the deserter. Fyock's Estate, 135 Pa. St. 522.)

After he has deserted her, leaving her in his house, upon his creditors' levy thereon, she can claim the exemption, if not waived by him. Kerst's Appeal, 2 Lew. Supr. Ct. Cas. (Pa.) 117.

Where, in consideration that she would marry him, thereby losing her pension, he confessed a judgment in her favor, it was held that on their separation, each alleging desertion, she could have execution issued thereon, without intervention of a trustee. Kincade v. Cunningham, 1 Mon. Supr. Ct. Cas. (Pa.) 11.

As to the effect of her *laches* after his death, in seeking to obtain a re-vesting of his property conveyed to her in trust before marriage, see Bigham's Appeal, 123 Pa. St. 262; 10 Am. St. Rep. 522.

A deserted wife's conveyance, held to be void. Thorndell v. Morrison, 25 Pa. St. 326.

In order to sustain his claim of curtesy in the estate of a deserted wife, he must show that his desertion was justifiable. Hahn v. Bealor, 132 Pa. St. 243.

The moral obligation was held to be a sufficient consideration for a renewal, after divorce, of a promise made by the wife, during coverture, to pay a third party for work done upon her son's property. Hemphill v. McClimans, 24 Pa. St. 367.

In *South Carolina*, in case of the husband's absence long enough to raise a presumption of his death, the wife may sue and be sued as a *feme sole*. Boyce v. Owens, 1 Hill (S. Car.) 8.

In *Texas*, it was held that, upon a husband's desertion of his wife, she became vested with absolute control of her personal property (*e. g.*, a negro girl), and that on resumption of cohabitation after her sale thereof, they could not recover either the property or its increase. Walker v. Stringfellow, 30 Tex. 571.

In *Vermont*, it has been held that during the husband's absence of a few months, the wife may be presumed to be his authorized agent in the care of his farm and live stock, with power to contract for him. Felker v. Emerson, 16 Vt. 653; 42 Am. Dec. 532. See also

After their voluntary separation, they may for some purposes, be witnesses for or against each other.¹ His living apart from her has, under certain circumstances, been held to deprive him of remedy for her misconduct.²

2. Husband's Liability for Wife's Support.—The conjugal relation imposes upon the husband the duty to support the wife.³ If he has provided therefor by deed or otherwise, and is fulfilling the provision, she cannot pledge his credit therefor;⁴ otherwise, if he fails to fulfill the stipulation⁵ or to pay the alimony in a

a case as to a child's gravestone. *Meader v. Page*, 39 Vt. 406. But *Compare Robinson v. Reynolds*, 1 Aik. (Vt.) 174; 15 Am. Dec. 673; *Sawyer v. Cutting*, 23 Vt. 486.

His permission, granted upon her departure, that she take her apparel with her, was held to be a waiver of all his rights thereto. *Delano v. Blanchard*, 52 Vt. 579.

In *Virginia*, a bill by the husband's administrator for a discovery of money taken away by a deserting wife, was held to be properly dismissed. *McCormick v. McCormick*, 7 Leigh. (Va.) 66.

1. *Fenner v. Lewis*, 10 Johns. (N. Y.) 41.

In *Massachusetts*, before the statute of 1859, ch. 230, she was not a competent witness to support an action against him for her board. *Burlen v. Shannon*, 14 Gray (Mass.) 433.

2. Where a suspecting husband took a lodging for his wife, paying therefor and for her board, it was held that he could not maintain an action for criminal conversation committed by her while he remained away. *Weadon v. Timbrel*, 1 Esp. 116.

3. See HUSBAND AND WIFE, vol. 9, p. 815; 1 Black. Com. (Shars. ed.) 443.

The present common law thereon in case of separation without deed, most generally accepted, is very well expressed in certain statute law; e. g., Ga. Code, 1882, § 1758, similar to that of the *California* statute of 1874. See *infra*, this title, *Compulsory Statutes*, Cal. Civil Code, 1885, § 175.

This duty is not affected by the fact that he married her in order to secure his discharge in bastardy, and upon assurances that he would not be bound to live with her. *State v. Ransell*, 41 Conn. 433.

Nor by the fact that she induced the marriage by falsely representing herself to be with child by him. *Fairchild v. Fairchild*, 43 N. J. Eq. 473.

Under the *Iowa* statute (*McClain's*

Iowa Code, 1888, § 3415)—allowing the husband a divorce, if, at the time of the marriage, she was with child by another (unless he had an illegitimate child then living unknown to her)—he is not in such case bound to live with her or support her child. *Brannum v. O'Connor*, 77 Iowa 632.

In *West Virginia*, so also, where he did not know of her ante-nuptial prostitution, W. Va. Code, 1891, p. 612, § 5.

In *England*, he is liable also to support her children by a former marriage, if he has taken them into the family. *Stone v. Carr*, 3 Esp. 1.

In some of the States, a statute declares this to be his duty, if he has taken them in, etc. Cal. Civil Code, 1885, § 209.

4. See *supra*, this title, *Effect*. See also *Hunt v. Hayes* (Vt. 1892), 23 Atl. Rep. 920; 15 L. R. A. 661; *Baker v. Barney*, 8 Johns. (N. Y.) 73; 5 Am. Dec. 326.

It has been held that if on separation she freely makes her own terms as to her allowance or income, and it proves insufficient for her support, she cannot pledge his credit. *Eastland v. Burchell*, 3 Q. B. Div. 432. *Compare Jolly v. Rees*, 15 C. B. N. S. 628; 109 E. C. L. 628; *Debenham v. Mellon*, 5 Q. B. Div. 394; *Carmany v. Orth*, 2 Pears. (Pa.) 175.

Otherwise, where he paid the allowance to which he had obtained her agreement through threats to send her to a lunatic asylum. *Biffin v. Bignell*, 7 H. & N. 877.

5. *Hindley v. Westineath*, 6 B. & C. 200; 13 E. C. L. 141; *Nurse v. Craig*, 5 Bos. & P. 148; *Burgett v. Booty*, 8 Taunt. 343; *Lidlow v. Wilmot*, 2 Stark 86; *M'Gahay v. Williams*, 12 Johns. (N. Y.) 293; *Lockwood v. Thomas*, 12 Johns. (N. Y.) 248.

An early English case has been much criticised. A husband before, and in consideration of the marriage, and of 6,000 pounds, the wife's portion, had made a

decree *a mensa*.¹ In general, upon their voluntary separation without sufficient provision for her maintenance, he is liable for medical attendance or other necessities furnished her by third parties.² This general rule applies in many instances of separation not mutually voluntary.³ The decisions as to the requisites of recovery in a suit against him upon debts incurred by her for support while apart, are not uniform.⁴ While the presumption of her agency continues, the burden of proof is on the husband to show that he had supplied her sufficient maintenance according to their condition in life.⁵

trust deed of lands, to pay her annually 100 pounds pin money. After cohabiting many years they quarreled, and she went alone to France, and remained there; finally inducing her trustees to bring ejectment for recovery of the term. He filed a bill in equity, tendering cohabitation, and payment of the annuity if she would return, and praying injunction of the suit. But *Ld. Hardwicke*, chancellor, refused the prayer, and ordered him to account. *Moore v. Moore*, 1 Atk. 272.

1. *Hunt v. Blaquiere*, 5 Bing. 550; 15 E. C. L. 535. See *dicta* in *Dwyer v. Dwyer*, 26 Mo. App. 647.

2. *Harrison v. Grady*, 13 L. T. N. S. 369; 12 Jur. N. S. 140; *Fredd v. Eves*, 4 Harr. (Del.) 385; *Calkins v. Long*, 22 Barb. (N. Y.) 97; *Allen v. Aldrich*, 29 N. H. 63; *Lindenschmidt v. Lindenschmidt*, 29 Mo. App. 295; *Rumney v. Keyes*, 7 N. H. 571; *Parson v. McLane*, 64 N. H. 478; *Mayhew v. Thayer*, 8 Gray (Mass.) 172; *Pearson v. Darrington*, 32 Ala. 227; *Thorne v. Brown*, 139 Mass. 35.

He assenting to her living apart and earning her own support, cannot recover for her earnings paid to her and appropriated thereto. *Norcross v. Rodgers*, 30 Vt. 588.

A precarious income from some extraneous source is not sufficient. Thus the fact that a deserted wife had a pension of 300 pounds a year, determinable at the pleasure of the crown was held not to preclude her from pledging her husband's credit. *Thompson v. Harvey*, 4 Burr. 2177.

3. So held where, without such provision, he unjustifiably left the State to get a divorce. *Hanover v. Turner*, 14 Mass. 227; 7 Am. Dec. 203.

Where he unjustifiably absented himself, he was held liable for debts meanwhile incurred by her in keeping a boarding house for her support. *Rotch v. Miles*, 2 Conn. 638.

If he abandons her, she can put her minor children to proper service, and assign their wages to aid in their support. *Camerlin v. Palmer Co.*, 10 Allen (Mass.) 539.

4. As to suits for necessities furnished during cohabitation, see *HUSBAND AND WIFE*, vol. 9, p. 830.

In *England*, one who furnishes support to an unjustly deserted wife, has a remedy in equity against the husband. *Deare v. Soutten*, L. R., 9 Eq. 151; *Jenner v. Morris*, 3 De Gex F. & J. 45.

In *New York*, until the code system, a suit at law was held to be the proper remedy. *Pomeroy v. Wells*, 8 Paige (N. Y.) 406.

5. *Baker v. Sampson*, 14 C. B. N. S. 383; 108 E. C. L. 382; *Frost v. Willis*, 13 Vt. 202; *Walker v. Loughton*, 31 N. H. 111; *Tebbetts v. Hapgood*, 34 N. H. 420.

As to circumstances requiring the tradesman to show that the husband did not make sufficient provision, see *Mott v. Comstock*, 8 Wehd. (N. Y.) 544; *Pool v. Everton*, 5 Jones (N. Car.) 241.

Where, on separation by mutual consent, the husband paid the wife \$300, she agreeing to make no claim to support, and to release her dower right in his land, and she made no such claim nor any offer to return, it was held that he was not chargeable with other supplies furnished her. *Alley v. Winn*, 134 Mass. 77; 45 Am. Rep. 297.

Where, on such separation, he contracted with her father for her maintenance, but she afterwards left her father without any good cause, it was held that she could not pledge her husband's credit for her support. *Pidgin v. Cram*, 8 N. H. 350.

Where she justifiably departed and remained with a relative until divorced, meanwhile receiving (to induce her to join in a conveyance) certain purchase money, the husband was held to be

This presumption does not extend to authorize her to "borrow money to lay out for necessities."¹ His assent to the furnishing will be presumed, upon proof that he knew thereof and made no objection.² Whether upon separation with a sufficient allowance, which the husband continues to meet, or upon adequate provi-

liable to him for her board before, but not after the receipt. *Litson v. Brown*, 26 Ind. 489.

In a suit for apparel furnished her, he may show, in evidence of the superfluity, that she had incurred debts therefor with other parties. *Renaux v. Teakle*, 20 Eng. L. & Eq. 345.

Proof that she acquiesced in the allowance, is not conclusive that it accorded with her husband's position, etc. *Hodgkinson v. Fletcher*, 4 Camp. 70. The question of suitability to her estate in life may depend upon her husband's apparent, rather than his actual income. *Morgan v. Chetwynd*, 4 F. & F. 451; *Waithman v. Wakefield*, 1 Camp. 120. For circumstances rendering proper a verdict that an allowance of £800 per annum was sufficient for a lady of certain rank, see *Holder v. Cope*, 2 C. & K. 437; 61 E. C. L. 435. An allowance of \$80 per month (less than one-third of his income) was approved. *Johnson v. Johnson*, 24 Ill. App. 80.

Articles are not rendered "necessaries" merely because substituted for other articles which might be nuisances. *Thorpe v. Shapleigh*, 67 Me. 235. They are "something more than mere house-room and food enough to sustain animal life." *Briggs v. Briggs*, 24 S. Car. 377. In *Thill v. Pohlman*, 76 Iowa 638, the court, by Granger, J., defined them to be "those comforts and surroundings reasonable and necessary for home-enjoyment in the society in which she lives." See also as to quality, quantity, category, etc., *Porter v. Briggs*, 38 Iowa 166; 18 Am. Rep. 27. What are such is a question of fact for the jury.

See also (in addition to cases considered in notes to HUSBAND AND WIFE, vol. 9, p. 831), as to apparel, *Bentley v. Griffin*, 5 Taunt. 356; *Atkins v. Curwood*, 7 C. & P. 756; 32 E. C. L. 721; *Theriot v. Baglioli*, 9 Bosw. (N. Y.) 578; *Lord v. Thompson*, 41 N. Y. Super. Ct. 115; *appropriation of earnings* (e. g., of her two children, \$24 monthly), *Hall v. Weir*, 1 Allen (Mass.) 261. Birds for her aviary, *Freestone v. Butcher*, 9 C. & P. 643;

38 E. C. L. 269. *A carriage*, *Bugbee v. Blood*, 48 Vt. 497. *Dentistry*, *Gilman v. Andrus*, 28 Vt. 241; 67 Am. Dec. 713. *Jewelry*, *Montague v. Espinasse*, 1 C. & P. 356, 502; 11 E. C. L. 416, 454; *Motague v. Baron*, 5 D. & R. 532; *Raynes v. Bennett*, 114 Mass. 424; *Bergh v. Warner*, 47 Minn. 250. *Laces*, *Morton v. Withers*, Skin. 348. *Millinery*, *Lane v. Ironmonger*, 13 M. & W. 368; *Ogden v. Prentice*, 33 Barb. (N. Y.) 160. *A piano*, *Parke v. Kleeber*, 37 Pa. St. 251. *A pleasure trip* (e. g., over Europe with her child), *Thorpe v. Shapleigh*, 67 Me. 235. *A sewing-machine*, *McQuillen v. Singer Mfg. Co.*, 99 Pa. St. 586.

1. *Earle v. Peale*, 1 Salk. 387; *Harris v. Lee*, 1 P. Wms. 483; *Stone v. Macnair*, 7 Taunt. 432; *Paule v. Goding*, 2 F. & F. 585; *Jenner v. Morris*, 3 De G. F. & J. 45; *Anderson v. Cullen*, 16 Daly (N. Y.) 15.

A husband was held not to be liable for money loaned to his wife to enable her (the party having failed upon whom he had drawn) to fulfill his request that she join him at the Cape of Good Hope. *Knox v. Bushell*, 3 C. B. N. S. 334; 91 E. C. L. 333.

But compare the case of a loan to procure a child's gravestones. *Meador v. Page*, 39 Vt. 306.

In *Pennsylvania*, a husband living separately is not liable for money loaned to the wife, unless it be shown that he turned her away without cause, and that the money was actually expended for necessities. *Walker v. Simpson*, 7 W. & S. (Pa.) 73; 42 Am. Dec. 216.

2. Compare *Hultz v. Gibbs*, 66 Pa. St. 360.

So held, where against the husband's consent, the wife had gone to her brother's and died there, and he visited her while the debt for medical services sued upon was accruing. *Collins v. Mitchell*, 5 Harr. (Del.) 369.

In *Harrison v. Grady*, 13 L. T. N. S. 369, the court, by Earle, C. J., said: "If the husband was not liable, the plaintiff was supplying the skill and attendance without any one being liable for it. It is supplied to the wife with the

sion from any other source, he must give express notice thereof in order to exempt himself from liability to tradesmen assuming to deal with her, the decisions have not been uniform.¹ Upon her departure without his default, his general notification not to give her credit, has been held to be sufficient;² otherwise, upon his turning her off unjustifiably.³ He has sometimes been held liable notwithstanding his express prohibition.⁴ In general, upon a separation, a party furnishing the wife with necessities, accepts at his peril her pledge of the husband's credit; and must show the existence of justifiable cause, especially if, at the time thereof, aware of her intent of desertion.⁵ If the wife has justifiably

knowledge of the husband who never interfered, and the bill is sent in to him. It is like the case of saying to a tradesman: 'My wife has funds, and you can compel her to pay you.'

So held also in an attorney's action against him for legal services and expenses in her behalf in a proceeding instituted by the husband against the wife to compel her to give bond for peace. *Warner v. Heiden*, 28 Wis. 517; 9 Am. Rep. 515.

His assent is not to be presumed from his having seen her in possession of the purchased goods. *Bentley v. Griffin*, 5 Taunt. 356.

As to when equity will consider the wife's contract for necessities to bind her separate estate, see *Priest v. Cone*, 51 Vt. 495; 31 Am. Rep. 695.

1. Compare *Mizen v. Pick*, 3 M. & W. 481; *Rawlins v. Vandyke*, 3 Esp. 250; *Reeve v. Conyngham*, 2 C. & K. 444; 61 E. C. L. 444.

In *Missouri*, he has been held liable, if not notifying. *Harshaw v. Merryman*, 18 Mo. 106; *Porter v. Bobb*, 25 Mo. 36.

In *Georgia*, by statute, notice relieves him if she abandons him without sufficient provocation; but not if for his misconduct. Ga. Code, 1882, § 1758. There he has been held to be liable, notwithstanding a provision of the court for past alimony, made after the necessities had been delivered. *Mitchell v. Treanor*, 11 Ga. 324; 56 Am. Dec. 421. See *Glenn v. Hill*, 50 Ga. 94; *Houlis-ton v. Smith*, 3 Bing. 127; 11 E. C. L. 64; *Keegan v. Smith*, 5 B. & C. 375; 11 E. C. L. 253; *Black v. Bryan*, 18 Tex. 453; *Payne v. Bentley*, 21 Tex. 542.

In *Michigan*, in a proceeding at law to recover against the husband's estate for the wife's support, the sufficiency of the alimony allowed in chancery cannot be reviewed by a jury. *Crittenden v. Schermerhorn*, 39 Mich. 661;

33 Am. Rep. 40, citing *Wilson v. Smyth*, 1 B. & Ad. 801; 20 E. C. L. 486.

In *New York*, the report of a referee, fixing alimony, if not confirmed, is no defense to a suit for necessities. *Lord v. Thompson*, 41 N. Y. Super. Ct. 115.

2. *Lungworthy v. Hockmore*, 1 Ld. Raym. 444 note; *Tod v. Stokes*, 12 Mod. 244; *Etherington v. Parrott*, 2 Ld. Raym. 1006; *Cany v. Patton*, 2 Ashm. (Pa.) 140; compare *Holt v. Brien*, 4 B. & Ald. 252; 6 E. C. L. 472; *Kemp v. Downham*, 5 Harr. (Del.) 417.

3. *Harris v. Morris*, 4 Esp. 41; *Johnston v. Manning*, 12 Jr. C. L. R. 149. The husband was held liable, where he concealed from the wife and from the tradesman furnishing her necessities the fact that his change of place was with intent to desert her. *Jenner v. Hill*, 1 F. & F. 269. His selling off the furniture is presumptive proof of such intent. *Forristall v. Lawson*, 34 L. T. N. S. 903.

4. *Bolton v. Prentice*, 2 Stra. 1214. Compare *Cromwell v. Benjamin*, 41 Barb. (N. Y.) 558; *Daubney v. Hughes*, 60 N. Y. 187; *Pierpont v. Wilson*, 49 Conn. 450.

In *Manby v. Scott*, Lev. 4; 1 Sid. 109, the leading English case, thereon, the majority of the court held that the husband could not be held against his express prohibition. See 2 Smith L. Cas. (8th ed.) 451; also note thereon (p. 492) after *Seaton v. Benedict*. See also review thereof in 2 Kent. Com. (13th ed.) 148; also *dicta* thereon in *Compton v. Collinson*, 1 H. Bl. 334.

5. *Child v. Hardyman*, 2 Stra. 875; *Mainwaring v. Leslie*, 2 C. & P. 507; 12 E. C. L. 238; *Clifford v. Laton*, 3 C. & P. 15; 14 E. C. L. 188; *Woodman v. Chapman*, 1 Camp. 189; *Bevier v. Sumner*, 3 Hurl. & N. 261; *Rea v. Durkee*, 25 Ill. 103; *Bevier v. Gallo-*

withdrawn and dies, the husband is liable for her funeral expenses.¹ In general, he is also liable for proper expenses in legal proceedings, if incurred by her because of his misconduct.² So also does the general rule of the husband's liability for necessities apply

way, 71 Ill. 517; Schnuckle v. Bierman, 89 Ill. 454; Wilson v. Bishop, 10 Ill. App. 588; Hartmann v. Tegart, 12 Kan. 177; Rutherford v. Cox, 11 Mo. 347; Reese v. Chilton, 26 Mo. 598; Billing v. Pilcher, 7 B. Mon. (Ky.) 458; 46 Am. Dec. 523; Brown v. Patton, 3 Humph. (Tenn.) 135; Oinson v. Heritage, 45 Ind. 73; 15 Am. Rep. 258; Brown v. Mudgett, 40 Vt. 68; Thorne v. Kathan, 51 Vt. 250.

It has been held that the husband is not chargeable for necessities obtained through her concealing the fact of separation. Stevens v. Story, 43 Vt. 327.

1. Jenkins v. Tucker, 1 H. Bl. 91; Bradshaw v. Beard, 12 C. B. N. S. 344; 104 E. C. L. 344; Cunningham v. Reardon, 98 Mass. 538; 96 Am. Dec. 670. So held also, on conflicting evidence as to her having any justifiable cause for leaving him. Ambrose v. Kerrison, 10 C. B. 776.

2. These are ordinarily considered as governed by the rule of necessities. Thus it has been held that he is liable for the reasonable costs of proceedings at law or in equity against him by her. Williams v. Fowler, 1 M'Cl. & Y. 269; Sprayberry v. Merk, 30 Ga. 81; 76 Am. Dec. 637.

Where he needlessly sought to compel her to find sureties to keep the peace, he was held to be liable for her expenses in defense. Warner v. Heiden, 28 Wis. 517; 9 Am. Rep. 515.

In *England*, if he has turned her out, and rendered it necessary for her to exhibit articles of the peace against him, he is liable for the attorney's fees therein. Shepherd v. Mackoul, 3 Camp. 326; Turner v. Rookes, 10 A. & E. 47; 37 E. C. L. 35. But compare Grindell v. Godmand, 1 N. & P. 168; Mecredy v. Taylor, 7 Ir. C. L. R. 256.

In the *United States* also, he has been held liable for her expenses in necessarily proceeding against him for breach of the peace. Morris v. Palmer, 39 N. H. 123.

Otherwise, if her proceeding was groundless. Smith v. Davis, 45 N. H. 566.

As to her costs in divorce proceedings generally, see DIVORCE, vol. 5, p. 745; COSTS, vol. 4, p. 319.

Where the wife instituted a suit for divorce, but the husband reconciled her, and she withdrew it, her attorney was not permitted to recover expenses against him. Phillips v. Simmons, 11 Abb. Pr. (N. Y.) 287.

In *Iowa*, it has been that where her attorney had reasonable grounds to believe her entitled to a divorce, but it was refused, the husband was nevertheless bound for the services. Preston v. Johnson, 65 Iowa 285; Porter v. Briggs, 38 Iowa 166. But compare Johnson v. Williams, 2 Greene (Iowa) 97; 54 Am. Dec. 491.

In Porter v. Briggs, 38 Iowa 166; 18 Am. Rep. 27, in holding the husband liable for legal services in a divorce suit brought by the wife to establish her innocence of a charge of adultery made by himself—the court, by Beck, J., declared “necessaries” to include “apparel, furniture, or personal services of servants, mechanics, artists, physicians, or others whom she may employ.”

It has been held that he is not liable for legal services rendered in her successful defense against his divorce suit. Coffin v. Dunham, 8 Cush. (Mass.) 404; 54 Am. Dec. 769; Wing v. Hurlburt, 15 Vt. 607; 40 Am. Dec. 695; Dorsey v. Goodenow, Wright (Ohio) 120; McCullough v. Robinson, 2 Ind. 630; compare Brown v. Ackroyd, 5 E. & B. 819; 85 E. C. L. 818; Shelton v. Pendleton, 18 Conn. 417; Morrison v. Holt, 42 N. H. 478.

In absence of statutory provision therefor, a court will not grant her temporary allowances pending her divorce suit. Harrington v. Harrington, 10 Vt. 505.

Sometimes although the husband prevails in a suit for separation, the court may find cause for declining to order him to pay any allowance. Waring v. Waring, 100 N. Y. 570.

As to her expenses of proceeding for restitution of her conjugal rights, see Wilson v. Ford, L. R., 3 Ex. 63. As to those for separation, see Rice v. Shepherd, 12 C. B. N. S. 332; 104 E. C. L. 330.

In *Louisiana*, he has been held not to be liable for her expenses in a suit *a mensa*, even though she be poor, and

where his wrongdoing compels the separation.¹ So also is he liable therefor, if she, although voluntarily and unjustifiably leaving him, has returned, or has made a *bona fide* offer to return.²

One seeking to charge the husband for necessities furnished must make out a case negating mere captious abandonment.³

entitled to alimony *pendente lite*. State v. Judge, 22 La. Ann. 264.

1. Hodges v. Hodges, 1 Esp. 441; Emmett v. Norton, 8 C. & P. 506; 34 E. C. L. 503; Baker v. Sampson, 14 C. B. N. S. 383; 108 E. C. L. 382; Emery v. Emery, 1 Y. & J. 501; Evans v. Fisher, 10 Ill. 369; Ross v. Ross, 69 Ill. 569; Snover v. Blair, 25 N. J. L. 94; Norton v. Rhodes, 18 Barb. (N. Y.) 100; Clement v. Mattison, 3 Rich. (S. Car.) 93; Zeigler v. David, 23 Ala. 127; Kenyon v. Farris, 47 Conn. 510; 36 Am. Rep. 86.

Where a husband placed a dissolute woman at the head of his table, and confined his wife on a charge of insanity, but she escaped, it was held that he, not verbally forbidding her return, was not liable for necessities furnished her. Horwood v. Heffer, 3 Taunt. 421.

This decision has been severely animadverted upon in *England*. In *Houlston v. Smyth*, 3 Bing. 127; 11 E. C. L. 64, the court, by Gaselee, J., said: "If a man renders his house unfit for a modest woman to remain in it, she is authorized in going away."

The decision has also been disapproved in America, in a case involving precisely the circumstances. *Descellus v. Kadmus*, 8 Iowa 51.

Compare the very similar case of adultery with a servant girl. *Sykes v. Halstead*, 1 Sandf. (N. Y.) 483.

Where the wife was forced by cruelty to take refuge with her father, the husband was held liable for her board, notwithstanding his notification that he would not pay therefor. *Watkins v. De Armond*, 89 Ind. 553. Compare *Eiler v. Crull*, 99 Ind. 375.

2. *Robison v. Gosnold*, 6 Mod. 171 (*sub nom.* *Robinson v. Gosnold*, J. Holt 103); *M'Cutchin v. M'Gahay*, 11 Johns. (N. Y.) 281; 6 Am. Dec. 373; *Cory v. Cory*, 11 N. J. Eq. 400; *Cunningham v. Irwin*, 7 S. & R. (Pa.) 247; 10 Am. Dec. 458; *Williams v. Prince*, 3 Strobh. (S. Car.) 490; *Clement v. Mattison*, 3 Rich. (S. Car.) 93; *Renick v. Picklin*, 3 B. Mon. (Ky.) 166; *Sturtevant v. Starin*, 19 Wis. 268.

From evidence of reconciliation, the

jury may infer his assent to her contracts for necessities thenceforward. *Henderson v. Stringer*, 2 Dana (Ky.) 291.

A note executed by him to a trustee, to induce her to return, is *nudum pactum*. *Copeland v. Boaz*, 9 Baxt. (Tenn.) 223; 40 Am. Rep. 89.

In *England*, it has even been held that a husband who, after condoning his wife's adultery, turns her out, is liable for necessities thereafter furnished her. *Harris v. Morris*, 4 Esp. 41.

See also *Manby v. Scott*, 1 Sid. 109; 1 Lev. 4; and notes thereon in 2 Smith L. Cas. (8th ed.) 451.

In *Rhode Island*, it has been held that even her adultery will not exempt him from paying for support of their child permitted by him to remain in her custody. *Gill v. Read*, 5 R. I. 343; 73 Am. Dec. 73.

And in general, upon his wrongfully driving her out, or rejecting her tender of cohabitation, he has been held to be also liable for the necessary expenses of their child properly in her custody. *Bazeley v. Forder*, L. R., 3 Q. B. 559; *Kimball v. Keyes*, 11 Wend. (N. Y.) 33; *Rumney v. Keyes*, 7 N. H. 571; *Walker v. Loughton*, 31 N. H. 111; *Reynolds v. Sweetser*, 15 Gray (Mass.) 78.

3. *Walker v. Simpson*, 7 W. & S. (Pa.) 83; 42 Am. Dec. 216; *Hultz v. Gibbs*, 66 Pa. St. 360. Compare *Sower's Appeal*, 89 Pa. St. 173.

As to what constitutes desertion, see *DIVORCE*, vol. 5, p. 799. See also *Williams v. Williams*, 130 N. Y. 193.

In *Pennsylvania*, her withdrawal through wrongful representations by his relatives, that she intended to put him in an insane asylum, was held not to be desertion. *Moore's Appeal*, 3 Pa. Sup. Ct. R. (Pa.) 110.

As to what does or does not constitute *sævilia* forcing the wife to remain away, see *Clement v. Mattison*, 3 Rich. (S. Car.) 93; *Briggs v. Briggs*, 24 S. Car. 377; *Breinig v. Meitzler*, 23 Pa. St. 156; *Eshbach v. Eshbach*, 23 Pa. St. 343; *Brown v. Ackroyd*, 5 E. & B. 819; 85 E. C. L. 818.

In *West Virginia*, "a charge of

Her bigamy, if committed through his fault, has been held not to exempt him from liability for her support.¹ So also as to her adultery committed through his connivance.² Proof that the wife, at the time of furnishing her the necessaries, was living in open adultery, constitutes a valid defense to the suit against the husband therefor.³ So also if the plaintiff knew at the time that

prostitution made by the husband against the wife falsely, shall be deemed cruel treatment," etc. W. Va. Code, 1891, p. 613, § 6.

As to *sævitia* of the wife, adjudged insufficient to justify his abandoning her, see *Boyce v. Boyce*, 23 N. J. Eq. 337.

In *Louisiana*, where a wife's "incessant demands for money," scorn and personal violence were met by the husband "with unresisting imbecility," until he abandoned the dwelling, she was held not to be entitled to a decree of separation. *Naulet v. Dubois*, 6 La. Ann. 403. Compare *Lalande v. Jore*, 5 La. Ann. 32.

A husband cannot without justifiable cause be compelled to support his wife elsewhere than at his own home. *Monroe Co. v. Budlong*, 51 Barb. (N. Y.) 493; *People v. Vitan*, 20 Abb. N. Cas. (N. Y.) 298; *Wallace v. Ellis*, 42 Ind. 582; *Morgan v. Hughes*, 20 Tex. 141; *Houts v. Houts*, 17 Ill. App. 439; *Johnson v. Johnson*, 24 Ill. App. 80.

Where they quarreled, and she left him, not through fear of his violence, and refused to return unless he would drive his relatives from the house, he was held not to be liable to her father for board furnished to her meanwhile. *Blowers v. Sturtevant*, 4 Den. (N. Y.) 46.

In *California*, "the husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto. Cal. Civil Code, 1885, § 156. "Neither can be excluded from the other's dwelling." § 157.

In *Idaho*, the same. *Idaho Rev. Stat.* 1887, § 2494.

But in *New Jersey*, where a husband opened a boarding house in another city, with a woman who was unfriendly to his wife, and insincerely invited the wife to come there, he was held to be liable for her support elsewhere. *Elliott v. Elliott*, 48 N. J. Eq. 231.

In *Louisiana*, the wife must follow the husband wherever he fixes his domicile. *Chretien v. Chretien*, 5 Martin, N. S. (La.) 60.

In *New York*, as to the residence of the husband not drawing with it the residence of the wife in divorce jurisdiction, see *Toosey v. Toosey*, 14 Daly (N. Y.) 537; *De Meli v. De Meli*, 120 N. Y. 485; 17 Am. St. Rep. 652.

1. In A's action to recover of B for the support of A's sister C, it appeared that B had married C in London, had forced her away by cruelty, and married D, with whom, after serving a sentence of bigamy therefor, he came to Massachusetts and procured report that he was dead. C then married E, but B caused her to be sentenced for bigamy therefor, and she never after lived with E, but was supported by A. Held, that A was entitled to recover. *Cartwright v. Bate*, 1 Allen (Mass.) 514; 79 Am. Dec. 759. But compare *Com. v. Mash*, 7 Met. (Mass.) 472.

As to questions turning upon one's remarriage through mistaken belief in the other's death, see *BIGAMY*, vol. 2, p. 194. See also *ABSENCE*, vol. 1, p. 37; *Cropsey v. McKinney*, 30 Barb. (N. Y.) 47.

In *Colorado*, an unmarried person's knowingly marrying the wife of another person is punishable by fine or imprisonment. Colo. Annot. Stat. 1891, § 1318.

2. *Wilson v. Glossop*, 19 Q. B. Div. 379; 20 Q. B. Div. 354 (citing *Hope v. Hope*, 1 Swab. & Tr. 94; and *distinguishing Seaver v. Seaver*, 2 S. & T. 665, a case of mutual guilt; and *Drew v. Drew*, Cas. Eccl. & M. 315; where, in suit for restitution of conjugal rights, there was a plea of *compensatio criminis*).

In *New Hampshire*, it has been held that his duty to support her is not terminated by her adultery committed with his written consent given on condition that she shall not look to him for support. *Ferren v. Moore*, 59 N. H. 107.

3. *Emmett v. Norton*, 8 C. & P. 506; 34 E. C. L. 503; *Atkins v. Pearce*, 2 C. B. N. S. 763; 89 E. C. L. 762.

Otherwise, where he left her in his house with two children bearing his name. *Norton v. Fazan*, 1 B. & P. 226.

the husband had discarded her for her adultery.¹ Separation by insanity of either does not change the general rule as to their rights and liabilities meanwhile.² The husband's liability, upon separation, for the support of a pauper wife, is not the same in all the States; owing ordinarily to the difference in their poor laws.³

IV. COMPULSORY STATUTES.—In many States, a statutory provision is made for compulsory support of the wife by a husband unjustifiably abandoning her.⁴

In absence of proof of her guilt, her actual want of the necessities must be clearly shown. *Hardie v. Grant*, 8 C. & P. 512; 34 E. C. L. 506.

She may be a witness to prove the adultery, and that her husband's visits to her were only to negotiate a deed of separation. *Cooper v. Lloyd*, 6 C. B. N. S. 519; 95 E. C. L. 518. And it has been held that after her adultery and being consequently turned away, he is not bound to support her, even though himself had previously committed adultery. *Govier v. Hancock*, 6 T. R. 603. But in such case he was not allowed to prove her adultery by mere evidence of proceedings to a verdict in the divorce court without a decree. *Needham v. Bremner*, L. R., 1 C. P. 583.

If he turns her out after condoning her adultery, he is liable for subsequent necessities furnished her. *Harris v. Morris*, 4 Esp. 41.

Where she had left in consequence of a dispute, it was held that the party seeking to render him liable for her board and lodgings must show either that his conduct rendered it improper for her to live with him, or that he knew where she was residing, and made no right-conditioned offer to take her back. *Reed v. Moore*, 5 C. & P. 200; 24 E. C. L. 277. Compare *Rex v. Flintan*, 1 B. & Ad. 227; 20 E. C. L. 380.

1. *Govier v. Hancock*, 6 T. R. 603. See *dicta* in the noted case, *Forrest v. Forrest*, 9 Abb. Pr. (N. Y.) 289. See also *Dailey v. Dailey*, Wright (Ohio) 514.

The fact that she had been jailed on a complaint for adultery was held to be sufficient notice. *Hunter v. Boucher*, 3 Pick. (Mass.) 289.

It has even been held that where the wife eloped with an adulterer, the husband was not liable, although the tradesman had no notice of the fact. *Morris v. Martin*, 1 Stra. 647.

2. *Richardson v. Du Bois*, L. R., 5 Q. B. 51; *Read v. Legard*, 6 Exch. 636.

The husband's insanity does not necessarily exempt his estate from liability for necessities furnished. *Read v. Legard*, 6 Exch. 636; *Davidson v. Wood*, 1 De G. J. & S. 465.

The wife of a lunatic cannot transfer his property to pay one creditor, to the prejudice of the others. *Alexander v. Miller*, 16 Pa. St. 215.

In an action for necessities, the validity of her marriage to a lunatic cannot be questioned. *Stuckey v. Mathes*, 24 Hun (N. Y.) 461.

In *Colorado*, allowances may be made to the wife of a solvent lunatic as to a widow. Colo. Annot. Stat. 1891, § 294.

3. In *New York*, the wife of a husband able to support her is not a "pauper" within the statute; and although he unjustifiably turns her out, the superintendents of the poor cannot recover of him for necessities furnished her. *Norton v. Rhodes*, 18 Barb. (N. Y.) 100.

In *Massachusetts*, otherwise. *Monson v. Williams*, 6 Gray (Mass.) 416.

In *Vermont*, he is liable for not over one year's support. *Vt. Rev. Laws*, 1880, § 2821.

In *Ohio* also, he is liable. *Springfield Tp. v. Demott*, 13 Ohio 104; *Howard v. Whetstone Tp.*, 10 Ohio 365.

In *Iowa*, the husband is not liable for expenses of a treatment of his insane wife in the State hospital. *Delaware Co. v. McDonald*, 46 Iowa 170.

In *West Virginia*, otherwise. W. Va. Code, 1891, p. 588, § 41.

See generally POOR AND POOR LAWS, vol. 18, p. 766.

4. As to what constitutes desertion, etc., see DIVORCE, vol. 5, p. 799. As to the custody of the children, see PARENT AND CHILD, vol. 17, p. 364.

The *Massachusetts* statute affords a good illustration. "When a husband

fails, without just cause, to furnish suitable support for the wife, or has deserted her, or when the wife, for justifiable cause, is actually living apart from her husband, the probate court may, by its order on the petition of the wife, or, if she is insane, on the petition of her guardian or next friend, prohibit the husband from imposing any restraint on her personal liberty for such time as the court shall in such order direct, or until the further order of the court thereon; and the court may, upon the application of the husband or wife or of her guardian, make such further order as it deems expedient concerning the support of the wife, and the care, custody, and maintenance of the minor children of the parties, and may determine with which of the parents, the children or any of them shall remain; and may, from time to time, afterwards, on a similar application, revise and alter such order, or make a new order or decree, as the circumstances of the parents or the benefit of the children may require." Mass. Pub. Stat. 1882, p. 823, § 33.

This statute is constitutional, although it makes no provision for trial by jury. *Bigelow v. Bigelow*, 120 Mass. 320. The husband, though under guardianship as a spendthrift, may be prohibited from restraining the wife's liberty. *Kavanaugh v. Kavanaugh*, 146 Mass. 40. The probate court cannot, without consent, order payment of a sum in gross for all the future support of the wife. *Doole v. Doole*, 144 Mass. 278. As to the effect of the decree in evidence, see *Barney v. Tourtellotte*, 138 Mass. 106. The fact that the husband has deserted his wife and gone to another State, does not preclude the statutory award for separate maintenance. *Blackinton v. Blackinton*, 141 Mass. 432; 55 Am. Rep. 484. The petition may be granted, although the living apart was only for a day. *Smith v. Smith*, 154 Mass. 262. The fact that she has executed a release of all claim for support, and that the consideration has been received by her, is no bar to her petition. *Silverman v. Silverman*, 140 Mass. 560.

Where an attachment has been ordered for separate maintenance, successive executions may be issued thereon. *Downs v. Flanders*, 150 Mass. 92.

Massachusetts also affords a good representative of statutes declaring such abandonment a criminal offense. "Whoever unreasonably neglects to

provide for the support of his wife or minor child shall be punished by fine not exceeding \$20, or imprisoned in the house of correction not exceeding six months;" the fine, at discretion of the court, to go to the town, city, society or person actually supporting, etc. Mass. Stat. 1885, ch. 176.

In a prosecution thereunder, the complainant, to rebut the husband's charge that she had failed in her marital duty, was permitted to adduce a decree of the probate court for her separate maintenance, also a decree dismissing his libel for divorce. *Com. v. Ham* (Mass. 1892), 31 N. E. Rep. 639.

In *England*, by Stat. 20 Vict. ch. 85, a wife wrongfully deserted by her husband, may have an order for protection of her property; and upon judicial separation, have the rights of a *feme sole*. As to requisites of proof of one's refusal to support his wife, in a case thereunder, see *Flannagan v. Bishop Wearmouth*, 8 E. & B. 450; 92 E. C. L. 450.

In *Alabama*, upon voluntary separation, the chancery court may, on petition of either party, give either the father or mother "the custody and control of the children and to superintend and direct their education, having regard to the prudence, ability and fitness of the parents, and the age and sex of the children." Ala. Code, 1886, § 2368.

The expression "voluntary" applies to a case where the conduct of the husband, though not amounting to legal cruelty or other cause of divorce, has justified the wife in leaving his house and going to her father's. And the custody of a daughter five years old was in such case given to the wife. *Anonymous*, 55 Ala. 428.

In *California*, by the act of 1874, "if the husband neglect to make adequate provision for the support of his wife, except in the cases mentioned in the next section, any other person may in good faith supply her with articles necessary for her support, and recover the reasonable value thereof from the husband." Cal. Civil Code, 1885, § 174. "A husband abandoned by his wife is not liable for her support until she offer to return, unless she was justified, by his misconduct, in abandoning him; nor is he liable for her support when she is living separate from him by agreement, unless such support is stipulated in the agreement." § 175.

The husband is not bound to maintain his wife's children by a former marriage, unless he has taken them into the family. Cal. Civil Code, 1885, § 209. Compare, as to one *in loco parentis*, *Williams v. Hutchinson*, 5 Barb. (N. Y.) 122. Under § 136, the court, though refusing the wife a divorce, may require the husband to provide for her maintenance apart. *Hagle v. Hagle*, 68 Cal. 588.

In *Colorado*, as to compulsory support pending her suit for divorce, see Colo. Annot. Stat. 1891, § 1567. His liability for her ante-nuptial debts is not extinguished by her death. § 3015.

In *Connecticut*, any husband neglecting, without good cause, to support his wife, may be sentenced to hard labor for not more than sixty days, or compelled to give bond, etc. Conn. Gen. Stat. 1888, § 3402.

Upon a prosecution for failure to support, her adultery is a sufficient defense. *State v. Schweitzer*, 57 Conn. 532.

In the *Dakotas*, as to the wife's remedy against the liquor seller, for consequences of the husband's drunkenness, see Dak. Comp. Stat. 1887, § 2206.

A wife through cruelty justifiably living apart, may maintain an action for support, without asking for a divorce. *Bueter v. Bueter* (S. Dak. 1890), 45 N. W. Rep. 208.

In *Delaware*, a husband deserting his wife without provision, etc., is liable to have his property sequestered by the board of trustees of the poor. Del. Laws, 1874, p. 236, § 15.

As to the effect of a special legislative divorce giving a wife all the rights of a *feme sole*, see *Stilley v. Grubb*, 1 Del. Ch. 406.

In *Florida*, in case of his cruelty or desertion, the court will intercept her estate in his hands, or remove him as trustee. *Abernathy v. Abernathy*, 8 Fla. 243. As to the *ganancial* rights of husband and wife, see *McGee v. Doe*, 9 Fla. 382. He is not liable for her ante-nuptial debts. Fla. Dig. Laws, p. 755, § 7.

In *Georgia*, "if any man shall whip, beat, or otherwise cruelly maltreat his wife, he shall be deemed guilty of a misdemeanor, and . . . the wife shall be a competent witness." Ga. Code, 1882, § 472.

The statute, rendering him liable for her support (§ 1758), is like that of California, *supra*. She may, without

applying for a divorce, maintain an action against him for intolerable cruelty. *Glass v. Wynn*, 76 Ga. 319.

In *Illinois*, as to the wife's right upon his abandoning her or being imprisoned, see Ill. Rev. Stat. 1891, p. 792, § 11. As to her support, while living apart without her fault, see § 22.

They are not living "separate and apart," within the statute giving her a right to separate maintenance, if they are dwelling in the same house, and eating at the same table, though not occupying the same room. *Klemme v. Klemme*, 37 Ill. App. 54. She must show that the living apart was without her fault. *Jenkins v. Jenkins*, 3 Ill. App. 641; *Cooper v. Cooper*, 4 Ill. App. 285; *Tureman v. Tureman*, 4 Ill. App. 335; *Hunter v. Hunter*, 7 Ill. App. 253; *Umlauf v. Umlauf*, 9 Ill. App. 517.

As to compulsory support pending her suit for divorce, see Ill. Rev. Stat. 1891, p. 546, §§ 15, 18.

On a bill for separate maintenance, temporary alimony may be granted, this being not an incidental, but a homogeneous, part of the subject-matter. *Johnson v. Johnson*, 20 Ill. App. 495. As to the requisites of such bill, see *Fountain v. Fountain*, 23 Ill. App. 529. Upon mutual fault, and her refusal of his request to return, a decree for separate maintenance will not be granted. *Schraeder v. Schraeder*, 26 Ill. App. 524. The mere fact of his insanity will not entitle her to a decree for separate maintenance. *Nuetzel v. Nuetzel*, 13 Ill. App. 542.

In *Indiana*, the wife, by an ordinary suit against the husband, may obtain support when he has deserted her without cause and without provision, or has been convicted of a felony and imprisoned, or is an habitual drunkard, or renounces the marriage covenant, or refuses to live with her in the conjugal relation, by joining himself to a sect, the rules of which require such renunciation. Ind. Rev. Stat. 1888, § 5132.

The *Indiana* act for relief of a "deserted" wife, does not apply to a deserting one. *Stanbrough v. Stanbrough*, 60 Ind. 275. An omission in the complaint to allege that his deserting her was without cause, is cured by verdict. *Harris v. Harris*, 101 Ind. 498. His unjustifiably deserting her is punishable by fine. Ind. Rev. Stat. 1888, § 2133.

In *Iowa*, on abandonment by either

and absence from the State for one year, without provision, or imprisonment for a year or more, the abandoned spouse may, by ordinary action in the district or circuit court, become authorized "to manage, control, sell and incumber the property of the husband or wife, for the support of the family, and for the purpose of paying debts." McClain's Iowa Code, 1888, § 3398.

In case of her justifiable withdrawal, an action lies for support without applying for a divorce. *Finn v. Finn*, 62 Iowa 482; *Farber v. Farber*, 64 Iowa 362; *Platner v. Platner*, 66 Iowa 378.

In *Kansas*, "the wife may obtain alimony from the husband without a divorce, in an action brought for that purpose in the district court, for any of the causes for which a divorce may be granted." Kan. Gen. Stat. 1889, § 4762.

In *Kentucky*, "where the husband abandons the wife, or fails to make sufficient provision for her maintenance, or where he is confined in the penitentiary for an unexpired term of more than one year, the wife may, by action in equity, be empowered to use, enjoy and sell, for her own benefit, any property she may acquire or may have acquired; to make contracts, sue and be sued;" may "sell and convey by her own deed," etc. "But the husband, upon manifesting proper disposition again to live with his wife and make suitable provision for her or upon his release from the penitentiary, by his petition in such action may, in the discretion of the court, have all or part of said powers set aside, be permitted to take upon himself the prosecution or defense of any pending action against her." Ky. Gen. Stat. 1887, p. 722, § 5.

In *Louisiana*, their voluntary separation does not prevent their acquisitions from falling into the community. *Joffrion v. Bordelon*, 14 La. Ann. 628. But compare *Wooters v. Teny*, 12 La. Ann. 449.

In *Maine*, a wife whose husband has abandoned her and left the State, or is in execution of sentence in the State prison, may be authorized by the supreme judicial court to contract, etc., as a *feme sole*. Me. Rev. Stat. 1883, p. 525, § 7.

In *Maryland*, as to the unconstitutionality of acts wherein the legislature assumes judicial determination of a wife's allowances, see *Crane v. Megin-*

nis, 1 Gill. & J. (Md.) 463; 19 Am. Dec. 237.

In *Michigan*, an abandoned wife may, in the probate court, obtain relief like that in *Massachusetts*. Mich. Stat. 1882, § 6264. Although her withdrawal was justifiable, her suit for support will be defeated by very long and inexcusable delay—*e. g.*, eighteen years. *Reed v. Reed*, 52 Mich. 117; 50 Am. Rep. 247. If there are young children, very imperative reasons will be required. *Davidson v. Davidson*, 47 Mich. 151.

One who is a minor is not liable to a criminal prosecution for failure to support his wife, unless he has the means, or has been emancipated. *People v. Todd*, 61 Mich. 234.

In *Minnesota*, the support may be ordered, with or without a decree of separation. Minn. Stat. 1891, § 3924.

In *Mississippi*, as to the wife's rights and remedies, see *Wells v. Treadwell*, 28 Miss. 717; *Stephenson v. Osborne*, 41 Miss. 119; 90 Am. Dec. 358.

In *Nebraska*, as to their rights on separation after her violation of the terms of his trust deed, see *Austin v. Austin*, 18 Neb. 310.

In *Missouri*, as to the requisites for a conviction for abandonment, see *State v. Broyer*, 44 Mo. App. 393. As to the unconstitutionality of acts wherein the legislature assumes judicial determination of a wife's allowance, etc., see *State v. Fry*, 4 Mo. 125. The wife may forfeit her dower by her adultery. *McAlister v. Novenger*, 54 Mo. 251. As to what is a "vagrant" husband within the divorce act, see *Dwyer v. Dwyer*, 26 Mo. App. 647.

His refusal to assure her of a discontinuance of intolerable insults from his relatives, was held to entitle her to a separate maintenance. *Spengler v. Spengler*, 38 Mo. App. 266.

His deserting her without good cause is punishable by fine and imprisonment; and on the trial, the marriage may be proved by adducing in evidence therefor the same facts as in a civil action. Mo. Rev. Stat. 1889, § 3501.

In *New Hampshire*, the wife may, on abandonment, in the supreme court, obtain relief like that afforded by the probate court in *Massachusetts*. N. H. Pub. Stat. 1891, p. 499, § 4.

The wife of an alien may, after six months, acquire the rights of a *feme sole*, and have the custody of her minor

children. N. H. Pub. Stat. 1891, p. 499, § 8. His becoming a citizen and cohabiting, has the effect of marriage upon her contracts and business, § 9.

Alimony was refused when sought disconnected with a suit for divorce. *Parsons v. Parsons*, 9 N. H. 309; 32 Am. Dec. 362.

In *New Jersey*, a husband neglecting to support his family, may be compelled by the overseer of the poor, as a "disorderly person." N. J. Rev. St. 1877, p. 305, § 5. As to the procedure thereupon by the board of chosen freeholders, under the act of 1882, see N. J. Supp. 1887, p. 219, § 2. Equity will decree sale of property of a neglected wife living separate; and she may sell as if sole, p. 447.

Where a husband withdrew from the wife on the alleged ground of her physical formation, etc., but she was willing to cohabit, it was held that she was entitled to relief on her bill for maintenance. *Van Arsdalen v. Van Arsdalen*, 30 N. J. Eq. 359. A husband having an income of \$5,000 per annum, and leaving his wife to support herself and child in one of his houses, or rents of others (\$60 per month), was held guilty of "refusing and neglecting to provide for her" within the maintenance act. *O'Brien v. O'Brien* (N. J. 1892), 23 Atl. Rep. 1073. A husband's departure to another city and opening a boarding house with a woman unfriendly to his wife, although accompanied with an invitation to come and dwell with him (evidently aimed for defense to her suit for maintenance), was held to be an abandonment, within the statute. *Elliott v. Elliott*, 48 N. J. Eq. 271.

In *New Mexico*.—"Whenever any difficulty arises between the husband and wife on account of the failure of either to fulfill any of the duties named in the preceding section" [§ 988: "She is obliged to live with him" . . .], "it shall be lawful for the injured party to go before the justice of the peace of the precinct and make complaint." . . . *New Mexico Comp. Laws*, 1884, § 989 . . . "It shall be the duty of the justice to endeavor to effect a reconciliation. . . . In case of resistance, the said justice may order that such person be confined in the county jail, there to remain until he comply with those duties by which both the husband and wife were both mutually bound."

In *New York*, where a husband

leaves his wife or child a public charge, his property may be seized by the superintendent of the poor or other proper officer, and on confirmation of the warrant by the court of sessions, may be sold, and the proceeds be applied to pay taxes, liens, repairs and insurance, and the residue for the support and care of the wife and child, etc. N. Y. Rev. Stat. 1890, p. 2277, § 138.

If she has unjustifiably left him, and he offers to maintain her at a place of her own selection, the order will not be granted. *People v. Naehr*, 30 Hun (N. Y.) 461. Circumstances to justify a decree of maintenance must be such as to justify a decree of separation. *Ruckman v. Ruckman*, 58 How. Pr. (N. Y.) 278. As to alteration of the decree according to changed circumstances, see *Erkenbrach v. Erkenbrach*, 63 How. Pr. (N. Y.) 194.

As to the unconstitutionality of acts wherein the legislature assumes judicial determination of a wife's allowances, etc., see *Holmes v. Holmes*, 4 Barb. (N. Y.) 295. As to varying allowances, see *Miller v. Miller*, 6 Johns. Ch. (N. Y.) 91; *Forrest v. Forrest*, 6 Duer (N. Y.) 102, 142; 3 Bosw. (N. Y.) 674.

It seems that the *New York* statutory provision for a recognizance by a neglectful husband was designed to enforce actual physical support only. *People v. Pettit*, 74 N. Y. 320. As to the requisites thereof, see *Bulkley v. Boyce*, 48 Hun (N. Y.) 259. As to practice on his appeal, see *People v. Hodgson*, 126 N. Y. 647. As to a retroactive order for support, see *Percival v. Percival*, 124 N. Y. 637.

In *North Carolina*, a husband deserting his wife and living in adultery, forfeits all his right to her personal property, or to property settled upon her at the marriage. N. Car. Code, 1883, § 1845. A wife eloping with an adulterer, and not living with her husband at his death, loses all right of dower. § 1844.

In *Ohio*, if the husband neglects to provide for the wife, any other person may in good faith supply her with necessaries, and recover the reasonable value thereof from the husband, unless she has unjustifiably abandoned him, and does not offer to return. Ohio Rev. Stat. 1890, §§ 3116-7.

In *Oklahoma*, if the husband has deserted the wife, or is imprisoned, she may prosecute and defend in his name, etc. Okl. Stat. 1890, § 4319.

In *Pennsylvania*, if a husband neglects to provide for his wife, she may avail herself of the sole trader act of 1718, B. P. Dig. Pa. L., p. 1154, § 27. Any husband who, for one year before his wife's death, has willfully neglected to provide for her or has deserted her, forfeits all claim and right to her real or personal estate, after her death, as tenant by the curtesy, or under the intestate laws. § 30.

A special legislative act of divorce has been held to be no ground for vacating a judicial order for a weekly allowance for the wife's support. *Philadelphia v. Thiele*, 10 Phila. (Pa.) 205.

To establish her claim on his estate for her support, she must show that her withdrawal was not caused by her own misconduct. *Lippincott's Estate*, 14 Phila. (Pa.) 277. In a desertion case, the allowance may be increased or diminished, or revoked according to the changed relation of the parties. *Com. v. Jones*, 90 Pa. St. 431.

On his deserting her, she may maintain an action under the act of 1855, for support; and may begin it by attaching his property. *Reilly v. Reilly*, 4 Brewst. (Pa.) 169. As to drunkenness of the husband, and the wife's rights thereupon under the act of 1855, see *Black v. Tricker*, 59 Pa. St. 13. As to the jurisdiction of a proceeding under the desertion act of 1867, see *Barnes' Appeal*, 2 Pa. Supr. Ct. R. (Pa.) 506; *McKendry v. McKendry*, 131 Pa. St. 24.

A deserting husband's right in his wife's estate is not restored by his merely having contributed to her support. *Birchard's Estate* (Pa. 1892), 11 Co. Ct. R. 234. Her deserting him and living in adultery, if condoned, does not deprive her of her rights as distributee in his estate. *Drinkhouse's Estate* (Pa. 1892), 11 Co. Ct. R. 96; 29 W. N. C. (Pa.) 35.

Where, in fulfillment of their agreement of separation, the husband had given her certain cash and bank stock, it was held that he was not liable to prosecution for failure to support her. *Com. v. Richards*, 131 Pa. St. 209.

In *Rhode Island*, a wife entering the State alone, may, after so continuing one year, acquire the rights of a *feme sole*. R. I. Pub. Stat. 1882, p. 420, § 4.

In *South Carolina*, "If a wife leave her husband and go away, and continue with her advouter, she shall be barred forever of action to demand

her dower. . . ." *South Carolina* Gen. Stat. 1882, § 799, "A married woman shall have the right to purchase any species of property in her own name, and to take proper legal conveyances therefor, and to convey and be contracted with as if she were unmarried," provided her husband shall not be liable for her debts, except for her necessary support. § 2037.

In *Tennessee*, as to the rights of a wife, in her husband's absence, to dispose, etc., by will or deed, see *Tenn. Code*, 1884, § 3344-6.

If his cruelty has compelled her to leave him, she may have a decree for rents and profits of land in his possession acquired by her since the marriage. *Corley v. Corley*, 8 Baxt. (Tenn.) 7.

In *Texas*, a wife suing for divorce, may, on oath that the husband will waste either her separate property, or their common property, or the revenues, may obtain a writ of sequestration. *Tex. Civil Stat.* 1889, § 4489. Or an injunction, § 2873. See *Wright v. Wright*, 3 *Tex.* 168. His deserting her and living in adultery does not deprive him of his interest in the community property, nor confer on her any rights except of management, and if necessary of disposal thereof. *Hensley v. Lewis*, 82 *Tex.* 595.

The wife of a deserting husband, not suing for a divorce, cannot compel him to support her. *Trevino v. Trevino*, 63 *Tex.* 650.

In *Vermont*, "a married woman whose husband deserts her, or from intemperance or other cause becomes incapacitated or neglects to provide for his family, may in her name make contracts for her labor and the labor of her minor children, shall be entitled to her and their wages, and in her own name may sue for and recover them." *Vermont Rev. L.* 1880, § 2327. And the county court may invest her with the rights of a *feme sole*; may authorize her to sell her realty and his personality for her support; and the chancellor may give her sole use of his realty, §§ 2328-2333. Similarly, in ease of his imprisonment. § 2334. As to her remedy against the liquor seller for consequences of the husband's drunkenness, see § 3834. As to the town's recovering of him for her support, see §§ 2820-1.

The county court may prohibit a deserting husband from restraining his wife's liberty. *Vt. L.* 1892, p. 49. His

Definition.

SEPULCHER—SEQUESTRATION.

Definition.

SEPULCHER.—The place where a corpse is buried.¹

SEQUESTRATION.—(See also ATTACHMENT, vol. 1, p. 894; EQUITY, vol. 6, p. 683; EQUITY PLEADINGS, vol. 6, p. 724.)

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I. DEFINITION.—To sequester, in the civil law, is to renounce or disclaim; or to deposit the subject of a controversy in the hands of a third person to hold for the contending parties.² Under the law of *Louisiana*, a judicial sequestration is a mandate of the court ordering the sheriff to keep the thing in controversy until after the termination of the suit.³

failure to support her after notification by the overseer of the poor, is a misdemeanor finable not more than \$20, p. 51.

In *Virginia*, by willfully deserting her until her death, he forfeits "all interest in her separate or other estate as tenant by the curtesy, distributee or otherwise." Va. Code, 1887, § 2296. He is not liable for her ante-nuptial debts incurred in respect to her separate estate. § 2290.

Since the married women's act, the husband's curtesy initiate in his wife's lands cannot be sold to pay his debts. *Welsh v. Solenberger*, 85 Va. 441. As to the effect of a separation agreement upon his tenancy by the curtesy, see *Dooley v. Baynes*, 86 Va. 644.

In *Washington*, as to the wife's remedy against the liquor-seller for the consequences of the husband's drunkenness, see Wash. Gen. Stat. 1891, § 2528.

In *West Virginia*, a decree of separation may provide "that the parties be perpetually separated and protected in their persons and property." W. Va. Code, 1891, p. 614, § 12.

In *Wisconsin*, whenever the husband or wife is about to abscond or he refuses to support her, "the mayor of the city, president of the village, or supervisors of the town" may issue a warrant, etc., against his or her goods, etc., and on confirmation by the county court, sufficient shall be sold at auction for the maintenance, etc. The property may be restored on bond, etc. Wis. Annot. Stat. 1889, §§ 1506-1510. As to her remedy against the liquor seller

for consequences of the husband's drunkenness, see § 1560. When he "shall have deserted her, or shall, from drunkenness, profligacy, or any other cause neglect or refuse to provide for her support, or for the support and education of his children, she shall have the right to transact business in her own name, and to collect and receive the profits of such business, her own earnings, and the earnings of her minor children in her charge," etc., without his interference, or liability for his debts. § 2344.

In *Wyoming*, pending her suit for divorce, the court may prohibit him from restraining her personal liberty. *Wyoming Rev. Stat.* 1887, § 1577. He may also be required to give security for obedience to the orders of the court, as to his property, etc. § 1583. He is not liable for her ante-nuptial debts. § 1563.

1. See BURIAL, vol. 2, p. 698; CEMETERIES, vol. 3, p. 49; DEAD BODY, vol. 5, p. 115.

2. Black's L. Dict.; Bouv. L. Dict.

3. *Louisiana Code*, art. 269. See *infra*, this title, *In Louisiana and Texas*.

In *Pitot v. Elmes*, 1 Martin (La.) 79, the court by Lewis, J., said: "The only case of sequestration known to the civil law is when two persons, or more, lay claim to the same property. In this case the judge orders that, *pendente lite*, the property in dispute shall remain in the hands of the sequestrators. According to the laws of *Spain* when a creditor proves his demand, and shows to the satisfaction of the judge, that the

In chancery practice a writ of sequestration affords a remedy for the enforcement of a decree, or for the preservation of the thing in controversy during the suit.¹ The term is used also in *English* ecclesiastical law. In international law to sequester is to seize the property of an individual and appropriate it to the use of the government.²

II. IN EQUITY PRACTICE—1. In General.—The process was brought into the *United States* with the chancery system, from *England*, and has been recognized by the courts and adopted in many of the States.³ Although in a great measure superseded, it has

debtor is wasting his goods, so that there is danger that, without some summary relief, the property of the debtor will be destroyed or removed out of the reach of the creditor, before, in the ordinary course of business, judgment may be obtained, the judge orders the debtor's property to be sequestered, unless he gives surety to the creditor.

"This sequestration is not a proceeding *in rem*. It creates no lien in favor of the person who obtains it. It is not always an original process; it is a mere provisional order, which may be had at any stage of the suit and the judgment that intervenes, is against the estate of the debtor generally, not more against the sequestered property than against any other part of it. It consequently creates no lien, no privilege."

1. 3 Bl. Com. 444; Abb. L. Dict.; Daniel's Ch. Pr. (Am. ed. 1865), vol. 2, p. 1063.

2. Black's L. Dict.

3. In *Keighler v. Ward*, 8 Md. 254, the court by Mason, J., said: "We have no doubt that this writ is in full force in this State both as a *mesne* process against a party in contempt, as well as a judicial writ to enforce the performance of a decree, and in its latter office may be said to be analogous to an execution at law. The process of sequestration came with our chancery system from *England* and has since been fully recognized and adopted by our legislature, as appears from the act of 1785, ch. 72, § 25. The circumstance that it has never been resorted to in practice in the State does not, on that account, render it inoperative or powerless."

It was said in *Clymer v. Willis*, 3 Cal. 363; 58 Am. Dec. 414, that if an attaching creditor of an execution plaintiff were otherwise remediless, it might be that chancery would afford relief by process of sequestration.

In *In re Hoare*, 14 Ch. Div. 41, it

was questioned whether a writ of sequestration could be properly issued to enforce a simple judgment for a debt, or to enforce an order upon a judgment debtor's summons.

In *Hosack v. Rogers*, 11 Paige (N. Y.) 603, it was said to be doubtful whether a sequestration could be granted where, by the non-imprisonment act, a party cannot be committed upon execution, or by attachment for not paying the money due upon a decree in a suit founded on contract.

Under the rule of the United States circuit court, if the delinquent party cannot be found, a writ of sequestration issues against his estate upon a return of *non est inventus* to compel obedience to the decree. See the 8th Equity rule.

In *Steam Stone Cutter Co. v. Sears*, 9 Fed. Rep. 8, the plaintiff, as owner of a patent, brought a bill against a company for infringement and obtained a decree establishing the title to and validity of the patent, the fact of infringement, and for an account of the profits. After the decree, on application of the plaintiff, a writ of sequestration in the nature of an attachment, to create a lien for satisfying the decree, was issued and served by attaching the real estate of the defendant. The only question made was as to whether the court had power to issue such writs and whether the service of such a writ in that manner created a lien that would hold until decree, and it was held, that the court had the power and that by the due service of such a writ a valid lien was created.

In *Shainwald v. Lewis*, 6 Fed. Rep. 766, a decree was entered against the respondent by which he was adjured to have obtained possession of the funds of a bankrupt firm of which the complainant was assignee, by fraud. He was decreed to be a trustee for the

not, as a general rule, been prohibited or abolished, and may be resorted to whenever it may be deemed necessary or advisable.¹

complainant, of such funds and was ordered to pay over the amount as ascertained by the decree. An execution was issued and returned unsatisfied. The court by Hoffman, J., said: "The appointment of a receiver of all the property of the defendant is, in truth, as we have seen, in the nature, not of an attachment, but of a sequestration, which by the ancient practice of the court of chancery of *England*, issued as of course upon failure of the defendant to comply with the decree, and the process of sequestration is still in use in *England*. We have also seen that the court will now, where a sequestration has been ordered to enforce a decree for the payment of money, order the sequestrators to apply what they have received, by virtue of the sequestration, in satisfaction of the decree. . . . The decree was obtained in this court; and perhaps a writ of sequestration might have issued at once upon the failure of the defendant to comply with the decree, as it certainly could have done if the decree had been for the specific performance of some act."

1. *White v. Geraardt*, 1 Edw. Ch. (N. Y.) 336.

In *Hosack v. Rogers*, 11 Paige (N. Y.) 603, the court by Walworth, Ch., said: "The process of sequestration, although it has gone almost out of use since the statute allowing an ordinary execution against the real as well as the personal estate of a party, to enforce the payment of money decreed by this court, may be properly resorted to as a means of enforcing the performance of other decrees, when attachment cannot be served, or when the defendant chooses to remain in prison after his commitment for contempt of the court."

Vermont.—In *Steam Stone Cutter Co. v. Jones*, 13 Fed. Rep. 567, it was said that the use of the writ of sequestration as *mesne* process of attachment in a suit in equity in the court of chancery of *Vermont* is coeval with the institution of the court. It is not the writ of sequestration known to the English chancery; but is merely an attachment by *mesne* process in an equity suit.

The court by Blatchford, J., said: "It is a *mesne* security given *pendente lite*,

operating, in that regard and to that end, like a provisional injunction or a temporary receivership, or a writ of *ne exeat* or other filing of a *lis pendens*."

North Carolina.—There is a distinction in the course that will be taken by the court between the ordinary case of an injunction to stay execution upon a judgment at law and a sequestration. In the former case, if the equity of the bill be derided fully and fairly in the answer, the defendant will be entitled to a dissolution of the injunction; but in the latter case the right of the plaintiff to have the property sequestered pending the litigation does not depend upon the "equity conferred by the answer;" and the court having secured the fund, will keep it secured until the rights of the parties are adjudicated, unless the application was improvidently granted; or unless, upon the coming in of the answer it appears, taking the whole together, that the claim of the plaintiffs is unfounded; or that the security is unnecessary. *McDaniel v. Stoker*, 5 Ired. Eq. (N. Car.) 274.

Pennsylvania.—In *Philadelphia, etc., R. Co.'s Appeal*, 70 Pa. St. 355, a judgment was recovered against the Philadelphia, etc., Railroad Company. The plaintiff issued a *fi. fa.* which the sheriff returned unsatisfied. The plaintiff petitioned for and obtained a writ of sequestration and a sequestrator was appointed. The defendants assigned as error the awarding of the writ of sequestration. *Held*, that by the act of April 7, 1870, instead of sequestration based upon the *fi. fa.* under the act of 1836, unsatisfied in whole or in part, an alias *fi. fa.* may be issued to seize and sell the franchises and property of the delinquent corporation out and out; that sequestration was not grantable, and that proceedings below must be reversed.

The court by Thompson, C. J., said: "The Act of 1870 undoubtedly supplies the provisions of the Act of 1836 in regard to insolvent corporations to the extent noticed. Both cannot possibly co-exist as remedies. A judgment creditor proceeding by sequestration could not restrain another from proceeding by execution, the obvious result of which would be to put an end to sequestration by a sale of the property and franchises. There is

The process of sequestration is used in proceedings for contempt.¹

Formerly, it was the appropriate process to compel the defendant to answer; or to pay money into court or elsewhere;² or to answer interrogatories before a master.³ It issued also in case of contempt for the non-production of papers.⁴ It has been granted in *England* for not returning papers according to order.⁵ It has been held to afford a remedy where the defendant, to save his estate, obstinately lay in prison or exhausted his estate in paying other creditors to the injury of the plaintiff.⁶ The remedy has been applied to secure alimony;⁷ and to enforce an order to deliver the defendant's property to a receiver, the defendant being in contempt for not obeying the order.⁸

nothing in any act which would prevent the latter from taking his remedy by execution, under the new law." And in *Bayard's Appeal*, 72 Pa. St. 453, it was held that the act of April 7, 1870, superseded the remedy by sequestration under the act of June 16, 1836, of which it is a supplement and to that extent supplies its provisions.

1. *Pratt v. Inman*, 43 Ch. Div. 175. See also *Roberts v. Stoner*, 18 Mo. 481, where Scott, J., said: "A writ of sequestration is a process for contempt used by chancery courts to compel a performance of their orders and decrees."

"When there is a decree against a party for the payment of money or to do any other act, this process cannot issue until he is put in contempt, or it is shown that process cannot be served."

"It would seem that a sequestration merely to compel the payment of money, cannot now issue, as imprisonment for debt is abolished. As process against the body for the non-payment of a debt cannot now issue, there would be no means of putting a party in contempt. When the decree is for the performance of acts within the power of the party, he may be compelled by sequestration . . . This manner of enforcing decrees is now very unusual, since the statute has given the writ of execution to courts of chancery to carry into effect their decrees. It is necessary whenever the writ issues, that the court should name the sequestrators who are to take charge of the defendant's estate."

In *Wharam v. Broughton*, 1 Ves. 184, Lord Hardwicke said: "For the writ of sequestration does not require the sequestrators to levy to the use of the plaintiff, but only to detain and keep

him in their hands till the sum is fully paid, the contempt cleared and the court make further order to the contrary. It is not of a great many years' standing, that the court has ordered goods to be sold, to satisfy payment after a decree; but it is very lately that the court has ordered it for a collateral contempt in proceedings before a decree; which the court now does in aid of its proceedings."

2. See *Pratt v. Inman*, 43 Ch. Div. 175.

3. *Lupton v. Hescott*, 1 S. & S. 274.

4. *Rigg v. Trigg*, 1 S. & S. 274, n.

5. *In re Hassenclever*, 1, Bro. C. P. 434.

6. *Ross v. Colville*, 3 Call (Va.) 382.

7. *Anonymous*, 1 Hayw. (N. Car.) 347.

By statute in *Michigan* the courts are authorized in divorce cases to sequester the real or personal estate of the husband, and to apply the rents or profits of the realty and the personal estate to the payment of such alimony as may be decreed. *Held*, that a decree awarding alimony and sequestering the property of the defendant for the payment of the same, was void where jurisdiction was not obtained by personal service. *Bunnell v. Bunnell*, 25 Fed. Rep. 214.

8. *People v. Rogers*, 2 Paige (N. Y.) 103.

Miscellaneous Instances.—During the construction of a railway an injunction was granted against the company, restraining them from further interfering with a particular road, and from so constructing their works as to obstruct, impede, or render less secure the same road, or so as to hinder or prevent the passage of carriages along the same. The company then laid their perma-

2. Corporations.—In some of the States of the Union the process of sequestration affords a remedy for the enforcement of judgments against corporations.¹

ment rails over the road on a level, and by the direction of the commissioners of railways, erected gates across the road for security of passengers, and, with the sanction of the same commissioners, opened the line for public traffic; whereupon the court ordered a sequestration to issue for breach of the injunction and refused to suspend the issuing of process until an appeal against the order could be heard. *Attorney-Gen'l v. Great Northern R. Co.*, 15 Jur. 387; cited in 5 Chitty's Equity Index 5288.

Where a widow elected not to take under the will of her husband, the court held that the substituted devise and bequests to the wife were a trust in her for the benefit of the disappointed claimants to the amount of their interest therein, and that the court would assume jurisdiction to sequester the benefit intended for the refusing wife, in order to secure compensation to those whom her election disappoints. *Sandoe's Appeal*, 65 Pa. St. 314; *Gallagher's Appeal*, 87 Pa. St. 200.

It was said in *Parker v. Grammer*, Phil. (N. Car.) 28, that where there is reason to fear that the defendant, in a suit in equity, will remove the subject in controversy beyond the jurisdiction of the court, or destroy it, or otherwise dispose of it, pending the suit, so that the complainant may lose the fruit of his recovery, or be hindered and delayed in obtaining it, the court in aid of the primary equity, will secure the fund by the writ of sequestration, or the writs of sequestration and injunction until the main equity is adjudicated at the hearing of the cause.

The court, by Pearson, C. J., said: "These writs are extraordinary process, and to sustain them on a motion to dissolve the injunction and remove the sequestration the court must be satisfied: 1. That the complainant does not sue in a mere spirit of litigation, and seek to set up an unfounded claim, but has probable cause, and may at the hearing be able to establish his primary equity. 2. That its extraordinary process is not asked for simply to vex and embarrass the defendant, but because there is reasonable ground for apprehension in regard to the se-

curity of the fund pending the litigation."

1. Michigan.—When a judgment at law or a decree in chancery is obtained against any corporation incorporated under the laws of *Michigan*, and an execution, issued thereon, is returned unsatisfied, in whole or in part, upon the petition of the person obtaining such judgment or decree, or his representatives, the court within the proper county may sequester the stock, property, etc., of the corporation and appoint a receiver. *Cook v. Detroit, etc., R. Co.*, 45 Mich. 453. See *Jennison's Ch. Pr.* 318.

Massachusetts.—In *Jones v. Boston Mill Corp.*, 4 Pick. (Mass.) 507, it was said that the supreme court was authorized to issue the processes of *distringas* and sequestration in proceedings against corporations.

New York.—As to the jurisdiction under the Revised Statutes, see *Bangs v. McIntosh*, 23 Barb. (N. Y.) 591.

In *Devoe v. Ithaca R. Co.*, 5 Paige (N. Y.) 521, it was held that a sequestration ought not to be granted without giving the corporation an opportunity to be heard.

Pennsylvania.—In *Reid v. North Western R. Co.*, 33 Pa. St. 257, the court by Church, J., said: "The seventy third section of the act of June 16, 1836, prescribes this writ of sequestration as the execution process, when judgment has been obtained against corporations, except counties and townships, or others of like municipal character. The writ itself is most certainly of the nature of an execution. It is final process to enforce payment of a judgment."

"Being an execution process it is not *ex gratia* in the usual acceptation of that term, but is rather demandable of right; and consequently there can be no sound reason for giving previous notice that might not apply to any final process."

It was said in the above case that whether the corporation had assets subject to sequestration made no difference as to the validity of the writ.

In *Germantown Pass. R. Co. v. Fittler*, 60 Pa. St. 124; 100 Am. Dec. 546, it was said that a corporation was not necessarily dissolved by a writ of sequestration operating as a legal divestiture of all its available assets. See also, on

this point, *Mann v. Pentz*, 3 N. Y. 422.

In the case of corporations where the public is directly interested, creditors must recover their debts by sequestering the earnings of the corporation, allowing it to progress with its undertaking to accommodate the public. *Foster v. Fowler*, 60 Pa. St. 27.

Moneys received by a sequestrator of an incorporated company are to be distributed amongst all the creditors of the corporation according to the rules established in the case of the insolvency of individuals. *Steiners' Appeal*, 27 Pa. St. 313.

In *Penrose v. Erie Canal Co.*, 56 Pa. St. 46; 93 Am. Dec. 778, the court by Strong, J., said: "By the act of 1836, relating to executions, a creditor by contract of a canal company after having obtained judgment and after a return of *nulla bona* to an execution issued thereon, was entitled to have the tolls, rents, issues and profits of the company, together with all its rights and credits, seized and applied to the payment of his claim ratably with the claims of others. This could be effected by a writ of sequestration, and it was the only means of obtaining satisfaction of the debt if an execution proved fruitless. This right to sequestration was not dependent at all upon the manner in which the canal company might manage its property. It was absolute.

"Sequestration was, therefore, a substantial right, and assured by the contract. I do not say that some other process might not have been substituted for it—some other process that would have given the creditor equal facilities for appropriation of the tolls, rents, credits, etc., of the company; but the right to have that property appropriated in some way to the satisfaction of the debt was undoubtedly assured by the court. Such, then, were the rights which the plaintiff had when the act of 1850 was passed. By that it was enacted that it should not be lawful to grant a writ of sequestration and appoint a sequestrator when a return of *nulla bona* had been made to an execution against the Erie canal company except upon the judgment and decree of the court on hearing that the corporation is guilty of mismanagement, misappropriation of funds, or willful delay in discharging its legal liabilities. The act provided no substitute for seques-

tration in those cases when it would have been allowed before its passage but not afterwards." Held that the act of 1850 was invalid.

In *Muncy Creek R. Co. v. Hill*, 84 Pa. St. 459, the court by Woodward, J., said: "By the 73d section [of the act of June 16, 1836] after the return of an execution unsatisfied, a writ was authorized 'to sequester the goods, chattels and credits, rents, issues, and profits, tolls and receipts from any road, canal, bridge or other work, property, or estate of such corporation.' The 74th section made it the duty of the sequestrator to take charge of the property and funds and to make due distribution of their proceeds. That a sequestrator under the act of 1836 was entitled to assume the control of the works and structures out of which revenue was derived, has been repeatedly settled by judgments of this court. The idea of a transfer of possession is embodied in the etymological signification of the word sequestrate. Its original meaning was to give up for safekeeping. Throughout the civil law and common-law precedents, process of sequestration against revenue or income has been treated as carrying with it the right to the possession of the property out of which the revenue or income issued.

"It is competent, however, for the legislature to confine the process to stricter limits. And the peculiar language of the act of the 22d of April, 1858, indicates a purpose to modify and restrict in essential respects the remedy by sequestration as against a particular class of railroad corporations. It declared that so much of the act of 1836 as related to the appointment of sequestrators in cases of judgments recovered against corporations should not apply to any unfinished railroad. The enactment was followed by this proviso: 'That nothing herein contained shall be so construed as to prevent a sequestrator from taking custody of the receipts and revenues of any portion of any such road that may be so far completed as to be in running order.' The difference between the phraseology of this act and that of the act of 1836 is marked and significant. The effect of the latter statute is to declare that 'the goods, chattels and credits, rents, issues and profits, tolls and receipts' of an unfinished railroad shall not be sequestered, and that a sequestrator shall not 'take charge of the property and funds'

3. **What Property Liable.**—Land and goods may be sequestered;¹ so may choses in action.²

4. **Procedure.**—The procedure is regulated of necessity by the local practice of the various jurisdictions. It has been held in *England* that the writ issues on a motion verified by oath.³

of such railroad, but that he shall have 'power to take custody of the receipts and revenues' of any completed section."

Minnesota.—The individual liability of stockholders for debts of a corporation can be enforced in a sequestration proceeding, at the instance, or upon the complaint of any creditor who has become a party to it. *McKusick v. Seymour* (Minn. 1892), 50 N. W. Rep. 1114.

The equitable liability of the holders of "bonus" stock may be enforced by a creditor of the corporation in sequestration proceedings. *Hospes v. Northwestern Mfg., etc., Co.* (Minn. 1892), 50 N. W. Rep. 1117.

1. *Comyn's Dig.*, tit. Chancery.

In *Hyde v. Greenhill*, Dick 107, it was said that a sequestration covers the rents and profits of real estate but not the land.

A salary of an equerry to one of the royal family is not a subject of sequestration. *Fenton v. Lowther*, 1 Cox 315.

2. *Hosack v. Rogers*, 11 Paige (N. Y.) 603; *Prew v. Breed*, 12 Met. (Mass.) 363; 46 Am. Dec. 687; *Wilson v. Metcalfe*, 1 Beav. 263. But in *McCarthy v. Goold*, 1 B. & B. 387, it was held that dividends of bank stock, being choses in action, could not be sequestered. See generally *Fenton v. Lowther*, 1 Cox 315; *Dundas v. Dutens*, 1 Ves. Jr. 196.

If the holder of a chose in action admits the debt to be due, and is willing to pay over under order of the court, it may become the subject of sequestration, but not otherwise. *Keighler v. Ward*, 8 Md. 254.

In *Johnson v. Chippindale*, 2 Sim. 55, the vice-chancellor said: "I find no instance in which the court has compelled a third party to pay in a chose in action without a bill, when any resistance has been made by the holder of the chose in action." See generally *Francklyn v. Colhoun*, 3 Swanst. 276; *Simmonds v. Kinnaird*, 4 Ves. 735; *Proctor v. Reynel*, 1 Ch. Rep. 247; *Lord Pelham v. Duchess of Newcastle*, 3 Swanst. 293, n.

In *Hoffman's Ch. Pr.*, p. 160, it is said that the author cannot perceive the

difficulty in sequestering a chose in action. He says: "If the chose is a book debt, note, annuity, bank or other stock, and is sequestered without being collected, the discharge of the process, upon the clearing the contempt, restores it necessarily to the creditor. If there are vouchers, such as certificates of stock, they must be returned to him. If the chose has been collected the proceeds belong to the creditor. The sequestrators have collected it for his use."

In *White v. Geraardt*, 1 Edw. Ch. (N. Y.) 336, the court by McCoun, V. Ch., said: "I have no hesitation, therefore, in saying this court is competent through the medium of sequestration to lay hold of property of every description anywhere within its jurisdiction, belonging to a party in contempt for not obeying a decree, and also has power to apply it in satisfaction of the debt or duty decreed against such person."

3. *Bacon's Abr.* (Bouvier's ed.), vol. 8, p. 630; *Eyre v. Shaftesbury*, 2 P. Wms. 110. See *Daniel's Ch. Pr.* (Am. ed.), vol. 2, p. 1065.

It was held in *Monk v. Lawlor*, 1 Jones (N. Car.) 554, that notice of the motion was not necessary.

It was said in *O'Arien v. Foley*, 2 Ir. Eq. R. 418, that if the party is going against personal property notice of motion must not be given; though otherwise if the party is going against real property.

See also *Welsh v. Welsh*, 2 Ir. Eq. R. 360.

But in *Edwards v. Plunket*, 3 Ir. Eq. R. 502, it was held, that if the defendant has not appeared, it is not necessary to give him notice of a motion for liberty to execute a sequestration against his real property, but that the motion would not be granted unless the affidavit set forth the annual value of the lands.

See *Rowan v. —*, 2 Jones 184.

The affidavit of a party against whom process of sequestration has issued, will not be heard as cause against a conditional order obtained in the cause, such affidavit not stating any irregularity in the proceedings. *Creed v. Creed*, 1 L. & T. 581; cited in

5. **Discharge.**—The English authorities have held that a sequestration in mesne process is determined by the defendant's death, if the sequestration was to compel the performance of a personal duty; but that it was otherwise after a decree.¹ It has been held that a sequestration was discharged by the appointment of a receiver in the place of sequestrators.²

6. **The Sequestrators.**—As an officer of the court a sequestrator is armed with the powers conferred by such orders and decrees as the court makes and can enforce.³ He may be

Chitty's Equity Index (4th ed.), vol. 5, p. 5290.

In *Phillips v. Stephenson*, 11 Price 473, it was held that the warden's certificate of a prisoner being in his custody for contempt for non-payment of costs taxed was sufficient to found a motion for sequestration, without affidavit of demand and refusal.

Under the English Judicature Act a writ of sequestration against the estate of a receiver or other person for disobedience of an order of the court may be issued without leave of court. *Sprunt v. Pugh*, 7 Ch. Div. 567.

1. Where sequestration has been issued for the purpose of compelling the performance of a duty, the death of the defendant does not discharge it. If the sequestration issued only to compel the defendant to put in an answer, and he was dead, the sequestration would have been, of course, discharged. *Pratt v. Inman*, 43 Ch. Div. 175.

2. *Shaw v. Wright*, 3 Ves. 22. Other English cases upon the subject of discharge are, *Lord Pelham v. Duchess of New Castle*, 3 Swanst. 293, n.; *Shuttleworth v. Lonsdale*, 2 Cox 47; *Tatham v. Parker*, 22 L. J. Ch. 903; *Wharam v. Broughton*, 1 Ves. 184; *Hyde v. Foster*, Dick. 132; *Hyde v. Greenhill*, Dick. 106; *Sutton v. Stone*, Dick. 107.

3. *Suydam v. Northwestern Ins. Co.*, 51 Pa. St. 394.

By analogy to the proceeding under a commission of rebellion a sequestrator may break open doors in the execution of his office. *Lowten v. Mayor of Colchester*, 2 Meriv. 395.

A sequestrator may not be able to sue in his own name, but, even using the name of the corporation whose property is sequestered, he may avoid a fraudulent grant. *Suydam v. North Western Ins. Co.*, 51 Pa. St. 394.

And a bill of discovery will lie, if necessary, at the instance of a seques-

trator. *Suydam v. North Western Ins. Co.*, 51 Pa. St. 394; *Bevans v. Turnpike*, 10 Pa. St. 174.

A sequestrator may appeal from the award of arbitrators against the company whose property has been sequestered, since, by statute, he has the powers of trustees under the Insolvency Acts. *Turnpike Co. v. M'Anulty*, 4 W. & S. (Pa.) 293.

A sequestrator is not bound to advance his own money to repair a sequestered road, and he does so at his own risk. But when he has settled an account in court, which has been confirmed, it must be presumed that his proceedings have been sanctioned by the court. While the road was in the hands of a sequestrator an act of assembly authorized judgment creditors to have the road sold upon execution. It was accordingly sold and the money brought into court for distribution. In this case it was held that the sequestrator has the preference as against the execution creditor, the court, by Lowrie, J., saying: "The sequestration put the road into the hands of the law. The law protects its own officer in the discharge of the duties imposed upon him. It has been found that in the discharge of those duties he has properly advanced his own money. By another form of proceeding the law has converted the road into money and is now about to distribute it. Of course it cannot allow that money to go out of its power, until the expenses incurred under its sanction, in the care and custody of the thing converted, have been repaid, at least so far as the money will go." *Bean's Appeal*, 19 Pa. St. 453.

In *Crone v. O'Dall*, 2 Moll. 389, a reference was granted to inquire if it would not be for the benefit of all parties that sequestrators should make defense in the name of the proper person to an ejectment brought against lands under sequestration.

empowered to let sequestered real estate,¹ or to sell sequestered goods.²

If sequestrators have been turned out of possession by force, an injunction may issue to restore them.³ If they abuse their powers they may be proceeded against and punished.⁴

It is a contempt of court to disturb a sequestrator in his possession.⁵

Formerly it was held that a writ of assistance would not issue to sequestrators.⁶ Now, however, it seems that the court will direct a writ of assistance to issue for the purpose of putting sequestrators into possession.⁷

The fees of sequestrators are governed by the principles applied by courts of equity in fixing the fees of receivers and other administrative officers.⁸ Sequestrators are required to account to the court.⁹

1. *Neale v. Bealing*, 3 Swanst. 304, n.; *Dunkley v. Scrivenor*, 2 Mad. 443. But it has been held that the court will not order sequestrators on mesne process to make leases. *Ray v. —*, 3 Swanst. 306; *Gray v. Hooper*, Dick. 638.

2. *Hoffman's Ch. Pr.*, vol. 1, p. 150. But it has been held that it is questionable whether this should be allowed in the case of sequestration on mesne process. See on this point *Hales v. Shaftoe*, Dick. 711; 3 Bro. P. C. 72; 1 Ves. Jr. 86. The leading authority against the execution of a sequestration on mesne process is *Rowley v. Ridley*, Dick. 622. See also *Wharan v. Broughton*, 1 Ves. 184; *Simmonds v. Kinnaird*, 4 Ves. 735.

In *Goldsmith v. Goldsmith*, 5 Hare 123, it was laid down that a sequestration on mesne process may in a proper case be executed, and that the court may direct the tenants to attorn to the sequestrators. But the court will not, until the amount of the costs is ascertained, nor except for the purpose of paying such costs, direct the sale of goods seized under the sequestration, although the expense of keeping the goods gradually absorb the value of them.

There would seem to be no difficulty as to the sale of perishable goods, *Shaw v. Wright*, 3 Ves. 22; or of property, the title to which passes by delivery, *Mitchell v. Draper*, 9 Ves. 208. As to the sale of a leasehold estate there is more difficulty. See *Shaw v. Wright*, 3 Ves. 22; *Sutton v. Stone*, Dick. 107. But in *Hoffman's Ch. Pr.*, vol. 1, p. 151, it is said: "This dif-

ficulty does not seem to me sufficient to prevent a sale in a proper case; for although a purchaser will not be compelled to accept a mere equitable title, yet if the sale is made upon such terms expressly, the contract may be enforced. It is admitted that the purchaser would be protected by injunction. That difficulty would only, perhaps, diminish the price."

3. *Lord Pelham v. Newcastle*, 3 Swanst. 293 n.

4. As in *Pelham v. Harley*, 3 Swanst. 291, n., where one of the commissioners of sequestration had made use of the writ to get possession of certain property to which the sequestration did not rightfully extend; he was compelled to make complete restitution and was committed for contempt.

5. *Brooks v. Greathead*, 1 J. & W. 178; *Angel v. Smith*, 9 Ves. 335.

6. *Brown v. Cuffe*, 1 Hog. 145; *Bacon's Abr.* (Bouvier's ed.), vol. 8, p. 638.

7. *Daniel's Ch. Pl. & Pr.* (Perkins' ed.), vol. 2, p. 1072.

In *Com. v. Deffenbach*, 3 Grant Cas. (Pa.) it was said that the writ of assistance is an incident to sequestration and injunction, and will be issued whenever it is necessary to enforce either.

8. The question of fees is discussed in the early English cases of *Wood v. Freeman*, 2 Atk. 542; *Prentice v. Prentice*, Dick. 388; *Hyde v. Greenhill*, Dick. 106; *Hawkins v. Crook*, 3 Atk. 594; *Crone v. O'Dell*, 2 Moll. 389. See also *Daniel's Ch. Pl. & Pr.* (Perkins' ed. 1865), vol. 2, p. 1079.

9. *Bacon's Abr.* (Bouvier's ed.), vol. 8, p. 634; *Gibson v. Scevington*,

III. IN LOUISIANA AND TEXAS—1. In General.—Under the *Louisiana* Code sequestration is a kind of deposit which two or more persons engaged in litigation about anything make of the thing in contest to an indifferent person, who binds himself to restore it when the issue is decided to the party to whom it is adjudged to belong. The depositary in this case is called the sequestrator. A sequestration may be not gratuitous, and then it is rather a contract of hiring than of deposit. When it is gratuitous it is a real contract of deposit, subject to all the rules which apply to that contract, save the differences hereafter explained. A sequestration has this difference from a deposit, that it may have for its object not only movables, but also immovables.¹

The *Texas* statute contains provisions for sequestration founded on those of the civil law. In *Louisiana* a sequestration may be obtained where the plaintiff has a lien or privilege on property.² The plaintiff must make oath that he fears the property will be removed out of the jurisdiction of the court before he can have the benefit of his privilege;³ or, in the case of real estate, that he fears the defendant may make use of his possession to dilapidate the property or waste the fruits thereof.⁴

Vern. 247; *Dacres v. Chute*, 1 Vern. 160.

1. *Louisiana* Code, §§ 2973-6. See also *Stimson's St. L.*, § 4329.

2. *Louisiana*.—Code of Practice, art. 275.

Sequestration, being a harsh remedy, will be allowed only when one is clearly entitled to it. To entitle one to this writ, the affidavit must state that the plaintiff is either the owner of the property or has a privilege on it. *Baer v. Kopfler*, 19 La. Ann. 194.

3. It is not the privilege which gives the right of sequestering property, but the circumstance which causes the creditor to apprehend that the removal of the property out of the State may deprive him of its exercise. *Sellick v. Kelly*, 11 Rob. (La.) 149. See *Anderson v. Stille*, 12 La. Ann. 669.

4. In *Pasley v. McConnell*, 37 La. Ann. 552, the plaintiff brought suit to be decreed the owner of certain real estate and prayed for a judicial sequestration. It not being alleged that the plaintiffs had good ground to apprehend that the defendants might make use of their possession to dilapidate or waste the fruits and revenues of the property, or convert them to their own use, it was held that this was insufficient. Sequestration cannot be extended by implication, nor beyond

those cases for which the law was expressly provided.

See also *Barriere v. Feste*, 9 La. Ann. 535.

A party who applies for the stringent remedy of sequestration, must present a case clearly entitling him under the code and statutes to that process. *Shropshire v. Russell*, 2 La. Ann. 961.

Sequestration is an extraordinary and vigorous remedy, and the doctrine has been uniform that it is to be strictly construed and the requisites of the law must be observed on pain of nullity. *Wilson v. Churchman*, 4 La. Ann. 452.

In a suit against one partner by the others to compel the former to account for and pay over to the latter the shares of his partners, in which he is a trustee for the firm, sequestration will not issue. *Shropshire v. Russell*, 2 La. Ann. 961.

A prospective insolvency affords no ground for proceeding by injunction and sequestration against a debtor. *Barriere v. Feste*, 9 La. Ann. 535.

A vendor of movable property sued the executrix of the vendee for the dissolution of the sale and the recovery of the property, and procured a writ of sequestration. In their petition they alleged that they feared that during the pendency of the suit, the defendant

But mere grounds of suspicion, and those extremely slight, do not authorize a resort to so severe a mode of proceeding.¹ There must be a well-founded apprehension, the grounds of which must appear from the affidavit.² The statute makes provision for the giving by the defendant of an obligation, with surety, to the sheriff, to set aside the mandate of sequestration, the obligation to be in amount equal to the value of the property

might part with or dispose of the property. Defendant's counsel contended that the harsh remedy of sequestration should not be resorted to against one who intended no wrongful act. The court, by De Blanc, J., said: "A sequestration is intended to prevent, not merely a wrongful act, but any act—whatever it may be—the result of which would be to remove the sequestered effect from the possession in which it was at the date of execution of the writ. The article of the Code of Practice does not qualify the disposal against which it provides." *Daugherty v. Vance*, 30 La. Ann. 1246.

In *Da Ponte v. New Orleans Transf. Co.*, 42 La. Ann. 696, it was held that contractual relations exist between a passenger and a transfer company, to which he has surrendered his checks to have his baggage carried for hire from a depot to his residence, which the former may enforce by suit and sequestration.

1. *Stetson v. Le Blanc*, 6 La. 266; *Pirtle v. Price*, 31 La. Ann. 357.

2. *Wilson v. Churchman*, 4 La. Ann. 452; *Sellick v. Kelly*, 11 Rob. (La.) 149.

To entitle the plaintiff to sequester mortgaged property on the ground of apprehension that it will be removed before he can have the benefit of his mortgage, he must set forth in his affidavit, either directly or by reference to allegations of the petition, the facts which induce his apprehension, as required by art. 275 of the *Louisiana* Code of Practice, which requirement is not considered as dispensed with by the act of 1839. *Bres v. Booth*, 1 La. Ann. 307.

A writ of sequestration is issuable by a creditor having a special mortgage when he apprehends that the mortgaged property will be moved out of the State before he can reap the benefit of his mortgage, and therefore the propinquity of the property to the border of the State is an element to be considered in estimating the strength of his suspicion. It is not what the

defendant really intended to do or not to do that is to be considered, but whether he was doing and saying that from which his creditor might apprehend the existence of an intention to do the hurtful thing that a sequestration would prevent. *Duncan v. Wise*, 39 La. Ann. 74.

An affidavit in which the plaintiff says that he fears that the slave mortgaged may be removed beyond the jurisdiction of the State is insufficient to obtain a sequestration. The grounds of apprehension must be set out. *Clark v. Glover*, 14 La. 266.

The Affidavit.—The causes set forth in the affidavit are set forth with sufficient certainty if they are stated in the words of the Code of Practice prescribing the causes for which the writ may be obtained. *Carter v. Lewis*, 15 La. Ann. 574.

An affidavit for sequestration stated that the defendant was indebted to the affiant "in about the sum of forty-nine hundred and fifty dollars," and that "the deponent verily believes the said churchman will dispose of the same or send it out of the jurisdiction of the court." *Held*, that the affidavit is insufficient as not naming a sum certain, and that the "whole showing is loose and uncertain." The expression "during the pendency of the suit may not be sacramental, . . . but the necessity of the conservative process should substantially appear." *Wilson v. Churchman*, 4 La. Ann. 452.

In *Texas*, where the statute (*Texas* Rev. St. art. 4490) requires that "the property to be sequestered shall be described with such certainty that it may be identified and distinguished from property of a like kind, giving the value of each article of property and the county in which it is situated," it was held in *Boykin v. Rosenfield*, 69 Tex. 115, that the description of logs stated as being in the county in which suit was brought, in the possession of the named defendants, each marked cross within a circle on the end of the log, averaging from fourteen to thirty-five feet

to be left with the defendant ; and provides also that whenever the defendant shall not execute such obligation within ten days after the seizure of the property by the sheriff, it shall be lawful for the plaintiff "to give similar bond and security to the sheriff as that required by law from the defendant; and to take the property sequestered into his possession."¹

in length, and from one foot to thirty inches in diameter and containing, in the aggregate, about four hundred and sixty-five thousand seven hundred and fifty feet in measurement, the value of each log also being stated, was sufficiently certain.

In *Wells v. St. Dizier*, 9 La. Ann. 119, an affidavit for sequestration was as follows: "He, said affiant, fears that the defendant, August St. Dizier, will conceal, part with or dispose of the flatboat and lumber, claimed in the within petition during the pendency of this suit." It was objected that the affidavit was insufficient, for, 1. It did not state that the defendant was about to remove property out of the jurisdiction of the court; 2. That the plaintiffs do not swear to ownership of the property; 3. That it is in the alternative; 4. That it is not such as would subject the party to perjury if the facts sworn to were proved to be otherwise. It was held that the affidavit was sufficient.

The above case was affirmed in *Mabry v. Talla*, 15 La. Ann. 562, which held that an affidavit which embraces several of the alternatives provided by the act as a good basis for sequestration, is sufficient.

Allegations showing the plaintiff's right of possession and the wrongful possession of the defendant, and the fear of the petitioners that the defendant will dispose of the property, are sufficient to maintain the sequestration. *Lannes v. Courege*, 31 La. Ann. 74.

But, in sequestration based on a privilege (at least when the debt secured is due), an affidavit to the debt, to the privilege, and to the fear that "the defendant will conceal, part with, or dispose of the same during the pendency of the suit," is sufficient. The party is not bound to swear to or to prove any other grounds of fear than the simple facts that he has a privilege and that it lies in the power of the defendant to defeat or destroy it by doing some of the acts which he swears he fears he may do. *Lowden v. Rob-*

ertson, 40 La. Ann. 825. Where in a suit for the revendication of the paraphernalia of the wife, claimed by a third person, the husband and wife both appeared as plaintiffs, but the husband alone signed the affidavit for sequestration and made the bond, the sequestration was properly dissolved. *Goodin v. Allen*, 2 La. Ann. 448.

The title to property sequestered and bonded remains in the defendant until divested by process of law. The plaintiff obtained judgment against the defendant, and his lien and privilege on the property sequestered was recognized, but no execution was issued. Therefore when defendant went into insolvency he should have put the sequestered property in his schedule. *Downey v. Kenner*, 42 La. Ann. 1129.

See also *Coats v. Elliott*, 23 Tex. 606.

Custody.—In *Field v. Broderick*, 12 La. Ann. 552, certain property had been sequestered by the plaintiffs. At the instance of the plaintiffs, the property being perishable was sold, and was purchased by the plaintiffs themselves. They contended that they had a right to retain the price in their own hands because they had a claim pending in court for a privilege upon the property. *Held*, that the sheriff is the legal custodian of the property; that the effect of the sale was to transfer the custody from the property to the proceeds of the sale.

When the plaintiff in sequestration obtains possession under a release bond, he cannot be sued for that property in another court on the ground that it was improperly bonded while the suit in which it was sequestered is still pending. This is on the ground that the property sequestered and delivered to the plaintiff on bond is *in gremio legis*. The contrary doctrine would breed confusion. *Lemann v. Truxillo*, 32 La. Ann. 65.

1. *Louisiana Code of Practice*, art. 279.

The security thus given by the defendant, when the property sequestered

consists in movables, shall be responsible that he shall not send away the same out of the jurisdiction of the court; that he shall not make an improper use of them, and that he will faithfully present them, after definite judgment, in case he should be decreed to restore the same to the plaintiff. *Louisiana Code of Practice*, art. 280.

"As regards landed property this security is given to prevent the defendant, while in possession, from wasting the property, and for the faithful restitution of the fruits that he may have received since the demand, or of their value in the event of his being cast in the suit." *Louisiana Code of Practice*, art. 281. See *Baldwin v. Black*, 119 U. S. 643.

A court may authorize an intervenor to bond sequestered property. *Collins v. Edwards*, 13 La. Ann. 342.

In *Lemann v. Truxillo*, 32 La. Ann. 6, the court by Marr, J. said: "The release bond in attachments differs widely from the release bond in sequestration. In the attachment the plaintiff has no right to bond; and the obligation of the defendant who exercises that right is that he will pay and satisfy such judgment, up to the value of the property attached, as may be rendered against him in the suit. On giving this bond the attachment is dissolved, and the defendant resumes the possession of his property, with all the rights, powers and control touching it which he had before the attachment.

"In cases of sequestration the defendant has the exclusive right to bond for ten days. On his failure to avail himself of this right, the plaintiff may have the property delivered to him on bond. In either case the condition of the bond is that the party thus obtaining possession, if the property be movable, will not send it out of the jurisdiction of the court; that he will not make an improper use of it, and that he will faithfully present it after definitive judgment, in case he should be decreed to restore the same to the adverse party.

"The object of the attachment is to enforce the payment of a debt, without any pre-existing right to the property attached; the object of sequestration is to enforce some pre-existing right to the property, whether the plaintiff claim the possession or the ownership or some lien or privilege. These differences would justify the conclusion that the release on bond of prop-

erty attached takes the property out of the custody of the law, and substitutes, for the purposes of the suit, the bond with security; while, by its very terms, the release bond in a sequestration keeps the property under the control of the court, in order that the decree in reference to it may be enforced against the property itself."

On application for rehearing, the court by Spencer, J., said: "It would be strange, indeed, if a plaintiff could become owner of property by simply sequestering it on a claim of privilege or ownership and bonding it. Yet plaintiff's counsel insists that the effect of plaintiff's release bond is to put the property at his disposal. Is it possible that because I have a privilege on a thing, sequester it and bond it, I can dispose of it at my pleasure? Could not the owner revendicate it in kind in the hands of my vendee? Would not any sale of it by me be absolutely void? Is it not manifest, then, that a plaintiff in sequestration gets by his release bond only the custody and keeping of the thing preceding the litigation? That he holds the property for the court and not for himself? Yet the counsel cites us to 24 An. 570, as authority for the doctrine that plaintiff in such case can dispose at pleasure of the thing sequestered. The case decides nothing of the sort and would be absurd if it did. It simply decides that the defendant and owner who has bonded his property under sequestration may remove it from a rented place which he is leaving. Of course he can. He is its custodian as well as owner."

The Surety.—The surety on a sequestration bond must have his residence within the jurisdiction of the court. *Bres v. Booth*, 1 La. Ann. 307; *Gossett v. Cashell*, 14 La. 246.

Where the surety in a sequestration bond leaves the jurisdiction of the court, all objection will be removed by the furnishing of a new bond with a surety residing within the jurisdiction whose solvency is not questioned. *Foxworth v. Burckhalter*, 3 La. Ann. 365.

In Texas the statute regulating replevy bonds in sequestration cases seems to contemplate that the negative condition or conditions in the bond shall be only that the defendant will not do the particular act which the affidavit of sequestration states the plaintiff fears the defendant will do.

2. Damages for Illegal Sequestration.—Where a party who obtains a writ of sequestration fails to show any real cause of action, or any grounds of suspicion which would justify a man, in the sober pursuit of his right, in resorting to a remedy intended only for extreme cases, he subjects himself to pay damages.¹

Krall v. Printing Press, etc., Co., 79 Tex. 556.

The statute does not require that there shall be a bond executed separately to each defendant in a case in which there are several defendants against whom sequestration is sought. Boykin v. Rosenfield, 69 Tex. 115.

A sequestration bond is defective if it does not correctly describe the parties to the suit, and should be quashed, as the remedies of sequestration and attachment are equally stringent and the same strictness should apply to the procedure in one case as in the other. A bond was made payable to A B and C D without describing them as defendants; but was conditioned that plaintiffs "will pay to the defendants in said suit all such damages," etc., without stating who the defendants are. Although this gives rise to the conjecture that A B and C D are the defendants, the fact does not clearly appear on the face of the bond. Rohrbough v. Leopold, 68 Tex. 254.

1. Stetson v. Le Blanc, 6 La. 266.

A suit by sequestration is a lawful act, and, according to the general rule of law, the plaintiff would not be liable at all in damages for the exercise of the right; but is made liable in such a case for actual damages, in the event of his failure, by virtue of an exception to the general rule. Broxton v. Bloom, 15 La. Ann. 618.

The sheriff who has the sequestered property in charge for the successful litigant is responsible for its loss, if from his negligence it disappears, or is destroyed or lost. Jones v. Doles, 3 La. Ann. 588.

Whatever may be the responsibility of the sheriff, the plaintiff in the sequestration is responsible for the restoration of the property, and the sureties also. Jones v. Doles, 3 La. Ann. 588.

The plaintiff, who obtains a writ of sequestration, if he ratifies the acts of the sheriff, who, in execution of the writ, abused the process of the court, is liable. Casey v. Hanrick, 69 Tex. 44.

In Marin v. Satterfield, 41 La. Ann.

742, the firm of A & B instituted a suit for debt against a partnership of which the plaintiff was a member, and caused the sequestration of some movable property of the plaintiff. After delay, during which the plaintiff failed to bond the property, the defendant, attorney in fact for A & B, furnished a bond releasing the property from sequestration. He then disposed of the property at private sale without order of the court, and before judgment had been rendered. Held, that he had no power to do so, and that he was liable to the plaintiff for the value of the property thus illegally sold.

Measure of Damages.—As between the principals in a sequestration bond and the party whose property has been sequestered, they may be bound beyond the penalty expressed in the instrument. Biggs v. D'Aquin, 13 La. Ann. 21.

A liberal though not vindictive standard. Stetson v. Le Blanc, 6 La. 266.

Where a sequestration has been wrongfully obtained the true standard of damages should be the probable loss sustained in consequence of the party being deprived of the free use or disposal of his own property; and he should be placed as nearly as possible in the sequestration he would have been in if the sequestration bond had never issued. Sellick v. Kelly, 11 Rob. (La.) 149.

In Bonner v. Coply, 15 La. Ann. 504, it was held that actual damages were all that could be recovered, and that interest could not be allowed on the amount found.

In an action against the sureties on a sequestration bond to recover damages for the illegality of the sequestration, the plaintiff must show the value of the property taken and such other injury as was sustained. In the assessment the reasonable expense of counsel in the former suit may be included. But it is not necessary for the plaintiff to show that the counsel fees have actually been paid, it being material only that the liability has been incurred. Jones v. Doles, 3 La. Ann. 588.

Definition.

SERIOUS.

Definition.

SERIOUS.—See note 1.

Evidence in Mitigation of Damages.—The discontinuance of a suit is not conclusive evidence of want of cause of action, and that the sequestration was wrongfully sued out. The fact that the plaintiff had some cause of action may well be given in evidence in mitigation of damages. *Stetson v. Le Blanc*, 6 La. 266.

In *Lacoste v. Duvie*, 31 La. Ann. 367, Duvie was surety for Roses on the sequestration bond. Roses brought suit against Lacoste and had property of the latter sequestered, but was non-suited. Lacoste brings action against Duvie for damages resulting from the sequestration. Duvie offered evidence to show that Lacoste was not owner of the goods, and hence no damage. The evidence was rejected on the ground that the question of ownership could not be raised by the surety. *Held*, error.

In *Texas*.—*Blum v. Gaines*, 57 Tex. 135, was a suit brought to recover damages against appellants who had, in an action of trespass to try title, sued out a sequestration, and the appellee, failing to replevy, replevied and took possession of the sequestered property. On the first day of the term of court succeeding the levy, the plaintiff dismissed the suit but failed to return the possession of the property to the appellee. The court by Stayton, J., said: "A writ of sequestration is permitted by law to issue, in a suit of trespass, to try title, for the purpose of preventing injury to the property, its waste, or to prevent the conversion by the occupant of the fruits and revenues of the property; and it is permitted for no other purposes. It was never intended that a party might use such process for the sole purpose of getting possession of property in the possession of and claimed by another. Good faith requires a party plaintiff who obtains property through a writ of sequestration to prosecute his suit to final termination, and if the same is determined against him, to restore it with the revenue and rent of the same to the party from whose possession the same was taken.

"The dismissal of the suit in this regard was equivalent to an abandonment of claim and required a restoration of the property, and a failure to prosecute the suit, or, upon a voluntary dismissal thereof, to restore the property,

was evidence, the weight of which was for the determination of the jury in ascertaining whether the writ was sued out for a proper purpose."

Other Cases.—K was the owner of a tug. N and L holding a mortgage thereon brought suit and obtained a writ of sequestration and caused the sheriff to seize the tug. K not having bonded the tug within the time allowed, N and L bonded her and she was released into their possession. B was the surety on the bond and was their agent to receive the tug. He held the tug for about three months during which time she was employed in business of towing vessels under direction of N and L to whom the earnings were turned over. *Held*, that the proceedings of N and L by which they obtained possession of the tug were in accordance with law, and that therefore, B, their agent, was in lawful possession of her, but only as agent, and therefore there could be no claim against him by K, either in contract or tort, for the earnings of the tug. *Baldwin v. Black*, 119 U. S. 643.

In a suit for damages sustained by the defendant because the sequestration was wrongfully obtained against the sureties on the bond, not only the fact that the judgment was rendered for the defendant in the sequestration suit will be considered, but also the reasons for the judgment. *Clarke v. Scott*, 2 La. Ann. 907.

A motion to dissolve may be resorted to in case of sequestration. *Crawford v. Jones*, 2 La. Ann. 826.

In cases of attachment there is express legislation authorizing summary proceedings against the surety; but there is no such provision for sequestration bonds. Consequently, a surety on a sequestration bond cannot be proceeded against by rule or on motion. *Sharp v. Bright*, 14 La. Ann. 391.

1. **Serious Disease, Sickness, etc.**—(See also *DISEASE*, vol. 5, p. 683; *LIFE INSURANCE*, vol. 13, p. 634).—"The word 'serious' is not generally used to signify a dangerous condition, but rather to define a grave, important, or weighty trouble." *Brown v. Metropolitan L. Ins. Co.*, 65 Mich. 315.

The term **serious bodily injury**—as used in the *Texas Penal Code* in defining "aggravated assault," means "such an injury as gives rise to apprehension—an injury which is attended with

Definition.

SERVANT—SERVICE.

Definition.

SERVANT.—See *MENIAL*, vol. 15, p. 279; *MASTER AND SERVANT*, vol. 14, p. 740, and references there given.

SERVE.—See note 1.

SERVICE.—1. The being employed to serve another.² The contract by which one person binds himself to serve another is called the contract of service.³ The term also designates the duty or labor due from employé to employer.⁴

2. In feudal law, service was the consideration which the feudal tenants were bound to render to the lord in recompense for the lands they held of him. The services in respect of their qualities were either free or base services, and, in respect of their quantity and the time of exacting them were either certain or uncertain.⁵

3. The judicial delivery or communication of papers; execution of process; the delivery or communication of a pleading, notice, or other paper in a suit to the opposite party, so as to charge him with the receipt of it, and subject him to its legal effect.⁶

danger." *George v. State*, 21 Tex. App. 317.

"**Serious bodily harm**" is substantially equivalent to "great bodily harm." *Lawlor v. People*, 74 Ill. 228. See also *HOMICIDE*, vol. 9, p. 593.

1. **Serve Notice—Serve Process.**—(See also *SERVICE OF PROCESS*).—When notice is to be "served" there is an implication that the notice is to be written. *Wilson v. Nightingale*, 8 Q. B. 1034; *Reg. v. Shermer*, 7 Q. B. Div. 323. But the use of the term "serve" does not enjoin personal service. *In re McGrath*, 24 Q. B. Div. 466. The court by Cave, J., said: "I think the service of the notice was sufficient. The 186th rule requires that, where any order is made appointing the time and place for holding the public examination of a debtor, the official receiver shall serve a copy thereof on the debtor. It does not say that the order must be personally served, but that it must be served on the debtor. Then section 142 of the act provides that all notices and other documents—which words include the copy of an order such as this—for the service of which no special mode is directed may be served by prepaid post letter to the last-known address of the person to be served therewith. Now, undoubtedly, the debtor is the person to be served; and no special mode of service is directed. One way

of testing the point is to add to rule 186 the words of section 142; and, reading the two provisions together, there is nothing inconsistent in their language. But, if the rule and section so read had said that the official receiver should serve the debtor personally by sending a copy of the order by prepaid post letter to the last-known address of the debtor, that obviously would have been a contradiction in terms. For these reasons I am of opinion that the document to be served under rule 186 may be sent by a prepaid post letter; and as this has been done in this case in the manner pointed out by rule 92, viz., by a registered letter, the warrant for the arrest of the debtor may be issued."

2. *Bouv. L. Dict.*

3. *MASTER AND SERVANT*, vol. 14, p. 740.

4. **Ex Officio Services.**—See *EX OFFICIO*, vol. 7, p. 485.

Military Services.—Service in its restricted sense is the exercise of military functions in the enemy's country in the time of war, or the exercise of military functions in the soldier's own State or country in the case of insurrection or invasion. *Van Deuser v. Gordon*, 30 Vt. 118.

5. *Black's L. Dict., citing 2 Bl. Com. 60; RENTS.*

6. *Walker v. State*, 52 Ala. 193. See also *SERVICE OF PROCESS; SERVE.*

SERVICE OF PROCESS.—See also ATTACHMENT, vol. 1, p. 219; EXECUTIONS, vol. 7, p. 148; FOREIGN ATTACHMENT, vol. 8, p. 321; SHERIFFS; SUBPŒNA.

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I. GENERAL NATURE OF THE SUBJECT.—Process is a mandate of the court, and embraces those writs which are necessary to institute and conduct an action or suit and to carry into effect the judgment of the court.¹

It is a fundamental principle of justice that no valid proceedings can be had against any person until he shall have been notified of such proceedings by proper service of process upon him, either actually or constructively, and this right, recognized at

1. See PROCESS; *Comet Consolidated Co.*, 9 Minn. 55; *Fitzpatrick v. New Orleans*, 27 La. Ann. 457; *Bailey v. Min. Co. v. Frost*, 15 Colo. 310; *Hinkley v. St. Anthony Falls Water Power Williams*, 6 Oregon 71.

common law, is secured by constitutions and judicial decisions.¹ But when a defendant has been once brought into court by a proper service of process, he is charged with notice of whatever action the court may take while the suit is pending,² unless the petition or complaint is changed materially by amendment or otherwise after the original service, in which case he is entitled to further notice.³

II. BY WHOM SERVICE IS MADE.—The sheriff, as the ministerial officer of the court, is ordinarily the proper officer to execute all processes issued from the court, provided he is not an interested party, or otherwise disqualified.⁴ The sheriff making the service must be the one to whom the process is addressed; a writ addressed to one officer confers no authority upon another to execute it;⁵

1. Necessity of Process.—It is provided by the Constitution of the United States that no person shall be deprived of life, liberty or property, without due process of law, and also that no State shall deprive any person of life, liberty or property without due process of law. U. S. Const. Amdts., arts. 5, 14. The constitution of every State in the Union contains a similar provision. See Stimson's St. Law, p. 27. See also *Pennoyer v. Neff*, 95 U. S. 714; *Galpin v. Page*, 18 Wall. (U. S.) 350; 4 Minor's Inst. (2d ed.) 517, and cases cited; *Taylor v. Taylor*, 64 Ind. 356; *DUE PROCESS OF LAW*, vol. 6, p. 43; *PROCESS*, vol. 19, p. 224.

2. Governor v. Lassiter, 83 N. Car. 38; *Hancock v. Pico*, 40 Cal. 153; *Thomas v. Richards*, 69 Wis. 671.

And so where all the parties to an action were summoned to answer the original petition, but the record fails to show whether some of them were summoned to answer an amended petition, it will be presumed, after the lapse of thirty-five or forty years, that all the parties were served with proper process. *Best v. Vanhook* (Ky. 1890), 13 S. W. Rep. 49.

3. Where Petition or Complaint is Amended.—*State v. Burke*, 37 La. Ann. 231; *Thompson v. Allen*, 86 Mo. 85; *Best v. Vanhook* (Ky. 1890), 13 S. W. Rep. 49.

But where an amendment of the summons is merely formal and the defendant could derive no possible benefit from being served with it, a second service is unnecessary. *Bray v. Creekmore*, 109 N. Car. 49; *White v. Hinton* (Wyoming, 1892), 30 Pac. Rep. 953.

4. By the Sheriff.—See *SHERIFFS*, vol. 22. See also *Bac. Abr.*, Sheriff; *Evarts*

v. Georgia, 18 Vt. 15; *Knott v. Jarboe*, 1 Metc (Ky.) 504.

It is sufficient if the officer is one *de facto*, although not *de jure*. *Fowler v. Bebee*, 9 Mass. 231. Compare, however, *Bennett v. Fuller*, 4 Johns. (N. Y.) 486; *Putnam v. Mann*, 3 Wend. (N. Y.) 202; 20 Am. Dec. 686.

Under the practice in *Florida*, a process of the supreme court can be served only by a sheriff of that court. A citation to an appellee issued by the clerk of a circuit court is a process of the supreme court, and service of it by a sheriff of the latter court in person or by deputy is invalid. *Williams v. Hutchinson* (Fla. 1890), 7 So. Rep. 852; *Jenssen v. Walther*, 26 Fla. 448. See also *Guarantee Trust, etc., Co. v. Buddington*, 23 Fla. 514.

5. Must Be Served by Sheriff Addressed.—*Callaway v. Harrold*, 61 Ga. 111; *Poltull v. Brown*, 84 Ga. 338; *Arnold v. Wynn*, 26 Miss. 338; *Rudd v. Thompson*, 22 Ark. 363 (writ directed to sheriff and served by coroner). Compare *Adamson v. Parker*, 3 Ala. 727. Therefore a writ directed to a constable confers no authority upon a marshal to execute it. *Hickey v. Forristal*, 49 Ill. 255. Nor can a writ directed to a sheriff or marshal be served by a private person unless he be specially deputized. *Schwabacker v. Reilly*, 2 Dill. (U. S.) 127; *Republican Valley R. Co. v. Sawyer*, 13 Neb. 280; *Gantier v. Rosecrance*, 27 Wis. 488. And a summons issued in a suit commenced in one county and directed to the sheriff of another county, cannot be served by the deputy sheriff of the first county. *Branner v. Chapman*, 11 Kan. 118.

A writ addressed to —, constable of W. county, may be served by any con-

but it seems that where process is directed to the wrong officer and served by the right one, the proceedings based on such service are not necessarily invalid.²

Ordinarily a sheriff or similar officer has no authority to serve process beyond the limits of his county or district; a writ, from whatever jurisdiction issued, must therefore be addressed to and served by the sheriff or other officer of the county or district where service is to be made.³

A deputy has authority to serve process only in cases where his principal would have the authority to make such service; therefore where the sheriff is personally disqualified by reason of interest in the suit, prejudice, partiality, consanguinity to one of the parties, or by being himself a party to the record, service cannot be made by his deputy; but where the sheriff's disability arises from sickness, absence from the county, or other similar cause, his deputy is qualified to serve.⁴ A deputy's authority to serve process expires with that of his principal,⁵ but it seems that service by him after the expiration of his principal's term of office and before his successor has qualified is not necessarily invalid.⁶

Where the sheriff and his deputies are disqualified on the ground of interest the coroner is the proper officer to serve process.⁶ In courts of justices of the peace, the constable, being

stable in W. county. *Paul v. Vankirk*, 6 Binn. (Pa.) 123.

1. *Ware v. Todd*, 1 Ala. 199; *Sawyer v. Price*, 6 Ala. 285.

2. **Must Be Served by Officer of County Where Service Is Made.**—*Wirtz v. Henry*, 59 Ill. 109; *Cresswell v. McCaig*, 11 Neb. 222 (service by bailiff); *McMeekin v. Johnson*, 2 Dana (Ky.) 459; *Wood v. Crosby*, 2 Hill (S. Car.) 520; *Witt v. Kaufman*, 25 Tex. Supp. 384; *First Nat. Bank v. Dwight*, 85 Mich. 509; *Lillard v. Brannin* (Ky. 1891), 16 S. W. Rep. 349; *Church v. Edson*, 39 Mich. 113; *Ford v. Adams*, 54 Ark. 137; *Witkousky v. Rintels*, 69 N. Car. 38. *Compare* *Polhill v. Brown*, 84 Ga. 338 (special statute).

See the rule of the text applied in connection with the Michigan watercraft law of 1864, § 3, providing that process issued in either of two adjoining counties may be served in the waters of either, by the sheriff of either. *Baker v. Casey*, 19 Mich. 220.

3. **Service by Deputy.**—*Minott v. Vineyard*, 11 Iowa 90. See also *DEPUTY*, vol. 5, p. 628; *SHERIFFS*, vol. 22; *Nelson v. Nye*, 43 Miss. 124; *Branner v. Chapman*, 11 Kan. 118.

Service by a deputy upon several co-defendants, one of whom was the sheriff, was held valid in *Turnbull v. Thompson*, 27 Gratt. (Va.) 306.

In *Slocomb v. Powers*, 10 R. I. 256, service was allowed to be made by one deputy upon another; and in *Gage v. Graffam*, 11 Mass. 181, it was held that a deputy sheriff might lawfully serve a deputy jail-keeper, who acted under the same principal. *Wood v. Ross*, 11 Mass. 271.

4. See *DEPUTY*, vol. 5, p. 636.

5. *Garner v. Clay*, 1 Stew. (Ala.) 182.

6. **Service by Coroner.**—See *CORONER*, vol. 4, p. 175; *Witkousky v. Rintels*, 69 N. Car. 38; *Twiggs v. Hardwick*, 61 Ga. 272; *Graves v. Smart*, 75 Me. 295; *Webster v. Smith*, 13 Mo. App. 323; *Barlass v. May*, 16 Neb. 647; *Avery v. Warren*, 12 Heisk. (Tenn.) 559; *Nabors v. Thomason*, 1 Ala. 590; *McPherson v. State Bank*, 4 Ark. 558.

In some cases the marshal is the proper officer where the sheriff is disqualified. See *Gallegos v. Pino*, 1 N. Mex. 410.

Under *Kentucky Civil Code*, § 667, which provides that every process "shall be directed to the sheriff of the county; or, if he be a party, or be interested, to the coroner; or, if he be interested, to the jailer"—process cannot be directed to the jailer unless both the sheriff and coroner are disqualified; and an execution directed to the "coroner or jailer," cannot be executed by the jailer, as the presumption is that

the ministerial officer of such courts, is usually the one to serve all processes issued by them.¹ Process from the federal courts is served by the marshal or his deputies.²

It is a general rule that no one who is a party to the action or suit, or who is otherwise interested therein, can make a valid service of process in such suit,³ and in case the officers whose duty it is to serve process are disqualified, an indifferent person must be specially deputized.⁴

In case of service made by an indifferent person, he may be any competent person the court or justice may see fit to authorize.⁵

the coroner was qualified. *Gowdy v. Sanders* (Ky. 1889), 11 S. W. Rep. 82. When there is no coroner in the county, the court may appoint one to serve process against the sheriff. *Witkousky v. Rintels*, 69 N. Car. 38.

When process is served by the coroner, all the facts necessary to give him authority should affirmatively appear on the face of the writ; a general direction to him is not sufficient. *Carlisle v. Weston*, 21 Pick. (Mass.) 535; *Simonds v. Parker*, 1 Met. (Mass.) 508; *Beard v. Smith*, 9 Iowa 50 (nothing should be left to inference).

1. **By Constable.**—See *Winsor v. Cole*, 10 Kan. 620 (constable not bound to verify his return by affidavit); *Brown v. Brown*, 15 Mass. 389; *Hart v. Huckins*, 6 Mass. 399; *Prickett v. Cleek*, 13 Oregon 415 (service by constable's deputy).

2. **By Marshal.**—U. S. Rev. St., § 787. See *Gallegos v. Pino*, 1 N. Mex. 410.

3. **Service Cannot be Made by Party to the Suit.**—*Boykin v. Edwards*, 21 Ala. 261; *Toenniges v. Drake*, 7 Colo. 471; *Hemmer v. Wolfer*, 127 Ill. 435; *Snydacke v. Brosse*, 51 Ill. 357; 99 Am. Dec. 551; *Hayden v. Atlanta Sav. Bank*, 66 Ga. 150; *Pausch v. Gueward*, 67 Ga. 319; *Knott v. Jarboe*, 1 Met. (Ky.) 504; *Morton v. Crane*, 39 Mich. 526; *Bush v. Meacham*, 53 Mich. 574; *New York Code Civ. Proc.*, § 425. Compare *Walker v. Hill*, 21 Me. 481.

The fact that a sheriff is a ratable inhabitant of a town makes him incompetent to serve a writ against it. *Evarts v. Georgia*, 18 Vt. 15; *Lyman v. Burlington*, 22 Vt. 131. Compare *Clark v. Bray*, 1 Kirby (Conn.) 237; *Windham v. Hampton*, 1 Root (Conn.) 175.

It is said, however, that service of summons by a party is a mere irregularity, which cannot be taken advantage of after judgment. *Hunter v. Lester*, 10 Abb. Pr. (N. Y.) 260; *Myers v. Overton*, 2 Abb. Pr. (N. Y.) 344;

and in *Avery v. Warren*, 12 Heisk. (Tenn.) 559, it is said that § 559 of Tennessee code, providing for service by the coroner when the sheriff is a party, does not apply where he is a mere nominal party.

Where a writ was served by a person not an officer, but deputized by the sheriff, and who bore the same name as that of one of the plaintiffs, and nothing appeared to the contrary, the court held that it must be presumed, from the identity of names, that the person serving the writ was a plaintiff, and that the service was not good. *Filkins v. O'Sullivan*, 79 Ill. 524. Compare *Boykin v. Edwards*, 21 Ala. 261. But in *Cumming v. Richards*, 32 Ala. 459, it is held that the mere fact that the name of the sheriff who executed the summons on one of the defendants to a suit, in which judgment was by default, is the same with that of another of the defendants, is not a sufficient ground, in an appellate court, for presuming an identity, and reversing the judgment.

The fact that the sheriff is a party to a civil suit pending in a district court does not authorize service of process issuing in the cause by a town or city marshal residing in the county. *Robinson v. Schmidt*, 48 Tex. 13.

A sheriff after being appointed guardian of the plaintiff, cannot complete service commenced before his appointment. *Clark v. Patterson*, 58 Vt. 676.

In *Goodin v. State*, 14 Tex. App. 443, it is said that if one of several defendants is the sheriff, process is properly served by the constable, although it does not appear from the face of the petition that the sheriff is a party. Compare *Carlisle v. Weston*, 21 Pick. (Mass.) 535.

4. See *Miller v. Miller*, 39 Minn. 376; and cases cited in succeeding note.

5. **Service by Indifferent Person.**—See

The statutes of some States prescribe the age of such person,¹ but in the absence of statutory provision it seems that he must not be under twenty-one.²

The "summons" which is now used under the code practice in many States, being a mere notification, proceeding from the plaintiff's attorney, and not process, may be served by anyone not a party to the suit, unless otherwise prescribed by law.³

Service must in all cases be made by one duly authorized to make it, whether an officer or a private individual.⁴ Where a private person is deputized to make service, the deputation should be indorsed on the writ or appear of record,⁵ and should

Coffee v. Gates, 28 Ark. 43; *Sharpe v. Daugney*, 33 Cal. 505; *Lawrence v. Kingman, Kirby* (Conn.) 6; *Tyler v. Hull*, 2 Root (Conn.) 72; *Case v. Humphrey*, 6 Conn. 130; *Gadsby v. Stimer*, 79 Mich. 260; *Miller v. Miller*, 39 Minn. 376; *Haskins v. Citizens' Bank*, 12 Neb. 39; *Vinnedge v. Nicholas*, 28 Neb. 133.

As to who is a "competent person," see *Rasch v. Moore*, 57 Mich. 54; *Mudrock v. Killips*, 65 Wis. 622.

Such Person Must be Disinterested, and where he makes affidavit that he is "not directly interested," he thereby admits that he is indirectly interested, and is consequently not competent to make a valid service. *Union Mut. F. Ins. Co. v. Page*, 61 Mich. 72. See also *Treat v. Carrington*, 1 Root (Conn.) 356; *Dolbear v. Hancock*, 19 Vt. 388.

1. Age of Such Party.—In *California*, he must be over the age of eighteen, of sound mind, etc. *Peck v. Strauss*, 33 Cal. 678; *Barney v. Vigonreaux*, 75 Cal. 376; *infra*, this title, *Return of Process*.

2. Service by a Minor.—*Vail v. Rowell*, 53 Vt. 109; *Gadsby v. Stimer*, 79 Mich. 260; *Tyler v. Tyler*, 2 Root (Conn.) 519; *Harvey v. Hall*, 22 Vt. 211; *Dolbear v. Hancock*, 19 Vt. 388; *Cuckson v. Winter*, 2 M. & R. 313. Compare *Moore v. Graves*, 3 N. H. 408 (asserting a directly contrary doctrine); *Howard v. Galloway*, 60 Cal. 10.

3. Under Code Practice.—*New York Code Civ. Proc.*, § 425; *Myers v. Overton*, 2 Abb. Pr. (N. Y.) 344; *Hunter v. Lester*, 18 How. Pr. (N. Y.) 347. See also *infra*, this title, *Return of Process*.

New York Code Civ. Proc., § 1895, providing that summons in an action to recover a penalty given by statute to any person suing therefor can be

served "only by an officer authorized by law to collect an execution issued out of the same court," does not apply to an action under *New York Laws* 1857, ch. 185, giving a penalty of fifty dollars against a railroad company charging an excess of fare. *Quade v. New York, etc., R. Co.*, 14 N. Y. Supp. 875.

4. Service Must be by Person Duly Authorized.—*Leavitt v. Leavitt*, 135 Mass. 191; *Brown v. Brown*, 15 Mass. 389 (divorce cases); *Gabler v. Elizabeth*, 41 N. J. L. 316; *Grantier v. Rosecrance*, 27 Wis. 488.

In *Guarantee Trust, etc., Co. v. Budington*, 23 Fla. 514, it was held that service of a writ by an officer having no authority as such to make service, is invalid, and cannot be sustained upon the theory that he was at the time the deputy of the officer whose duty it was to serve it, when the former had at the time no information of the latter's intention to deputize him to do it.

Under the *Kentucky* statute empowering sheriffs, by indorsement on a summons, to authorize a special bailiff to serve it, an indorsement on an original writ confers no authority on a special bailiff to serve an *alias*. *Thompson v. Moore* (Ky. 1891), 15 S. W. Rep. 6. See also *Lillard v. Brannin* (Ky. 1891), 16 S. W. Rep. 349. In this latter case, it is held that § 668 of the *Kentucky Civ. Code* providing that, for good cause, the court may appoint a person to serve a particular process, who shall have the same power as a sheriff, a person appointed in one county cannot serve a process in another, since, by § 667, the process is required to be directed to the sheriff of the county and no sheriff has any authority beyond the limits of his own county.

5. Authority to Serve Must be Indorsed on Process.—*Miller v. Miller*, 39

show all facts necessary to authorize the appointment of such deputy.¹

III. TIME OF SERVICE.—Service of process, it seems, may be made at any hour of the day or night, and on any day save those excepted at common law and by statute.² Sunday being both by common law and by statute in nearly every State *dies non juridicus*, service of process is invalid if made upon that day.³ Various other legal holidays are provided in the several States,

Minn. 376; Gadsby v. Stimer, 79 Mich. 260; Culver v. Balch, 23 Vt. 618; Pricke v. Cleek, 13 Oregon 415; Union Mut. F. Ins. Co. v. Page, 61 Mich. 72; Coffee v. Gates, 28 Ark. 43.

1. Beard v. Smith, 9 Iowa 50; Simonds v. Parker, 1 Met. (Mass.) 508. Compare Currens v. Ratcliffe, 9 Iowa 309.

It is held that in indorsing upon a summons and deputation of authority to serve it, the justice need not certify that the person authorized is of age and not interested in the suit. It is not presumed that he selects an incompetent person. Buel v. Duke, 38 Mich. 167.

But a different view is taken, and it is held that the fitness of the deputy should appear from the indorsement, in Gadsby v. Stimer, 79 Mich. 260. See Union Mut. F. Ins. Co. v. Page, 61 Mich. 72.

Appointment of Deputy Generally.—In *Vermont*, the appointment of an indifferent person to execute process is a judicial act, and cannot be delegated. Kelly v. Paris, 10 Vt. 261; 33 Am. Dec. 199.

Such an appointment upon a blank writ is void, and those acting under it are trespassers. Kelly v. Paris, 10 Vt. 261; 33 Am. Dec. 199.

In *Vermont*, it is also held that service of a subpoena issued from chancery cannot be made by an indifferent person, who is not named in such a subpoena. Allyn v. Davis, 10 Vt. 547. See also Clarke v. Washburn, 9 Vt. 302.

In *Connecticut*, where an indifferent person is to serve process, the magistrate is required first to administer to him an oath. Kellogg v. Wadhams, 9 Conn. 201; Augur v. Augur, 14 Conn. 82; Eno v. Frisbie, 5 Day (Conn.) 122.

One specially appointed to serve a writ, is an officer *de facto* for that purpose. Jewell v. Gilbert, 64 N. H. 13; 13 Am. & Eng. Corp. Cas. 117.

As to appointment of a private person as special constable for service of sum-

mons, see Johnson v. MacCoy, 32 W. Va. 552. See also Polhill v. Brown, 84 Ga. 338.

It is held, also, that no authority to serve a process can be conferred upon one who has not power by statute for that purpose, without a judicial act of the magistrate who signs the process. Dolbear v. Hancock, 19 Vt. 388; Grantier v. Rosecrance, 27 Wis. 488.

And where a superior court writ is served by a person authorized only by a justice of the peace, and not by the authority signing the writ, the defect is fatal. Howard v. Walker, 39 Vt. 163.

Nebraska Code provides that at a party's request, and on being satisfied that it is expedient, a justice may depute a "discreet" person of suitable age to serve a summons, and that such deputation must be in writing, on the process. Under this, the appointment need not show that the justice was requested to make it, nor that he was satisfied of its expediency; it is sufficient to address the summons to the appointee as "special constable." Morse v. Carpenter, 31 Neb. 224; Culver v. Balch, 23 Vt. 618; Haskins v. Citizens Bank, 12 Neb. 39. Compare Gadsby v. Stimer, 79 Mich. 260; holding that the request must appear in the indorsement.

In *Jewett v. Garrett*, 47 Fed. Rep. 625, it is held that the appointment of a special deputy to serve process is not invalidated by the fact that the marshal delivered a signed blank writ for such appointment; and that plaintiff's attorney filled the blank with the deputy's name. Compare Kelly v. Paris, 10 Vt. 261; 33 Am. Dec. 199.

2. Stone's Case, 129 Mass. 156; McKalley's Case, 9 Coke 651.

3. See SUNDAY. See also, DAY, vol. 5, p. 85. *Dies non juridicus* means a day upon which no judicial proceedings can be had; and the term judicial proceedings embraces the issuing and service of all process. State v. Ricketts, 74 N. Car. 193.

either by State or Federal statutes; but whether these holidays are such that valid service of process cannot be made upon them is a question concerning which there is much doubt. It seems to be true, however, that service on such days is at least irregular.¹ The general rule is sometimes relaxed in favor of attachments, owing to the peculiar character of this remedy, and also in favor of criminal process, so that a valid service of such process may be made at times when the service of any other process would be invalid.²

Service must, of course, be made a sufficient time before the cause is to be heard for the defendant to prepare his defense and make his appearance. Therefore, it is required by statute in most of the States that service shall be made a certain number of days, at the least, before the return day, which is usually the first day of the term of the court at which the cause is to be heard;³ and in computing this time the day of service and the return day are not both to

1. *Paul v. Bruce*, 9 Bush. (Ky.) 317. In *Lampe v. Manning*, 38 Wis. 673, it is said that whenever a State statute declares a certain day to be a legal holiday, it becomes *dies non juridicus*.

In *New York*, service on election day is invalid, except service of a subpoena in chancery, or an injunction. *Wheeler v. Bartlett*, 1 Edw. Ch. (N. Y.) 323; *Meeks v. Noxon*, 1 Abb. Pr. (N. Y.) 280; 11 How. Pr. (N. Y.) 289; *Bierce v. Smith*, 2 Abb. Pr. (N. Y.) 411; but it is held in the same State, that service on any other legal holiday, for example, Saturday afternoon, is not invalid. *Didsbury v. Van Tassel*, 31 N. Y. St. Rep. 204. See *Malengreen v. Phinney* (Minn. 1892), 52 N. W. 915 (publication on May 30, valid). In *Connecticut*, service of process on a day appointed by the government as one for public thanksgiving is forbidden, and if made then is void. *Gladwin v. Lewis*, 6 Conn. 49; 16 Am. Dec. 33.

In *West Virginia*, it is held that process may be served on the fourth day of July as well as on any other day. *Horn v. Perry*, 11 W. Va. 694.

In *New Jersey*, valid service may be made on any day except Sunday. *Glenn v. Eddy*, 51 N. J. Eq. 255.

In *Arkansas*, a service on the Fourth of July is forbidden except in extreme cases. *Swinney v. Johnson*, 18 Ark. 534. Compare *Rogers v. Brooks*, 30 Ark. 612.

In *Whitney v. Blackburn*, 17 Oregon 564; 11 Am. St. Rep. 857, it is said that service of process upon a legal holiday is irregular, and may be pleaded in

abatement, or set aside on motion; but a notice of an election contest, like a summons, is not a technical "process," so that service of it is not necessarily invalid because made on a holiday.

2. Thus, in *Arkansas*, it is provided that no person shall on Sunday, or the Fourth of July, serve or execute any writ or process, except in criminal cases for breach of the peace, or when the defendant is about to leave the county. See *Swinney v. Johnson*, 18 Ark. 534; *Rogers v. Brooks*, 30 Ark. 612.

An attachment is in the nature of a summary remedy, and is intended to afford a remedy to a plaintiff when the defendant in the suit is about to abscond. Therefore, its effect might frequently be lost if it could not be used on a holiday. See 4 *Minor's Inst.* (2d ed.) 479; SUNDAY.

3. *Lofland v. Jefferson*, 4 Harr. (Del.) 303; *Leake v. Gallogly* (Neb. 1892), 52 N. W. Rep. 824; *Peacham v. Weeks*, 48 Vt. 73; *Marcele v. Saltyman*, 66 How. Pr. (N. Y.) 205; *Eaton v. Fullett*, 11 Ill. 491; *Murfree on Sheriffs* (2d ed.), §§ 119, 119a; *Dobynes v. U. S.*, 3 Cranch (U. S.) 241; *infra*, this title, *Return Days*.

Unless process is served the required time before the return day, it is utterly void, and may be cured only by the voluntary appearance of the defendant. *Draper v. Draper*, 59 Ill. 119; *Central Mfg. Co. v. Hartshorne*, 3 Conn. 199; *Thrower v. Brandon*, 89 Ala. 406; *Meisse v. McCoy*, 17 Ohio St. 225; *Harrington v. Harrington*

be counted—one or the other must be excluded.¹ A service made after the return day is therefore utterly void;² and where process

(Tex. 1890), 16 S. W. Rep. 538; *Peck v. La Roche*, 86 Ga. 314.

The return must show that it was executed in time; though it seems that if the return fails to state the time, it may be proved by other evidence. *Calhoun v. Matlock*, 3 How. (Miss.) 70; *Garity v. Gigie*, 130 Mass. 184; *Harding v. Larkin*, 41 Ill. 413. *Compare Cariker v. Anderson*, 27 Ill. 358.

A writ served on the thirty-first day of October, requiring the defendant to appear at 2.30 P.M. the third day of November, was held to have given the three days' notice required by statute of *Kansas*. *Foster v. Markland*, 37 Kan. 32.

Where statute required service at least ten days before return day, a service on Friday, June 22, the return day being Monday, July 2, was held sufficient. *Womack v. McAhren*, 9 Ind. 6. So service on the 15th, the return day being the 25th, is sufficient. *Korpeteter v. Wright*, 15 Ind. 456.

But under § 3227 of Virginia code, requiring service ten days before return day, a summons issued March 29, returnable on first Monday in April, cannot be served on March 30. *Virginia F. & M. Ins. Co. v. Vaughan*, 88 Va. 832. See for other cases, *Moffitt v. Bining*, 17 Ind. 195; *Martin v. Reed*, 9 Ind. 180; *Blair v. Davis*, 9 Ind. 236.

California Code, § 406, requires summons to be served within one year from the filing of the complaint. This provision is mandatory. *Linden Gravel Min. Co. v. Sheplar*, 53 Cal. 245.

1. Return Day and Day of Service Not Both to Be Counted.—*Thrower v. Brandon*, 89 Ala. 406; *Baxley v. Bennett*, 33 Ga. 146; *Moffitt v. Bining*, 17 Ind. 195; *Blair v. Manson*, 9 Ind. 357; *Monroe v. Paddock*, 75 Ind. 422; *Ryman v. Clark*, 4 Blackf. (Ind.) 329; *Schultz v. American Clock Co.*, 39 Kan. 334; *Pollard v. Yoder*, 2 A. K. Marsh. (Ky.) 267; *Ogden v. Redman*, 3 A. K. Marsh. (Ky.) 234; *Berry v. Spear*, 13 Me. 187; *Morrison v. Gailard*, 25 Miss. 194; *Den v. Fen*, 8 N. J. L. 303; *Taylor v. Harris*, 82 N. Car. 25; *Barto v. Abbe*, 16 Ohio 408; *Dickinson v. Lee*, 2 Coldw. (Tenn.) 615. *Compare*, however, *O'Connor v. Towns*, 1 Tex. 107; *Temple v. Carstens*, 1 Greene (Iowa) 492; *Snell v. Scott*, 2 Mich. N. P. 108; *Warrington*

v. Tull, 5 Harr (Del.) 107; *Spragins v. West Virginia, etc., R. Co.* (W. Va. 1891), 13 S. E. Rep. 45.

Under the *Indiana* rule, which requires service of summons to be made ten days before the first day of the term, the latter day to be included and the day of service excluded, a service made on December 27, returnable January 7 (the second day of the term), is sufficient; and a default taken on that day is valid. *Baltimore, etc., R. Co. v. Flinn* (Ind. App. 1891), 28 N. E. Rep. 201.

Service being required to be made ten days before the next succeeding term of court, the 29th day of February is to be included in the computation. *Helphenstine v. Vincennes Nat. Bank*, 65 Ind. 589; 32 Am. Rep. 86.

In computing the time for serving a writ, the return day is to be excluded; and if it falls on Sunday, the succeeding Monday is the day on which the return is to be made. *Baxley v. Bennett*, 33 Ga. 140. See also as to Sunday, *Turner v. Thompson*, 23 Ga. 49; *Ferris v. Plummer*, 46 Hun (N. Y.) 515.

Defendant may waive a defect in the service in being made too near the return day, and it seems that he does so impliedly by failure to object. *Torrent v. Sulter*, 67 Ga. 32.

As to extension of time for service, see *Allen v. Mutual Loan, etc., Co.*, 86 Ga. 74.

Whether or not a writ is served within required term, is a question for the jury. *People v. Clement*, 72 Mich. 116.

Subpœna.—The rule as to service of a subpœna for witnesses is laid down in 1 Greenleaf's Ev., § 314; like other mesne process it must be served a reasonable time before the day on which the witness is to appear, and this reasonable time must never be less than one day. *Hammond v. Stewart*, 1 Stra. 510; *Sims v. Kitchen*, 5 Esp. 46; *Scammon v. Scammon*, 33 N. H. 52. Service after the return day is utterly void. *Lofland v. Jefferson*, 4 Harr. (Del.) 303. As to what is a reasonable time in such connection, see *Ex parte Williams*, 2 L. M. & P. 580; 21 L. J. M. C. 46.

See generally, SUBPœNA.

2. Service Made After Return Day Void.—*Dozier v. Lamb*, 59 Ga. 461;

bears date after the officer's return of service, the return is no evidence of service and need not be traversed.¹

IV. WHERE AND UPON WHOM SERVICE IS MADE.—Service of process, to be valid, must be made within the territorial jurisdiction of the court from which the process issued and of the officer making the service.²

Service is to be made upon the party named in the process to be served; in case of summons this is ordinarily the defendant in the suit.³ If one is served with a process which contains his name as that of the defendant, but which he believes is intended for another person of the same name, he must nevertheless appear; if he fails to do so, relying upon the mistake in identity, he may be bound by the judgment by default rendered against him.⁴ A material mistake in the name of the party shown by the return to have been served will invalidate the service.⁵

Hitchcock v. Haight, 7 Ill. 604; *Draper v. Draper*, 59 Ill. 119; *Matthews v. Warne*, 11 N. J. L. 295; *State v. Kennedy*, 18 N. J. L. 22; *Violand v. Saxel*, 31 Tex. 283; *Harrington v. Harrington* (Tex. 1891), 16 S. W. Rep. 538; *Crews v. Garland*, 2 Munf. (Va.) 491.

1. *Keaton v. Moore*, 59 Ga. 553.

2. **Where Made.**—See *Duckworth v. Lee*, 10 Bush (Ky.) 51; *Yost v. State*, 48 N. J. L. 356; *Gould v. Johnston*, 24 Minn. 188 (under special statute).

A district court has jurisdiction where defendant was served with process upon an Indian reservation. The process of the court runs and may be served there, unless a treaty with the Indians stipulates otherwise. *Hyde v. Harkness*, 1 Idaho (N. S.) 536.

In *Peabody v. Hamilton*, 106 Mass. 217, it is said to be no objection to the validity of the service of process in a civil action that it was made upon the defendant while he was still on board a British mail steam vessel after she arrived at the dock but before she was moored.

A village marshal, to whom is given the powers of a constable for two counties, may serve process in either county. *Starkweather v. Sawyer*, 63 Wis. 297.

Under the Pennsylvania statute requiring service of process against one engaged in business in another county, to be made "at the usual place of business or residence" of such party, a personal service not made at one of such places is invalid. *Lehigh Valley Ins. Co. v. Fuller*, 81 Pa. St. 398.

Where a suit against a corporation is instituted in the county which is the

domicile of such corporation, service on the president outside the State is not sufficient. *Dillard v. Central Va. Iron Co.*, 82 Va. 734. See also *infra*, this title, *Upon a Corporation*.

Where a city marshal has no authority to serve process outside of the city limits, his return on a writ of attachment issued by a justice, will not confer jurisdiction unless it shows affirmatively that the writ was served within the city. *Alverson v. Dennison*, 40 Mich. 179.

3. **Upon Whom Service Is Made.**—See generally, *PARTIES TO ACTIONS*, vol. 17, p. 470.

In *Coleman's Appeal*, 75 Pa. St. 441, a bill was filed against a corporation, D., and persons alleged to be indebted to D., to compel a transfer of stock held by D. and payment to the petitioner by D. of money arising out of certain corporate transactions. It was held that D. was the "principal defendant," under the act of 1859 regulating the issuance and service of process in equity cases.

4. *Frazer v. Sibley*, 50 Ga. 96; *Case v. Bartholow*, 21 Kan. 300.

5. **Mistake in Name of Party Served.**—See generally, *NAME*, vol. 16, p. 122 *et seq.*; *Hammond v. Baker*, 39 Mich. 472; *Peterson v. Little*, 74 Iowa 223. A citation for "J. A. Townsend" was returned as served on "J. A. Townsen." *Held*, no objection to the validity of a judgment by default. *Townsend v. Ratcliff*, 50 Tex. 148. So also a judgment against "J. H. Bagwell" is supported by a summons actually served on him, though directed to "J. H. Bagswell." *Case v. Bartholow*, 21 Kan. 300. Likewise a return by the

V. MANNER OF SERVICE.—1. Upon a State.—In case of process issued against a State, either at law or in equity, it should be served upon the governor or chief executive magistrate, and the attorney-general.¹ The rule as to service of process against a State applies only in cases where the State is a party to the record; when the suit is prosecuted by an officer, conducting proceedings in his own name or that of his office, but acting in behalf of the State, the citation in error must be served on him, and service as against the State would be insufficient.² Process against a State issues "against the State of —." ³

2. Upon a Corporation.—At common law, process against a corporation was by writ of summons against some one of its officers, and in case no appearance was made, then by a *distringas* against its goods; so that if the corporation had neither land nor other property, there was no way to compel its appearance either at law or in equity.⁴

officer that he served the summons upon "James Mayberry" and delivered the said "Jame May" a certified copy of the complaint, is sufficient. *Allen v. Mayberry*, 14 Nev. 115. But service on "Asher B." is no service on "Ashley B." *Bates v. State Bank*, 7 Ark. 394; 46 Am. Dec. 293. Nor is service on "Jonathan McCarver" notice to "Jonathan McCravey." *McCravey v. Cox*, 24 Ark. 574.

Writing "Rosa K." instead of "Rose K." is not a material error. *Galliano v. Kilfry*, 94 Cal. 86. And in an action against "A. J. Veasey," a return of service upon "Jack Veasey" is held sufficient to support a judgment by default. *Veasey v. Brigman*, 93 Ala. 548. A return of process against "Jacob Kraig" as served on "Jacob Krug," is insufficient; the names are not *idem sonans*. *McClaskey v. Barr*, 45 Fed. Rep. 151. See also *Cheshire v. Milburn Wagon Co.* (Ga. 1892), 15 S. E. Rep. 311 (immaterial clerical error).

1. *Grayson v. Virginia*, 3 Dall. (U. S.) 320; *Chisholm v. Georgia*, 2 Dall. (U. S.) 419; *New Jersey v. New York*, 3 Pet. (U. S.) 461; 5 Pet. (U. S.) 284; *New York v. Connecticut*, 4 Dall. (U. S.) 6; *State v. Steele*, 57 Tex. 200; *State v. Cook*, 57 Tex. 205.

In *Huger v. South Carolina*, 3 Dall. (U. S.) 339, it was held to be a sufficient service where a subpoena had been issued in a suit in equity against a State; and it appeared that the original had been shown to the secretary of State; that a copy had been delivered to the attorney-general of the State, and a copy left at the governor's house.

In *Massachusetts*, it is held that in proceedings where the commonwealth is a party, or interested, and no other special mode of summons is provided by law, notice to the governor, as the chief executive officer, is sufficient. *Com. v. Boston, etc., R. Co.*, 3 Cush. (Mass.) 25.

Where the United States is defendant, it is not a sufficient service of the writ of error to leave a copy thereof at the residence, and with the wife, of the United States attorney. *Conway v. U. S.*, 2 Wash. 336. See also *Bennet v. U. S.*, 2 Wash. 179.

2. *Poydras de la Lande v. Treasurer of Louisiana*, 17 How. (U. S.) 1.

The rule of the Supreme Court of the United States points out the officers who shall represent the State, so far as concerns the service of process in those cases in which a State is party. *Poydras de la Lande v. Treasurer of Louisiana*, 17 How. (U. S.) 1.

3. *Florida v. Georgia*, 11 How. (U. S.) 293. In some jurisdictions the style of process is "against the Commonwealth," or "against the People of—". See *Summons*.

4. 1 Minor's Inst. 565; 3 Black Com. 445, 477; 1 Tidd's Pr. 121; *McQueen v. Middletown Mfg. Co.*, 16 Johns. (N. Y.) 5; *Glaize v. South Carolina R. Co.*, 1 Strobb. (S. Car.) 73; *Newell v. Great Western R. Co.*, 19 Mich. 345; *Newby v. Colts, etc., Co.*, L. R., 7 Q. B. 296; *Clarke v. New Jersey Steam Nav. Co.*, 1 Story (U. S.) 531.

"At common law no writ of *capias ad respondendum*, or other writ of arrest, lies against a corporation; for its existence being ideal only, it is inca-

The matter of service of process upon corporations is now regulated by statute. These statutes are the same in their general tenor; yet, in their details, they vary.¹ They provide an exclusive method of service on corporations, and supersede the common law mode of service.²

pable of being apprehended or committed to prison; and, therefore, it cannot be outlawed, for outlawry supposes a precedent right of arresting which has been defeated by the party's absconding; and that also a corporation cannot do. For these reasons the proceedings to compel a corporation to appear to any suit by attorney, are at common law always by distress on its goods and the profits of its lands after a summons has been executed and not obeyed." 1 Minor's Inst. (3d ed.) [565] 644.

In Absence of Statutory Provision.—In the case of *Heltzell v. Chicago*, etc., R. Co., 77 Mo. 315; 16 Am. & Eng. R. Cas. 619, it was said that, "in the absence of any statutory mode of service of notice upon a corporation, when it cannot be had upon the chief officer or managing agent, service upon any officer whose official relation to the governing body or managing agent or chief officer would make it his duty to communicate the notice, will be sufficient." Also that the secretary of a railway corporation is such an officer.

When there are no special provisions relative to service of process upon foreign corporations, such corporations, it is held, are within the operation of a general statute providing for service upon corporate agents. *Hannibal*, etc., R. Co. v. *Crane*, 102 Ill. 249; 40 Am. Rep. 581; *Midland*, etc., R. Co., v. *McDermid*, 91 Ill. 170; *Mineral Point R. Co. v. Keep*, 22 Ill. 9; 74 Am. Dec. 124; *Chicago*, etc., R. Co. v. *Manning*, 23 Neb. 552; 35 Am. & Eng. R. Cas. 618. But see *People v. Judge*, 24 Mich. 38, in which a contrary conclusion is reached. See also *Newell v. Great Western R. Co.*, 19 Mich. 336; *Hebel v. Amazon Ins. Co.*, 33 Mich. 400.

1. Constitutionality of Statute Conflicting with Charter.—A statute which prescribes a mode of service of process upon a corporation different from that provided for in its charter, is not void as impairing the obligation of the charter contract. *Cairo*, etc., R. Co. v. *Hecht*, 95 U. S. 168; *New Albany*, etc., R. Co. v. *Mc-*

Namara, 11 Ind. 543; *Sturgis v. Crowninshield*, 4 Wheat. (U. S.) 122.

Manner of Service.—The exact manner of service varies, of course, according to the language of the various statutes. The provision usually is that service shall be made by delivering a copy to an officer, etc. See *New York Code Civ. Proc.*, §§ 431-2. And where this is the case, service cannot be made by merely reading the contents of the writ to such officer. *Cairo*, etc., R. Co. v. *Janier*, 72 Ill. 520. See also *Sleeper v. Free Baptist Assoc.*, 58 N. H. 27.

New York Statutes.—The *New York* statute, relative to service of process upon a domestic corporation, may be quoted as affording a fair example of the statutes on the subject. *New York Code Civ. Proc.*, § 431, provides: "Personal service of the summons upon a defendant, being a domestic corporation, may be made by delivering a copy thereof within the State as follows: 1. If the action is against the mayor, aldermen, and commonalty of the city of New York, to the mayor, comptroller or counsel to the corporation. 2. If the action is against any other city, to the mayor, treasurer, counsel, attorney, or clerk; or, if the city lacks either of those officers, to the officer performing corresponding functions under another name. 3. In any other case, to the president or head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer, or a director or managing agent." See 1 Bliss' Annotated Code of *New York* 265; *New York Code Civ. Proc.*, § 431; *Winslow v. Staten Island*, etc., R. Co., 51 Hun (N. Y.) 298; *Emerson v. Auburn*, etc., R. Co., 13 Hun (N. Y.) 150; *Rochester*, etc., R. Co., v. *New York*, etc., R. Co., 48 Hun (N. Y.) 190.

In *Barrett v. American Tel.*, etc., Co., 31 N. Y. St. Rep. 465, it is said that if the person served sustains sufficient character and rank to render it reasonably certain that the corporation will be apprised of the service, the requirement of the statute is answered.

2. Statutes Provide an Exclusive Method of Service.—It has been held in

It has been decided that since the object of such statutes is merely to carry out the principle that no proceeding may be had against the defendant until due notice has been given him, a service which virtually accomplishes this object will not be held invalid, if the statute is capable of a double construction.¹

many cases that the method prescribed by statute for the service of process is exclusive of any other method of service; and this is particularly true in the case of foreign corporations. See *In re St. Paul, etc.*, R. Co., 36 Minn. 85; 28 Am. & Eng. R. Cas. 255; *Little Bobtail Min. Co. v. Lightbourne*, 10 Colo. 429; *Well v. Greene Co.*, 69 Mo. 281; *Cosgrove v. Tebo, etc.*, R. Co., 54 Mo. 495; *North v. Cleveland, etc.*, R. Co., 10 Ohio St. 548; *Hartford F. Ins. Co. v. Owen*, 30 Mich. 441; *Congar v. Galena, etc.*, R. Co., 17 Wis. 477; *Union Pac. R. Co. v. Pillsbury*, 29 Kan. 652. Compare *Houston, etc.*, R. Co. v. Willie, 53 Tex. 318; 37 Am. Rep. 756.

Therefore, where a statute prescribing the mode of service upon foreign corporations, only authorized service upon some one authorized by power of attorney to receive it, proof of service upon the "agent" of a foreign corporation was insufficient. *American Express Co. v. Conant*, 45 Mich. 642; *Gallagher v. American Express Co.*, 56 Mich. 13.

But this all depends upon the particular statute. Thus, where a statute provided that in actions for a failure to ring a bell before reaching a crossing, service might be made on a director of the railroad company,—the direction of the statute was held to be permissive, and not mandatory or exclusive; so that service might be made on a station agent of the company. *State v. Hannibal, etc.*, R. Co., 51 Mo. 532; *Houston, etc.*, R. Co. v. Willie, 53 Tex. 318; 37 Am. Rep. 756; *Quade v. New York, etc.*, R. Co., 59 N. Y. Super. Ct. 479.

A statute providing for service of process upon corporations, supersedes the common-law method of compelling corporations to appear in court; and the method of bringing into court any corporation charged with a criminal offense, is by service of a copy of summons upon one of its officers or agents. *State v. Western N. Car. R. Co.*, 89 N. Car. 584; 22 Am. & Eng. R. Cas. 58; *Boston, etc.*, R. Co. v. State, 32 N. H. 215. Compare *State v. Ohio, etc.*, R. Co., 23 Ind. 362.

1. *St. Louis, etc.*, R. Co. v. Yocum, 34 Ark. 493; *Ghiradelli v. Greene*, 56 Cal. 629; *Cicero Tp. v. Shirk*, 122 Ind. 572; *Nye v. Burlington, etc.*, R. Co., 60 Vt. 585. The case of *Norfolk, etc.*, R. Co. v. Cottrell, 83 Va. 511; 31 Am. & Eng. R. Cas. 235, affords an instance of this, where the court had under observation a statute which it styled "cumbrous in style and somewhat involved." The service was held valid, since it virtually gave the corporation notice of the proceeding against it. But see, as to this case, 13 Va. Law Jour. 775-6.

In the case of *Pope v. Terre Haute Mfg. Co.*, 87 N. Y. 137, it was observed that "the object of all service of process for the commencement of a suit or other legal proceeding is to give notice to the party proceeded against; and any service which reasonably accomplishes that end, answers the requirements of natural justice and fundamental law." See also *Barrett v. American Tel., etc.*, Co., 31 N. Y. St. Rep. 465; *Cincinnati, etc.*, R. Co. v. McDougall, 108 Ind. 179; *State v. Hannibal, etc.*, R. Co., 51 Mo. 532; *Peoria Ins. Co. v. Warner*, 28 Ill. 429 (statutes to receive a liberal construction).

And in one State it is specifically provided that no summons or service thereof shall be set aside when sufficient to inform the party of the action, the name of the plaintiff, the court, and the time when he must appear. *Indiana Rev. Stat.* (1881), § 317; *Cicero Tp. v. Shirk*, 122 Ind. 572. Where proper service is made upon an agent, a failure to notify the president by mail as the statute requires is a mere irregularity which does not invalidate the service. *Emerson v. McCormick Harvesting Machine Co.*, 51 Mich. 5; *Central R. Co. v. Smith*, 69 Ga. 268.

Rule of Construction.—Such statutes being of a remedial nature are therefore to receive a liberal construction. *Peoria Ins. Co. v. Warner*, 20 Ill. 429; 1 Minor's Insts. (3d ed.), 40; *Pope v. Terre Haute Car Mfg. Co.*, 87 N. Y. 137; *Cincinnati, etc.*, R. Co. v. McDougall, 108 Ind. 179.

In an action by certain officers of a corporation against the corporation itself, service is not valid if made upon one of the officers who is himself a plaintiff.¹

a. DOMESTIC CORPORATIONS.—Personal service is required by the various statutes to be made upon some officer of the corporation, or upon some one of its agents as designated by the statute.² Where the term "general agent" is used, it is intended to mean only those agents who have the general control of any

1. **Service Upon a Corporation Officer Who Is Plaintiff in the Suit.**—In the case of *St. Louis, etc., Min. Co. v. Edwards*, 103 Ill. 472, the directors and certain stockholders of the corporation brought suit against the corporation and the remaining stockholders for its dissolution. The service was made upon the corporation by serving only the plaintiff director with process. It was held that this was a void service, of which advantage might be taken in the supreme court after the case came up on writ of error, as well as in the trial court. The same principle is upheld in *St. Louis, etc., Min. Co. v. Sandoval, etc., Min. Co.*, 111 Ill. 37; *Lee v. Fox*, 89 Ill. 226; *Rhem v. German Ins., etc., Inst.*, 125 Ind. 135; *Craig v. Gisborne*, 13 Gray (Mass.) 270; *Buck v. Ashuelot Mfg. Co.*, 4 Allen (Mass.) 357. In this last case it was observed: "A service thus made by giving a copy of the writ to the plaintiff was to no essential purpose a service on the corporation as defendants. The action might as well have proceeded without any service of the writ as one of that character. The plaintiff had notice of the action because he instituted it. The notice to be effective must be notice to an adverse party. If there was no other agent or officer of the corporation except the plaintiff, it would seem to be the proper course to serve the process on some member of the corporation, and that member some other person than the plaintiff."

2. **Service Upon a Mere Member.**—*State v. Bennett*, 47 N. J. L. 275. Unless there is a specific statutory provision to that effect, service of process upon one who is only a member of the corporation and not an officer or agent, cannot be valid even though no officers have been elected for many years. *Bache v. Nashville Horticultural Soc.*, 10 Lea (Tenn.) 436; 4 Am. & Eng. Corp. Cas. 128; *Rand v. Proprietor, etc.*, 3 Day (Conn.) 441; *Fort Scott v. Schulenberg*, 22 Kan. 648. Compare,

however, *King v. Mobile Harbor Board*, 57 Ala. 135, where service made upon all the members was held valid.

Service Must be Upon a De Facto Officer.—Where there are adverse claimants to certain offices, service must be made upon the officer *de facto*. *Berrian v. Methodist Soc.*, 4 Abb. Pr. (N. Y.) 424; 6 Duer (N. Y.) 682.

Service may be made upon the acting president in the absence of the president. *Chamberlain v. Mammoth Min. Co.*, 20 Mo. 96.

The president of a corporation removed from the county where the place of business of the corporation was located, and at a meeting of the board, another person was elected president *pro tem.*, for that meeting. The old president, however, never resigned, nor was he removed; although he took no part in the management of the affairs of the corporation. *Held*, that service upon the absent president was sufficient to give the court jurisdiction over the corporation. *Eel River Nav. Co. v. Struver*, 41 Cal. 616.

Service Upon One Not an Officer of the Corporation.—Where, as in case of a *Mississippi* statute, it is provided that service must be made upon one of certain designated officers, or as the court may direct, service upon one who is a mere agent is not sufficient to bring the corporation within the jurisdiction of the court. *Southern Express Co. v. Craft*, 43 Miss. 508. So under the *New York* statute, service on a mere employé is insufficient. *Ruland v. Canfield Pub. Co.*, 10 N. Y. Supp. 913.

In *Waco Lodge v. Wheeler*, 59 Tex. 554, service upon a trustee who was not an officer of the corporation, was held insufficient.

Service Upon Vice-President.—*Colorado* Code provides that service shall be made by delivering a copy of the writ to the president or other head of the corporation, or to the secretary, cashier, treasurer, or general agent thereof. It has been held, that service upon a vice-president of a corporation is

sufficient, even though the return does not show that the president could not be found in the county. *Comet Consolidated Min. Co. v. Frost*, 15 Colo. 310.

See, also, as to service on vice-president, Norfolk, etc., R. Co. *v. Cottrell*, 83 Va. 512; 31 Am. & Eng. R. Cas. 235.

Secretary.—Service upon a secretary as a managing agent, or one whose knowledge would be that of the corporation is valid, in the absence of any statutory requirement otherwise. *Heltzell v. Chicago, etc., R. Co.*, 77 Mo. 315; 16 Am. & Eng. R. Cas. 619.

Directors.—Service of notice on a general director of a corporation has been held a valid service, even though the director never notified the corporation or its board of officers. *Boyd v. Chesapeake, etc., Canal Co.*, 17 Md. 195; 79 Am. Dec. 646.

Other cases in which service upon a director has been held to be service upon the corporation, are: *Curtis v. Avon, etc., R. Co.*, 49 Barb. (N. Y.) 148; *Com. v. Wilmington, etc., R. Co.*, 2 Pearson (Pa.) 408; *Com. v. Wilmington, etc., R. Co.*, 7 Pa. Co. Ct. Rep. 707; *Lewis v. Glenn*, 84 Va. 947 (service made on cashier also. In this case the officers recognized the service, but disclaimed any right to answer officially); *Railway Co. v. McCoy*, 42 Ohio St. 251 (service of notice of lien of material men); *Childs v. Harris Mfg. Co.*, 104 N. Y. 477; *Grubb v. Lancaster Mfg. Co.*, 10 Phila. (Pa.) 316; *Washington, etc., R. Co. v. Brown*, 17 Wall. (U. S.) 445; *Carnaghan v. Exporters', etc., Oil Co.*, 57 Hun (N. Y.) 588 (service on director held valid although the corporation was dissolved when service was made).

A director is not a "head or managing agent," however. *Alabama, etc., R. Co. v. Burns*, 43 Ala. 169.

Upon Treasurer.—Service may be made upon the treasurer where it appears that the president or chief officer is absent from the county. *McMurtry v. Tuttle*, 13 Neb. 233. But service on an assistant treasurer is held to be invalid, although the treasurer is a non-resident. *Winslow v. Staten Island Rapid Transit R. Co.*, 51 Hun (N. Y.) 298.

Service Upon Stockholder.—The *Colorado* Code, § 40, provides for service of process on a foreign corporation by delivery of the writ to a stockholder, when there is no agent or officer of

the corporation within the State. Under this, it was held that one who gratuitously transfers his stock in the corporation to trustees whose names he does not know, for some unknown and undefined purpose; and at the same time contributes \$50 to cover the expense of the transfer, is a stockholder within the meaning of the code. *Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Colo. 499.

Conductor.—A conductor has been held to be an agent upon whom valid service may be made. *New Albany, etc., R. Co. v. Grooms*, 9 Ind. 243.

Civil Engineer.—In a proceeding to condemn land for a right of way, a civil engineer in charge of the surveys and location of the road in the county where the appeal is taken, is a proper agent upon whom a notice of appeal may be served. *Jamison v. Burlington, etc., R. Co.*, 69 Iowa 670; 27 Am. & Eng. R. Cas. 413.

Highest Officer Found in County.—*Tennessee* Code provided that process might be served "on the president or other head of the corporation, or, in his absence, on the cashier," etc.; or, if none of these officers, reside in the State, then on the chief agent in the county where suit is brought. A return of service on "the superintendent, the highest officer to be found in the county," shows a sufficient service. *Kansas City, etc., R. Co. v. Daughtry*, 88 Tenn. 721, affirmed in 138 U. S. 298.

Under § 73 of *Kentucky* Code, process in an action against a common carrier, whether a corporation or not, may be served in the county where the action is brought, in case the defendant's highest officer or agent resides therein. *Adams Express Co. v. Crenshaw*, 78 Ky. 136.

Where Railroad Is Operated by Receiver.—In the case of *Heath v. Missouri, etc., R. Co.*, 83 Mo. 617, it was held, that service on the agent of a receiver operating a railroad gave no jurisdiction over the company. A contrary rule is laid down, however, in *Gauebin v. Phelan*, 5 Colo. 83; *Eddy v. Lafayette*, 49 Fed. Rep. 807 (service on station agent).

And where a State had seized a railroad for nonpayment of its bonds; and the receiver appointed by the court retained the employes in business, it was held, that such employes were not the agents of the railroad company for the purpose of service. *Cherry v.*

North, etc., R. Co., 59 Ga. 446. See also Georgia, etc., R. Co. v. Bigelow, 68 Ga. 219.

Resignation of Officer to Prevent Service.—An officer of a corporation is not bound to retain his office for the purpose of enabling process to be served upon him; and a resignation to prevent service cannot be held invalid. *Ervin v. Oregon Steam Nav. Co.*, 22 Hun (N. Y.) 598; *Amy v. Watertown*, 130 U. S. 320.

Nor will service upon him after he has filed his resignation, be of any effect. *Amy v. Watertown*, 130 U. S. 320; *Sturgis v. Crescent Jute Mfg. Co.*, 57 Hun (N. Y.) 587.

In New Jersey.—When suit is brought against a corporation, created for and engaged in trade or business, service of process on any officer or agent of such corporation, whose duty it is, either in his official capacity or by virtue of his employment, to communicate the fact of such service to the governing body of the corporation, is good under the provisions of the Practice Act of *New Jersey*. *Dock v. Elizabethtown Steam Mfg. Co.*, 34 N. J. L. 312. See *State v. Pennsylvania R. Co.*, 41 N. J. L. 250; 42 N. J. L. 490.

On Lessee of Railroad Company.—Under *Georgia Code*, § 3407, which provides that the lessee of a railroad shall be liable to suit of any kind in the same court or jurisdiction as the lessor before the lease, service of summons in an action against a lessee railroad company, by leaving a copy at the office of the superintendent in the county in which the declaration alleges the principal offices of the lessor and lessee were and are situate, is good. *Hills v. Richmond, etc., R. Co.*, 37 Fed. Rep. 660.

But leaving a copy with a depot agent is not sufficient service of a process issued against an individual lessee. *Jones v. Georgia Southern R., Co.*, 66 Ga. 558; *Wright v. Gossett*, 15 Ind. 119 (service on conductor insufficient). See also *Van Dresser v. Oregon R., etc., Co.*, 48 Fed. Rep. 202 (lessee is agent of lessor to receive service where lease is unauthorized).

Georgia Code, § 3369, requires that in suits against railway companies which have leased their lines, service shall be sent "to the president of the leasing company." The "leasing company" is the lessor, and not the lessee. *Atlanta, etc., R. Co. v. Harrison*, 76 Ga. 757.

One Person Agent for Two Companies.

—In a suit against two railroad companies, having the same local agent upon whom service is made, a separate certified copy could be left with such agent for such defendant. *Central, etc., R. Co. v. Morris*, 68 Tex. 49.

Issuance of process against a corporation does not begin a suit against another, although service is made upon a common agent of both. *Pennsylvania Co. v. Sloan*, 1 Ill. App. 364.

Other Cases.—Under some statutes, the character of the agent upon whom process may be served depends upon where the service is made, or the cause of action arose. Thus, under the *Oregon* statute, service on any other than the president, secretary, cashier, or managing agent, will be set aside unless it appears that the cause of action arose in the county or district. *Lung Chung v. Northern Pac. R. Co.*, 19 Fed. Rep. 254; 16 Am. & Eng. R. Cas. 548.

The *Tennessee Code*, § 2832, provides that "if neither president, cashier, treasurer, nor secretary, reside within the State, service upon the chief agent of the corporation residing at the time in the county where the action is brought, shall be deemed sufficient." Where it appeared that the defendant railroad company had no office, nor any part of its line in the State, but had only an agent who was employed to induce travelers to take its route, and who had no authority to sell tickets or to otherwise represent the company, service upon him was held invalid under the statute. *Chicago, etc., R. Co. v. Walker*, 9 Lea (Tenn.) 475; 16 Am. & Eng. R. Cas. 553; *Maxwell v. Atchison, etc., R. Co.*, 34 Fed. Rep. 286.

To make a writ of mandamus effective it must be served on the officers of the corporation who have the power, and whose duty it is to execute it; and against whom attachment to enforce its obedience may issue. Thus, a writ commanding a railroad company to build certain bridges is not properly served on the superintendent of the New Jersey division of the company's road. *State v. Pennsylvania R. Co.*, 41 N. J. L. 250; 42 N. J. L. 490.

Where the clerk of the court issues a summons to another county in an action against a corporation, it must be presumed that the necessity exists, by reason of there being no one in the county where the action is brought on whom valid service can be made.

particular department of its business or employment.¹ And the term "special agent" is intended to include only those who

Rochester, etc., *R. Co. v. Jewell*, 107 Ind. 332.

1. *Lake Shore, etc., R. Co. v. Hunt*, 39 Mich. 49; *Great West. Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46; 13 Am. St. Rep. 204; 24 Am. & Eng. Corp. Cas. 60; *Carr v. Commercial Bank*, 19 Wis. 272; *Upper Mississippi Transp. Co. v. Whittaker*, 16 Wis. 220; AGENCY, vol. 1, p. 348.

In the case of *Lake Shore, etc., R. Co. v. Hunt*, 39 Mich. 469, the court by Cooley, J., in speaking of service upon an agent of the corporation, observed: "But what sort of an agent? Was he an agent to buy wood, or to employ a switchman, or to keep cattle off the track, or what was his agency? Every servant of the road is in some sense an agent, yet there must be something more definite than a mere designation of a man as agent, before a court can say that his relation to the corporation was such as to make him its representative for the purpose of receiving service of process for it. The terms general or special agent are very indefinite, but employed as they are here, they evidently intend agents who, either generally or in respect to some particular department of the corporate business, have a controlling authority either general or special. They do not mean every man who is intrusted with a commission or an employment." See also as to general agents, *Lister v. Allen*, 31 Md. 543; 100 Am. Dec. 78; *London Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. St. 498; 78 Am. Dec. 390; *Lobdell v. Baker*, 1 Met. (Mass.) 193; 35 Am. Dec. 358.

The Code of Civ. Proc. of *Colorado* (1883), § 40, provides for service upon domestic corporations by means of their general agent. The court in the case of *Great West. Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46; 13 Am. St. Rep. 204; 24 Am. & Eng. Corp. Cas. 60, after a holding that this term "general agent" did not embrace one who was merely a foreman with authority to oversee laborers in a mine, went on to observe: "There is a wide distinction between a general and a special or particular agent; a distinction not unfounded or useless, and one which solves many cases. A special agency exists where there is a delegation of authority to do a single act;

and a general agency exists where there is a delegation to do all acts connected with a particular trade, business or employment. Story on Agency, § 17. Numerous other authorities recognize this same distinction, so clearly laid down by Mr. Story. *Beals v. Allen*, 18 Johns. (N. Y.) 363; 9 Am. Dec. 221; *Martin v. Farnsworth*, 49 N. Y. 555; *Merserau v. Phoenix, etc., Ins. Co.*, 66 N. Y. 274; *Atlantic, etc., R. Co. v. Reisner*, 18 Kan. 458; *Cruzan v. Smith*, 41 Ind. 288."

Service upon a certain person as agent will be held valid where it appears that such person was furnished with stationery and books necessary in the business; that the manager of the company referred others desiring policies to such person, and informed plaintiff's attorneys before suit that such person was the company's agent; and where the affidavits against the agency consisted merely of a formal denial of it by the secretary, and statements of the manager and the alleged agent that he was not an agent, because no bond had been filed by him and approved by the company. *Pacific Mut. L. Ins. Co. v. Williams*, 79 Tex. 633.

Resident Clerk.—A corporation whose principal office was in the city of H., carried on its manufacturing business in W., where its accounts were kept and its employes paid. The secretary resided in W., but went every day to H., where he spent the entire day in the company's office, and where all his duties were performed. *Held*, that he was not to be regarded as residing in W. within the meaning of § 12 of the Connecticut statute and that service upon the clerk at W. who paid the employes was valid. *Adams v. Williamantic Linen Co.*, 46 Conn. 320.

General or Special Agent.—The *Michigan* statute provided for service of summons in garnishment, upon a "general or special agent" of the corporation. The court, in the case of *Lake Shore, etc., R. Co. v. Hunt*, 39 Mich. 469, held that the agent meant by the term, was an agent having a general or special controlling authority, either generally or in respect to some particular department of the corporate business, and therefore not merely a person who was described as a "ticket agent of such road."

have authority to do a certain particular thing.¹ The term "managing agent" is of frequent use and is generally considered to embrace such persons as have a supervisory control

Ticket and Depot Agents.—It has been often held that service of summons upon a depot or station agent is sufficient to confer jurisdiction—in one case it being declared that, in the absence of proof to the contrary, a station agent of a railroad would be presumed to be employed in the management of the business of the road in the county within which the station is located. *Smith v. Chicago, etc., R. Co.*, 60 Iowa 512; 13 Am. & Eng. R. Cas. 534; *Schlenger v. Chicago, etc., R. Co.*, 61 Iowa 235; 19 Am. & Eng. R. Cas. 625; *Central R. Co. v. Smith*, 69 Ga. 268 (no letter to president necessary in such case); *Ex parte St. Louis, etc., R. Co.*, 40 Ark. 141; 16 Am. & Eng. R. Cas. 547; *Missouri Pac. R. Co. v. Collier*, 62 Tex. 318; 18 Am. & Eng. R. Cas. 218; *Hudson v. St. Louis, etc., R. Co.*, 53 Mo. 525; *East Tenn., etc., R. Co. v. Bayliss*, 74 Ala. 150; 19 Am. & Eng. R. Cas. 150 (without affidavit); *Missouri, etc., R. Co. v. Crowe*, 9 Kan. 496; *Ruthe v. Green Bay, etc., R. Co.*, 37 Wis. 344. *Compare Miller v. Norfolk, etc., R. Co.*, 41 Fed. Rep. 431; *Jones v. Georgia Southern R. Co.*, 66 Ga. 558.

But in the case of *Doty v. Michigan Cent. R. Co.*, 8 Abb. Pr. (N. Y.) 427, a person who merely sold tickets for a railroad company whose whole road and traffic was without the State, was held not a managing agent upon whom service of process may be made. See also *Lake Shore, etc., R. Co. v. Hunt*, 39 Mich. 469.

In the case of *Mackereth v. Glasgow, etc., R. Co.*, L. R., 8 Exch. 149, it was held that under a statute providing that process against a corporation shall be served upon the head officer, clerk, secretary or treasurer, service upon a ticket agent of a Scotch railroad at Carlisle was insufficient to charge the corporation, although it ran its cars into the railway station at that place.

Commercial Agent.—The service of process on a commercial agent of a railroad company is not a good service, under a statute which provides that it may be served upon "any station agent or ticket agent." *Detroit v. Wabash, etc., R. Co.*, 63 Mich. 712.

Book-keepers.—In the case of Cham-

bers *v. King, etc., Bridge Mfg. Co.*, 16 Kan. 276, it was held that a service of summons upon a person who kept books for a corporation, but who was not secretary or clerk of the corporation, or any other officer or agent upon whom legal service might be made, was not a valid service. The court, by Valentine, J., observed: "It is true, a book-keeper is, in one sense, a clerk; any person who performs clerical duty is in one sense a clerk. But the service of summons on a corporation cannot be made on every person who may, in some remote sense, be styled a clerk of the corporation. . . . It must be made on the clerk—the principal clerk of the corporation, if made on a clerk at all. It must be made upon the person who holds the office of clerk or secretary, as the case may be." See, also, *Dock v. Elizabethtown Steam Mfg. Co.*, 34 N. J. L. 312; *Hill v. St. Louis Ore, etc., Co.*, 90 Mo. 103.

Local Freight Agent.—In an action against a railroad company it was held, in the case of *Toledo, etc., R. Co. v. Owen*, 43 Ind. 405, that where the principal office of the company was not within the State, service might be made upon a local freight agent, he being a general agent of the company within the meaning of the *Indiana* statute.

Local Superintendent of Affairs.—Service on a section foreman of a railroad company is valid, under *Kansas* statute providing for service of process against a railroad company, on the local superintendent of affairs. *St. Louis, etc., R. Co. v. DeFord*, 38 Kan. 299.

Local Express Agent.—A local express agent, who supervises all the company's business in his town, is a general agent on whom process may be served. *Adams Express Co. v. St. John*, 17 Ohio St. 641. See *Southern Express Co. v. Skipper*, 85 Ga. 565; as to service on express company under *Georgia* statute.

1. *London Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. St. 498; 78 Am. Dec. 390; *Billings v. Morrow*, 7 Cal. 171; 68 Am. Dec. 235; *Great West. Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46; 13 Am. St. Rep. 204; 24 Am. & Eng. Corp. Cas. 60; *AGENCY*, vol. 1, pp. 348, 421-2. See also

over some general department of the business of the corporation, as distinguished from a mere superintendent of some particular division, and whose knowledge would be that of the corporation.¹

In all cases the service must be upon the identical agent provided for by the statute, and a service upon an agent or employé of a corporation who is not an agent upon whom service is authorized to be made, is no more binding upon the corporation than if no process at all had issued against it.²

Hampson v. Weare, 4 Iowa 13; 66 Am. Dec. 116.

A conductor on a railroad has been held a special agent of the railroad company. New Albany, etc., R. Co. v. Grooms, 9 Ind. 243; New Albany, etc., R. Co. v. Tilton, 12 Ind. 3; 74 Am. Dec. 195.

1. **Managing Agent.**—Newby v. Colts, etc., Co., L. R., 7 Q. B. 296; Upper Mississippi Transp. Co. v. Whittaker, 16 Wis. 220; Carr v. Commercial Bank, 19 Wis. 273; Brewster v. Michigan Cent. R. Co., 5 How. Pr. (N. Y.) 183; Emerson v. Auburn, 13 Hun (N. Y.) 150; Weight v. Liverpool, etc., Ins. Co., 30 La. Ann. 1186; Dock v. Elizabethtown Steam Mfg. Co., 34 N. J. L. 312.

See also FOREIGN CORPORATIONS, vol. 8, pp. 386-8, where a number of decisions are given as to who is and who is not, a managing agent upon whom process may be served.

The term "managing agent," means one invested with general powers involving the exercise of discretion, as distinguished from one who acts under the control of a superior authority both as to the extent of his work and the manner of executing it. Reddington v. Mariposa Land, etc., Co., 19 Hun (N. Y.) 405.

In the case of Emerson v. Auburn, etc., R. Co., 13 Hun (N. Y.) 150, one T. was employed by the president of the defendant railroad company to superintend the running of horse-cars on a portion of the defendant's road not yet completed. T. had no authority to make contracts for the defendant, except to purchase horses and feed, nor had he any control over or knowledge of the defendant or its books; and his employment was to continue during the president's pleasure. It was held, that he was not a managing agent upon whom process might be served.

In a suit in the U. S. circuit court against a town, service was made upon the town clerk. It was held that this

was not a valid service, since the town clerk could not be said to be the managing agent of the town. Young v. Dexter, 18 Fed. Rep. 201. See also Stout v. Sioux City, etc., R. Co., 8 Fed. Rep. 794; 2 Am. & Eng. R. Cas. 645.

The general superintendent of a telegraph company is a "managing agent." Barrett v. American Teleph., etc., Co., 56 Hun (N. Y.) 430.

The recording agent of an insurance company, whose business is merely to write policies and look after the interests of the company in connection with property insured by him, is not an agent employed in the general management of the business, within the meaning of Iowa Code 1873, § 2612, relating to service of process on corporations. State Ins. Co. v. Waterhouse, 78 Iowa 674.

Business Manager.—The Nevada statute provided for service of process upon the managing agent, and where the return showed service upon the "business manager," it was held insufficient. "Courts," it was said, "must know, and officers are presumed to know, what the legislature meant by the term 'managing agent;' but courts cannot know what an officer means by designation unknown to the law." Scorpion Silver Min. Co. v. Marsano, 10 Nev. 370.

Agent Acting Gratuitously.—The fact that a person acts gratuitously as agent of a corporation does not make him any less an agent on whom process against the corporation may be served. State v. Northwestern Endowment, etc., Assoc., 62 Wis. 174.

2. Great West. Min. Co. v. Woodmas of Alston Min. Co., 12 Colo. 46; 24 Am. & Eng. Corp. Cas. 60; 13 Am. St. Rep. 204; Chambers v. King, etc., Bridge Mfg. Co., 16 Kan. 270; Watertown v. Robinson, 59 Wis. 513; 6 Am. & Eng. Corp. Cas. 79; Kennedy v. Hibernia, etc., Land Soc., 38 Cal. 151; O'Brien v. Shaw's Flat, etc., Canal Co., 10 Cal. 343; Reddington v. Mariposa

It is almost invariably provided that service may be made upon the chief officer, with the alternative of the subordinate officers, generally according to the rank they occupy; and where they are named successively—as, for example, “president, secretary, cashier or treasurer,” etc.—it seems that service may be made upon any one of them without showing the absence of those preceding.¹ But where it is provided that service may be made upon a certain officer, “or in his absence, upon an agent,” etc., the fact that the officer named could not be found must affirmatively appear by the officer’s return before service upon the agent can be justified.²

Land, etc., Co., 19 Hun (N. Y.) 405; Cherry v. North, etc., R. Co., 59 Ga. 446; Union Pac. R. Co. v. Miller, 87 Ill. 45; Kingman v. Mann, 36 Ill. App. 338; Scorpion Silver Min. Co. v. Marsano, 10 Nev. 370; Winslow v. Staten Island, etc., R. Co., 51 Hun (N. Y.) 298; Southern Express Co. v. Craft, 43 Miss. 508; Fairfax v. Alexandria, 28 Gratt. (Va.) 16; 1 Minor’s Insts. (3d ed.), p. [566] 646.

If there is any doubt as to whether the functions of the person are such as to render service on him proper, the company must, on a motion to set aside the judgment, disclose his precise relations to them. *Donadi v. New York State Mut. Ins. Co.*, 2 E. D. Smith (N. Y.) 519.

Service of process upon an alleged agent will be set aside when it appears from depositions taken that the person served was really not an agent of the corporation. *American Bell Teleph. Co. v. Pan Electric Teleph. Co.*, 28 Fed. Rep. 625.

1. *Barrett v. American Telephone, etc., Co.*, 31 N. Y. St. Rep. 465; *New York, etc., R. Co. v. Purdy*, 18 Barb. (N. Y.) 574; *Carnaghan v. Exporters, etc., Oil Co.*, 32 N. Y. St. Rep. 117; *Heltzell v. Chicago, etc., R. Co.*, 77 Mo. 315; 16 Am. & Eng. R. Cas. 621; *Norfolk, etc., R. Co. v. Cottrell*, 83 Va. 512; 31 Am. & Eng. R. Cas. 235; *Governor v. Raleigh, etc., R. Co.*, 3 Ired. Eq. (N. Car.) 471; *Cincinnati, etc., R. Co. v. McDougall*, 108 Ind. 179; *Comet Consolidated Min. Co. v. Frost*, 15 Colo. 310.

2. *Hoen v. Atlantic, etc., R. Co.*, 64 Mo. 561; *St. Louis, etc., R. Co. v. Dawson*, 3 Ill. App. 118; *Peoria, etc., R. Co. v. Duggan*, 32 Ill. App. 351; *Miller v. Norfolk, etc., R. Co.*, 41 Fed. Rep. 431; *St. Louis, etc., R. Co. v. Dorsey*, 47 Ill. 288; *Cairo, etc., R. Co.*

v. Joiner, 72 Ill. 520; *Chicago, etc., Underground Co. v. Congden, etc., Mfg. Co.*, 111 Ill. 309; *Cairo, etc., R. Co. v. Trout*, 32 Ark. 17; *Reed v. Tyler*, 56 Ill. 288; *Southern Express Co. v. Hunt*, 54 Miss. 664; *Miles v. Hannibal, etc., R. Co.*, 31 Mo. 407; 13 Va. L. J. 776. Compare *Comet Consolidated Min. Co. v. Frost*, 15 Colo. 310; *Cincinnati Hotel Co. v. Central Trust, etc., Co.* (Ohio, 1891), 25 Wkly. Law Bull. 375. In the case of *St. Louis, etc., R. Co. v. Dawson*, 3 Ill. App. 120, where a statute, similar to that referred to in the text, was under consideration, the court by *Tanner, P. J.*, has to say: “The statute has divided the officers, agents and employes of railroad companies into two classes, and service upon one class is primary to service upon the other, and, before service had upon those of the second class can give the courts jurisdiction, it must appear affirmatively that service could not be had upon those persons embraced in the first class on account of the existence of the causes for which the statute authorized service upon the persons embraced in the second class.” See also *Hammond v. Olive*, 44 Miss. 543; *Kansas City, etc., R. Co. v. Daughtry*, 88 Tenn. 721; 138 U. S. 298. Proper service may be made on a subordinate officer when the superiors cannot be found in the county, even though these latter were actually in the county at the time. *Chicago, etc., Underground Co. v. Congdon, etc., Mfg. Co.*, 111 Ill. 309. It is not sufficient for the return to state merely that the superior officer was absent from his office; it must allege that he could not be found. *Hoen v. Atlantic, etc., R. Co.*, 64 Mo. 561.

In actions or proceedings against a defunct corporation, service made upon the members of its last acting board of

The locality of suits against corporations is usually provided by statute; and in connection with this it is often required that service of process shall be made upon some officer or agent within the county where the suit is brought, or where the principal office of the corporation is located, etc.¹

The same general rules apply to service upon municipal corporations, and under this head may properly be included service of process against cities, towns, villages and counties. Service should be made upon the chief executive officer of the municipality, and in his absence upon the next in order of official rank, unless otherwise especially provided.²

directors is sufficient to give jurisdiction under the *Ohio* statute. *Warner v. Callender*, 20 *Ohio St.* 190.

1. *Locality of Service.*—The *Virginia* statute concerning service of process on corporations is particularly explicit in this regard. See 13 *Va. L. J.* 741-776 (*Virginia* statute discussed in article by W. M. Lile); 1 *Minor's Insts.* (3d ed.) 564, *et seq.*; *Virginia Code* (1887), § 3225, *et seq.*

By the *Michigan* statute a corporation officer may be served in any county of the State. See *Potter v. John Hutchinson Mfg. Co.* (Mich. 1890), 44 *N. W. Rep.* 595. But in *West Virginia* it is held that the president can only be served in the county in which he resides, and return must show service in such county. *Taylor v. Ohio River R. Co.*, 35 *W. Va.* 328.

Other instances of such requirements are seen in *Dewey v. Central Car, etc., Co.*, 42 *Mich.* 399; *People v. Judge*, 23 *Mich.* 492; *Haywood v. Johnson*, 41 *Mich.* 601; *Houston, etc., R. Co. v. Burke*, 55 *Tex.* 323; 9 *Am. & Eng. R. Cas.* 59; 40 *Am. Rep.* 808 (service must be in county where suit is brought); *Ætna Ins. Co. v. Black*, 80 *Ind.* 513; *Mitchell v. Southwestern R. Co.*, 75 *Ga.* 398; *Kansas City, etc., R. Co. v. Daughtry*, 88 *Tenn.* 721; *affirmed*, 138 *U. S.* 208; *Cairo, etc., R. Co. v. Joiner*, 72 *Ill.* 520; *Western Union Tel. Co. v. Conant*, 11 *Colo.* 111; *Com. v. New York, etc., R. Co.*, 7 *Pa. Co. Ct. Rep.* 407; *Smith, etc., Co. v. Morse Woolen Scouring*, 10 *Pa. Co. Ct. Rep.* 624; *National Starch Co. v. Morse Woolen Scouring Co.*, 11 *Pa. Co. Ct. Rep.* 192.

Where Corporation Is "Found."—Where foreign corporations engage in business in a State whose law provides that they may be summoned by process served upon an agent in the

charge of its business, they are "found" in the district in which such agent is doing business within the meaning of act of Congress relative to the jurisdiction of the federal courts. *Block v. Atchison, etc., R. Co.*, 21 *Fed. Rep.* 529; *McCoy v. Cincinnati, etc., R. Co.*, 13 *Fed. Rep.* 3; *Brownell v. Troy, etc., R. Co.*, 3 *Fed. Rep.* 761.

In *Western Union Tel. Co. v. Conant*, 11 *Colo.* 111, it was held that within the meaning of the *Colorado* act, a domestic corporation is "found" only in the county where the principal office of the corporation is kept, or its principal business carried on. See also *Little Bobtail Gold Min. Co. v. Lightbourne*, 10 *Colo.* 429.

County Equivalent to Judicial District.—*Virginia Code*, 1887, § 3225, provides that "service of process against a railroad corporation may be made on any agent of the corporation when certain officers cannot be found in the county where the action is brought." The sheriff's return showed that the writ was served on the defendant's station agent and did not state that none of the said officers could be found in the judicial district. It was held that such service was insufficient, since, in the federal courts, the statutory limitations as to place apply to the district instead of the county. *Miller v. Norfolk, etc., R. Co.*, 41 *Fed. Rep.* 431; *Lung Chung v. North Pac. R. Co.*, 19 *Fed. Rep.* 254; 16 *Am. & Eng. R. Cas.* 548.

2. *Upon a City.*—See the rule of the text applied in *Amy v. Watertown*, 130 *U. S.* 301; *Dugan v. Mayor, etc., of Baltimore*, 70 *Md.* 1 (service accepted by city solicitor); *Sacramento v. Fowle*, 21 *Wall (U. S.)* 119 (service properly made upon president of board of trustees of city); *Merriden v. Trussell*, 52 *Miss.* 711; *Gabler v. Elizabeth*, 41 *N. J. L.* 316; *Worts v. Watertown*,

b. FOREIGN CORPORATIONS.¹—In the absence of statutes there

16 Fed. Rep. 534 (valid service made upon clerk and chairman of street commissioners); *Menominee v. Menominee Circuit Judge*, 81 Mich. 577; *McNeal v. Gloucester City*, 51 N. J. L. 444; *Stabler v. Alexandria*, 42 Fed. Rep. 490.

The constitution of *Texas* (art. 16, § 17) provides that "all officers within this State shall continue to perform the duties of their offices until their successors are qualified." Under this, service of process is properly made upon officers of a city whose terms have expired, and who have attempted to resign, or ceased to act, but whose successors have not been elected; especially if, by the failure to elect successors, it was designed to defeat the collection of debts owing by the city. *Jones v. Jefferson*, 66 Tex. 576. See also *Cloud v. Pierce City*, 86 Mo. 357 (similar case).

In *Watertown v. Robinson*, 69 Wis. 230, it is held that the mayor is the only officer upon whom service of process against the city can be made; and a service upon the chairman of the board of street commissioners and upon the city clerk confers no jurisdiction of the city which will support a judgment against it by default, even though there be at the time no mayor and no presiding officer of the common council. Compare *Worts v. Watertown*, 16 Fed. Rep. 534.

On a Town or Village.—A *Wisconsin* statute requires service upon a town to be made by delivering a copy of the summons "to the chairman of the town and to the town clerk." Under this, a service upon one alone is wholly ineffective for any purpose. *Mariner v. Waterloo*, 75 Wis. 428. And a return that copies were delivered to "the chairman of said town, and Edward Crump, the clerk of said town, elected at the last annual town-meeting, who claims he was not qualified, and upon Ida Lusk, who has charge of the records of said town and is the acting town clerk of the town and upon W. D. Stiles, clerk of said town; who was elected, and who qualified as such clerk, and who is the last clerk of said town who was elected who qualified," is insufficient to give the court jurisdiction. *Mariner v. Waterloo*, 75 Wis. 438.

A township supervisor has no representative authority outside the county in which the township is situated, and

a summons served upon him as agent for the township, under § 737, *How. St. Michigan*, must be served upon him within such county. *Pack v. Greenbush Township*, 62 Mich. 122. See also generally *Cicero Tp. v. Shirk*, 122 Ind. 572.

The statutory method, if any exists, must be pursued. Thus, where it was provided that service of process against a town should be made upon two certain officers, service upon one will confer no jurisdiction. *Mariner v. Waterloo*, 75 Wis. 438.

On County.—As *Missouri* Rev. Stat. 1879, § 3489, authorizes the service of the summons, in an action against the county, on the clerk of the county court, he is thereby made the agent of the county, and any neglect of his to communicate the fact of such service to the county court will not affect the validity of the service, or the judgment obtained therein by default. *Knox Co. v. Harshman*, 133 U. S. 152.

Process against a county should be issued against the clerk of the board of county commissioners and served upon him. *Leavenworth Co. v. Sellew*, 99 U. S. 624. And a county clerk may accept service of a notice of appeal in a suit against the county. *Read v. Benton Co.*, 10 Oregon 154.

A mandamus to the county commissioners is properly served on their chairman while the board is in session. *State v. Wellman*, 83 Me. 282.

On School District.—A writ may be properly served upon a school district by attaching certain personal property of the district and leaving a true and attested copy of the writ with the officer's return thereon at the house of the clerk of the district and in the hands of his wife. *Dow v. School Dist. No. 12*, 46 Vt. 108; and see *Downs v. Board of Directors* (Wash. 1892), 30 Pac. Rep. 147.

On Unincorporated Association.—*New York* Code, § 1919, requires that in suits against an unincorporated association service shall be made on the president or treasurer of such association. Under this, service may properly be made on the chairman or presiding officer, it appearing that the association has no officer called the president or treasurer. *Hatheway v. American Min. Stock Exchange*, 31 Hun (N. Y.) 575.

1. See FOREIGN CORPORATIONS, vol.

is no essential difference between foreign and domestic corporations as to service.¹ In many States, however, there are explicit statutory regulations as to how and upon whom service shall be made against a foreign corporation.² These statutes generally require, as a condition precedent to the right to transact business within the State, that the corporation shall appoint a resident agent upon whom process against the corporation may be served. The legislative power to make and enforce such a requirement is well settled.³ Where it is required that a particular State officer, as, for example, the auditor or insurance commissioner, shall be designated as such agent, his authority to receive and accept service is implied from the fact that the corporation carries on business within the State; and service may be made upon him, although the corporation has failed to act in the premises.⁴ The higher resident officials of foreign corporations are frequently designated by the statute as having authority to receive

8, pp. 382 *et seq.* See also generally, *Cunningham v. Southern Express Co.*, 67 N. Car. 425; *Sawyer v. North American L. Ins. Co.*, 46 Vt. 697.

1. In *Johnson v. Hanover F. Ins. Co.*, 15 Fed. Rep. 97, it was held that the statute of *Illinois* relative to service of process against domestic corporations applied equally to process against foreign corporations, and this seems to be the accepted view. *Haygin v. Comptoir D'Escompte*, 33 Q. B. Div. 519; except where the statute provides a specific manner of service for foreign corporations. *Quade v. New York, etc., R. Co.*, 59 N. Y. Super. Ct. 479. See also *Johnson v. Hanover F. Ins. Co.*, 15 Fed. Rep. 97; *State v. U. S. Mut. Accident Assoc.*, 67 Wis. 624.

In *Missouri*, if a corporation of another State has a chief officer or place of business in the State, as designated by the statute, such foreign corporation is regarded as being a domestic one so far as service of process is concerned, and is amenable to the jurisdiction of the *Missouri* courts by the common process of summons. But if it has no such place of business the proceeding against it must be *in rem* by attachment. *Middowgle v. St. Joseph, etc., R. Co.*, 51 Mo. 520. See also *Gross v. Nichols*, 72 Iowa 239.

2. **Statutory Method Exclusive.**—*Desper v. Continental Water Meter Co.*, 137 Mass. 252 (service on treasurer held insufficient, he not being one of the officers designated by the statute); *Lewis v. Northern R. Co.*, 139 Mass. 294 (similar case); *Rhem v. German Ins., etc., Inst.*, 125 Ind. 135; *Gates v. Tusten*, 89 Mo. 13.

3. **Appointment of Agent to Accept Service.**—See *FOREIGN CORPORATIONS*, vol. 8, p. 383; *Paul v. Virginia*, 8 Wall. (U. S.) 168; *U. S. v. American Bell Teleph. Co.*, 29 Fed. Rep. 17; *Gibson v. Manufacturers' F. & M. Ins. Co.*, 144 Mass. 81; *Van Dresser v. Oregon R., etc., Co.*, 48 Fed. Rep. 202; *Ehrman v. Teutonia Ins. Co.*, 1 McCrary (U. S.) 123. See *Osborne v. Shawmut Ins. Co.*, 51 Vt. 278, for peculiar application of such a law.

4. Thus in *Missouri*, a foreign corporation is prohibited from carrying on business in the State until it has filed with the insurance commissioner a certificate stipulating that service may be made upon him. If a corporation does business in the State it will be presumed that it impliedly accepts the provisions of the statute, and service upon the commissioner is valid though he refuses to receive the summons, no certificate having been filed by the corporation. *Knapp v. National Mut. F. Ins. Co.*, 30 Fed. Rep. 607. The same view is sustained in other cases. *Ehrman v. Teutonia Ins. Co.*, 1 McCrary (U. S.) 123; *Hagerman v. Empire State Co.*, 97 Pa. St. 534; *Funk v. Anglo American Ins. Co.*, 27 Fed. Rep. 336 (in case of such failure service may be upon any agent transacting the company's business); *U. S. v. American Bell Teleph. Co.*, 29 Fed. Rep. 17; *Van Dresser v. Oregon R., etc., Co.*, 48 Fed. Rep. 202; *State v. U. S. Mut. Accident Assoc.*, 67 Wis. 624; *Gibbs v. Queen Ins. Co.*, 63 N. Y. 114; 20 Am. Rep. 513.

In *Farmer v. National L. Ins. Assoc.*, 50 Fed. Rep. 829, it is said that the

service.¹ As in the case of domestic corporations it is often provided that service may be made upon a "managing agent,"² and this does not necessarily mean an agent having complete charge of the whole business of the corporation.³ Generally service on

appointment of the State superintendent of insurance to receive service does not authorize him to accept service by mail.

Where the statute plainly provides that the corporation may appoint "some person" who is authorized to receive service, the term "agent or agents," as used in other portions of the statute, being purposely omitted, service can be made only on such agent as is appointed and a return of service upon "one of the agents of such company" summoned as garnishee, does not show a valid service. *Gates v. Tusten*, 89 Mo. 13; *Stone v. Travelers Ins. Co.*, 78 Mo. 655. See *Goodwin v. Colorado Mortgage, etc., Co.*, 110 U. S. 1 (agent's name need not be given).

Service of summons issuing from the city court of New York may be served on the superintendent of insurance in his office at Albany. *People v. Justices*, 11 N. Y. Supp. 773.

As to fraudulent use of statute authorizing appointment of agent for service of process, see *Richardson v. Western Home Ins. Co.* (Supreme Ct.), 8 N. Y. Supp. 873.

1. Upon Officers.—*Benwood Iron Works v. Hutchinson*, 101 Pa. St. 359 (valid service made on secretary); *Tennessee Code*, § 2832. Compare *Desper v. Continental Water Meter Co.*, 137 Mass. 252 (service on treasurer held invalid).

A person in the State who receives the money of a foreign corporation, is a "cashier" within the meaning of § 432 of *New York Code of Civ. Proc.*, upon whom process may be served, there being no other officer of the corporation in the State. *McCulloh v. Paillard, etc., Watch Co.* (Supreme Ct.), 14 N. Y. Supp. 491.

2. *Reddington v. Mariposa Land, etc., Co.*, 19 Hun (N. Y.) 405.

On Managing Agent.—A "managing agent," within the meaning of the *New York code*, is a person designated as general agent—*e. g.*, a general passenger agent; he is not necessarily one who controls the road. *Tuchband v. Chicago, etc., R. Co.*, 115 N. Y. 437; 40 Am. & Eng. R. Cas. 612. See also

Hat-Sweat Mfg. Co. v. Davis Sewing Mach. Co., 31 Fed. Rep. 294 ("managing agent" defined).

On the time-tables of a defendant, a railroad company, and on the windows of its office on Broadway were the words: "O., General Agent Passenger Department, 261 Broadway." O. made affidavit that he was not its managing agent, but only in charge of the passenger department, and that defendant had another agent in the State in charge of the freight department. It was held, however, that he was a managing agent within the meaning of the code, § 432, providing for the service of process on foreign corporations. *Tuchband v. Chicago, etc., R. Co.*, 115 N. Y. 437; 40 Am. & Eng. R. Cas. 612, note; *Pacific Mut. L. Ins. Co. v. Williams*, 79 Tex. 633.

That a foreign corporation had an agent in *Ohio*, whose duty was merely to receive what was sent to him and to remit back proceeds, did not constitute him a managing agent, on whom process against the corporation might be served. *Gibbin v. Kanawha, etc., Coal Co.*, 2 Cin. Sup. Ct. Rep. (Ohio) 75. See also FOREIGN CORPORATIONS, vol. 8, pp. 386 *et seq.*

3. In the case of *Palmer v. Pennsylvania Co.*, 35 Hun (N. Y.) 370 (*affirmed* 99 N. Y. 679), the court said: "There is no doubt that the defendants hold P. out to the world as their agent in the city of New York. It is plain that he has a large authority, and within a wide field his acts are binding on defendant. The code does not specify the extent of the agency required to bind defendants by service of process, except that the person upon whom the service is made must be a managing agent. Were the rule to be established, as contended by appellants, that the agent must have charge of the whole business of the corporation, the statute would be a dead letter, for such an agency seldom, if ever, exists. Every object of the service is obtained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant would be apprised of the service made. The statute is satisfied if he be a managing

an agent may be sufficient if the person served was the agent conducting the transaction out of which the suit arose.¹ Service on an agent is valid only when made during the term of the agency,² but a corporation cannot by revoking the authority of an agent

agent to any extent." See also *Berlin Iron Bridge Co. v. Norton* (N. J. 1889), 17 Atl. Rep. 1079.

1. *Estes v. Belford*, 22 Fed. Rep. 275.
On Attorney.—Where the statute authorizes service on a certain attorney appointed to accept service, a return of service on the "lawful attorney" of the corporation is sufficient. *Webster Wagon Co. v. Peterson*, 27 W. Va. 314.

A foreign corporation had appointed a commissioner of corporations to be its attorney on whom process might be served pursuant to *Massachusetts* statutes, and its attorney in the suit accepted service "to the same extent that the plaintiff would have obtained service by leaving a copy of the writ with the commissioner of corporations." It was held that such service was valid and gave jurisdiction to render a personal judgment against defendant. *Wilson v. Martin-Wilson, etc., Fire Alarm Co.*, 149 Mass. 24; *Webster Wagon Co. v. Peterson*, 27 W. Va. 314.

But an attorney who merely has claims to collect for a foreign corporation is not an agent on whom process against the corporation may be served. *Moore v. Freeman's Bank*, 92 N. Car. 590.

On Agents Generally—Who Is Proper Agent.—Service on any agent appointed by the corporation to receive service is valid. *Swallow v. Duncan*, 18 Mo. App. 622.

But authority given by a corporation to an agent to accept service "in actions on any liability or indebtedness incurred or contracted" by the corporation, does not authorize his acceptance of service in garnishment proceedings. *Moore v. Speed*, 55 Mich. 84.

A person whose sole duty it is to solicit travel for the railroad which he represents is not an agent upon whom process against the company may be served, even though he was employed by it to try to compromise the claim involved in the suit. *Maxwell v. Atchison, etc., R. Co.*, 34 Fed. Rep. 286; *Chicago, etc., R. Co. v. Walker*, 9 Lea (Tenn.) 475; 16 Am. & Eng. R. Cas. 553.

Under the *New Jersey Corporation Act*, § 88, providing for the service of process upon agents of corporations, it is held, that the person to whom is committed the management and control of the business of a foreign corporation becomes an agent of the corporation for the purpose of receiving such service of process. *Berlin Iron Bridge Co. v. Norton* (N. J. 1889), 17 Atl. Rep. 1079.

But in an action against a *New York* corporation, service in *New Jersey* upon a person whose only connection with the corporation consisted in receiving advertisements at the published rates, forwarding the same to the home office, receiving the bills for the same, and collecting them upon commission, was not held service upon an agent of the company. *Mulhearn v. Press Pub. Co.*, 53 N. J. L. 150, 153.

Service on a general agent was held sufficient in *Société's Foncière v. Milliken*, 135 U. S. 304; and in *Saunders v. Sioux City Nursery, etc., Co.* (Utah, 1890), 24 Pac. Rep. 532, it is said that if the statutory general agent cannot be found, service may be made on any agent having property in charge.

A finding by the trial court that the agent served was competent will not be reversed on appeal where the evidence is conflicting. *Vorheis v. People's Mut. Ben. Soc.*, 86 Mich. 31; *Pacific Mut. L. Ins. Co. v. Williams*, 79 Tex. 633; *Sugg v. Thornton*, 73 Tex. 666.

See generally as to proper agent, *Norton v. Atchison, etc., R. Co.* (Cal. 1892), 30 Pac. Rep. 585; *Snelling v. Joffrion*, 42 La. Ann. 886; *Shafer Iron Co. v. Stone*, 88 Mich. 464; *Burgess v. Aultman*, 80 Wis. 292; *Gottschalk v. Distilling, etc., Feeding Co.*, 50 Fed. Rep. 681.

2. Service on Agent After Expiration of Agency.—If the agency for carrying on the business out of which the contract sued on arose, has been discontinued and the agent's authority revoked, service cannot be made on an agent employed in the same place to transact other business. *Winney v. Sandwich Mfg. Co.* (Iowa, 1891), 50 N. W. Rep. 565.

protect itself from service in a suit growing out of a transaction conducted by such agent.¹

Frequently there are special statutory provisions relating to service on foreign insurance companies.² Generally service may be made on a local agent of a foreign insurance company whose business it is to issue policies, collect premiums, pay losses, etc.,³ but it has been held that a mere recording agent was not competent to receive service.⁴ So generally service may be made on any general

1. Revocation of Agent's Authority in Order to Prevent Service.—Thus service may be made upon the agent of insurance company who issued the policy, although he is no longer agent. *Gillespie v. Commercial Mut. Ins. Co.*, 12 Gray (Mass.) 201; 71 Am. Dec. 743.

A *Massachusetts* statute required foreign insurance companies to appoint an attorney as its agent to receive service. A firm consisting of A., an attorney, and B., who was not an attorney, was appointed. The firm was afterwards dissolved and B. continued to act. Just before service in a certain suit, the company withdrew B.'s authority. It was held that service on B. was nevertheless valid. *Gibson v. Manufacturers' F. & M. Ins. Co.*, 144 Mass. 81.

Death of Appointed Agent.—*Virginia* Acts of 1876-7, ch. 252, providing that if the agent in that State of a foreign insurance company should die and a new agent should not be appointed, process against the company might be served on the personal representative of the deceased agent, is prospective only, and cannot be held to apply to the representative of the agent of a company which had abandoned business in the State years before. *Ellis v. Connecticut Mut. L. Ins. Co.*, 19 Blatchf. (U. S.) 383.

2. Service Upon Insurance Companies.—*Rehm v. German Ins., etc.*, 125 Ind. 135. See *Osborne v. Shawmut Ins. Co.*, 51 Vt. 278.

3. Insurance Agents.—*Sadler v. Mobile L. Ins. Co.*, 60 Miss. 391 (agent to collect and remit premiums); *Vorheis v. People's Mut. Ben. Soc.*, 86 Mich. 31 (agent to receive payment of assessments and give receipts therefor); *Southern Ins. Co. v. Wolverton Hardware Co.* (Tex. 1892), 19 S. W. Rep. 615 (local agent); *Southwestern Mut. Ben. Assoc. v. Swenson* (Kan. 1892), 30 Pac. Rep. 405 (local or branch secretary appointed to receive assessments from members and to countersign and deliver receipts therefor and to forward

money so received). Compare *State Ins. Co. v. Waterhouse*, 78 Iowa 674.

In *Pacific Mut. L. Ins. Co. v. Williams*, 79 Tex. 633, it appeared that the agent served was furnished with stationery and books necessary for insurance business and that the manager of the company referred others desiring policies to him. The service was held valid.

Wisconsin Rev. St., § 1977, declares that all persons who aid in transacting any business for any insurance company are insurance agents upon whom service of process against the company may be made. The statute applies as well to unlicensed companies as to others, and its definition will include one who receives premiums for insurance, takes his commissions and advertises himself as the company's agent.

In *State v. U. S. Mut. Accident Assoc.*, 67 Wis. 624, the court said: "By that definition, whoever solicits insurance on behalf of any insurance corporation, or transmits an application for insurance, or a policy of insurance to or from any such corporation, or who makes any contract of insurance, or collects or receives any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business for any insurance company, or advertises to do any such thing, shall be held an agent of such corporation to all intents and purposes, and the word agent whenever used in ch. 89 of the Rev. Stat. shall be construed to include all such persons. The several things thus enumerated are connected by disjunctives and the doing of any one of them makes such party an agent."

4. Recording Agent—Iowa Statute.—*State Ins. Co. v. Granger*, 62 Iowa 272; *State Ins. Co. v. Waterhouse*, 78 Iowa 674. In this latter case the business of the recording agent was to write policies and to look after the company's interests in connection with property insured by him. The court

agent of the company having the general charge of the company's business in the county.¹

When service of process is made within a State upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record that the corporation was engaged in business in that State.² Service made upon an officer or agent of a foreign corporation, who is casually within the State and not there in an official or business capacity, is therefore void and cannot support a judgment.³ The same is true where an offi-

held that he was not an agent "employed in the general management of the business" within § 2612 of *Iowa Code* (1873), relating to service of process against foreign corporations generally. This decision depends upon the peculiar *Iowa* statute and seems to be at variance with the holdings of other courts. As to the *Iowa* statute, see also *Philp v. Covenant Mut. Ben. Assoc.*, 62 *Iowa* 633.

1. On General Agent.—Centennial Mut. L. Assoc. v. Walker, 50 *Iowa* 75 (valid service may be had on any agent, general or special, having charge of company's business in the county); *Farmers' Ins. Co. v. Highsmith*, 44 *Iowa* 330; *Michigan State Ins. Co. v. Abens*, 3 *Ill. App.* 488.

The *Iowa* statute requires that service shall be upon an "agent appointed" for the purpose or upon one "employed in the general management" of the company's business. A person employed by an insurance company to investigate losses, to look up testimony in lawsuits, and at times to look after local agents, but not to take risks or to issue policies, and who has no office within the State, is not such an agent, and valid service cannot be made upon him in a suit against the company. *Philp v. Covenant Mut. Ben. Assoc.*, 62 *Iowa* 633.

The *Iowa Code*, § 2613, also provides that where a corporation has an agency in another county, "service may be made on any agent employed in such office or agency, in all actions growing out of or connected with such office or agency." Under this, service on one agent of process in an action growing out of the business of another and former agent who conducted a different office in the same town is not good. *State Ins. Co. v. Granger*, 62 *Iowa* 272.

2. *St. Clair v. Cox*, 106 U. S. 350; 1

Am. & Eng. Corp. Cas. 19. See also *New England Mut. L. Ins. Co.*, 111 U. S. 138; *Good Hope Co. v. Railway Barb Fencing Co.*, 22 *Fed. Rep.* 635; *Merchants' Mfg. Co. v. Grand Trunk R. Co.*, 13 *Fed. Rep.* 358; *Morawetz Priv. Corp.*, § 522; *Fitzgerald, etc., Const. Co. v. Fitzgerald*, 137 U. S. 98.

If a corporation of *Colorado* has an office in the city of New York and nowhere else, and all persons competent to represent it are also in *New York*, service may be made upon its agents in the latter State. *Hunter v. International R. Imp. Co.*, 26 *Fed. Rep.* 299. But where a foreign corporation is doing no business in the State beyond negotiating a mortgage on its property, and having the bonds secured thereby put on the list of the Stock Exchange, it is not engaged in business in the State, and no jurisdiction over it is acquired by service of summons on the president while temporarily in the State for this purpose. *Crews v. Woodstock Iron Co.*, 44 *Fed. Rep.* 31; *Bentlife v. London, etc., Finance Corp.*, 44 *Fed. Rep.* 667; *Reifsnider v. American Imp. Pub. Co.*, 45 *Fed. Rep.* 433; *FOREIGN CORPORATIONS*, vol. 8, p. 384.

3. Service Cannot Be Made on Officer or Agent Casually Within the State.—See *FOREIGN CORPORATION*, vol. 8, p. 384, where the subject is examined. See also as sustaining the rule of the text, *City F. Ins. Co. v. Carrugi*, 41 *Ga.* 660; *Silsbee v. Quincy Hotel Co.*, 30 *Ill. App.* 204; *Weight v. Liverpool, etc., Ins. Co.*, 30 *La. Ann.* 1186; *Phillips v. Burlington Library Co.*, 28 *W. N. C. (Pa.)* 21; *Kinfeke v. Merchants' Dispatch Transp. Co.*, 3 *McCrary (U. S.)* 547; *Golden v. The Morning News*, 42 *Fed. Rep.* 112; *Clews v. Woodstock Iron Co.*, 44 *Fed. Rep.* 31; *Reifsnider v. American Imp. Pub. Co.*, 45 *Fed. Rep.* 433; *St. Clair v. Cox*, 106 U. S.

cer has been inveigled into a jurisdiction for the purpose of securing service of process upon him.¹

The principles governing the effect of constructive service of process on non-residents² apply as well to corporations as to private persons; so that no personal judgment rendered against a corporation, based upon a service by publication, can be of any force or validity except as to the property of the corporation within the State, to reach and affect which was the object of the suit.³ A State may provide, however, that service of process on

350; 1 Am. & Eng. Corp. Cas. 19. Compare *Klopp v. Creston City, etc.*, Co. (Neb. 1892), 52 N. W. Rep. 819 (such service held valid). See also *Snelling v. Joffrion*, 42 La. Ann. 886 (resident agent).

Thus service cannot be made on the vice-president of a corporation while he is temporarily within the State as a witness. *Mulhearn v. Press Pub. Co.*, 53 N. J. L. 153.

The president of a street railroad company in Galveston, while on a personal visit to Chicago, sent a telegram from the latter place in relation to a sale of the road. It was held not to be an act which would authorize service of process against the company upon him so as to enable the *Illinois* courts to render a personal judgment. *Galveston City R. Co. v. Hook*, 40 Ill. App. 547. See same principle held in *St. Louis Wire-mill Co. v. Consolidated Barb-wire Co.*, 32 Fed. Rep. 802. Compare *Shickle, etc., Iron Co. v. Wiley Construction Co.*, 61 Mich. 226, 1 Am. St. Rep. 571, holding that if service is made on an officer of the corporation it is not necessary that he should be in the State on official business or that he should be specially authorized to receive service.

A *Pennsylvania* air brake company sent a train of cars into *Iowa* for the purpose of exhibiting its brake. The chief officer of the company attended the train. It was held that service could not be made upon time of process in a suit against the company in the federal court for the *Iowa* district. *Carpenter v. Westinghouse Air-brake Co.*, 32 Fed. Rep. 434.

Resident Agent.—Code of Civil Proc. *South Carolina*, § 155 (amended by 19 St. 385), provides that service may be made on a foreign corporation "only when it has property within this State, or the cause of action arose therein, or where such service shall be made in this State personally upon the presi-

dent, . . . or any resident agent thereof." It was held that whether service upon one who was not an officer, but who was alleged to be a resident agent was sufficient or not, was a question of fact for the trial court. *Hester v. Rasin Fertilizer Co.*, 33 S. Car. 609; 33 Am. & Eng. Corp. Cas. 44.

1. **Officer Inveigled into State.**—*Fitzgerald, etc., Const. Co. v. Fitzgerald*, 137 U. S. 98.

2. See *Pennoyer v. Neff*, 95 U. S. 714; *infra*, this title, *Upon Non-Residents*.

3. **Effect of Constructive Service in Suits in Personam.**—The rule of the text is upheld in many cases. *St. Clair v. Cox*, 106 U. S. 350; 1 Am. & Eng. Corp. Cas. 19; *Good Hope Co. v. Railway Barb Fencing Co.*, 22 Fed. Rep. 635; *Moulin v. Trenton Mut., etc., Ins. Co.*, 24 N. J. L. 223; *Peckham v. North Parish*, 16 Pick. (Mass.) 286; *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 407; *Winsdor v. McVeigh*, 93 U. S. 274; *FOREIGN CORPORATIONS*, vol. 8, pp. 384-396.

Service by Publication.—The laws of *Kansas* provide that service by publication may be made where defendant foreign corporation has property within the State. It was held that such service might be made where there is property in the hands of a receiver of the court where the action is pending, which was delivered to him by the sheriff, who seized it in an action of replevin by defendant against a third person, though the action is still pending before the same court. *U. S. Electric Lighting Co. v. Martin*, 43 Kan. 526.

Bonds of a foreign corporation having an agent in the State, and not the obligations which they evidence, are personal property within the provision of the *New York Civ. Proc.*, § 438, par. 5, which provides that an order directing service of summons by publication may be had where the complaint de-

an authorized agent of a foreign corporation may support a personal judgment against it.¹

3. Upon a Partnership.—Outside of special statutory regulation, the rule in this connection seems to be that when the suit is against the firm in the firm name, service upon one of the members of a commercial partnership is a valid service upon all, provided such service is made during the continuance of the partnership;² and that valid constructive service may be made, as in case of corporations, by service upon any clerk or general agent, or by leaving a copy at the usual place of business.³ But if service purports to be made upon the individual members of a firm it must be car-

mands judgment affecting the title to specific personal property within the State. Where the bonds are without the State in the possession of defendants, an order of publication against them cannot be made. *Von Hesse v. Mackaye*, 55 Hun (N. Y.) 365.

In the case of *McClaren v. Byrnes*, 80 Mich. 275, it was held, that in proceedings to enforce a laborer's lien against the personal property of a foreign mining corporation on which personal service cannot be had, § 8404 must be followed, which provides that in such case plaintiff may obtain substituted service by publication, upon pursuing the method pointed out for an attachment proceeding. *Michigan* How. St., § 8145, applies only to cases where personal service can be obtained.

1. *McNichol v. U. S. Mercantile Reporting Agency*, 74 Mo. 457. This on the principle that the corporation, by coming into the State to do business, consents to be bound by the statute.

2. *Lindley on Partnership*, 473; *Bates' Law of Partnership*, §§ 1062-85-87; *Parker v. Danforth*, 16 Mass. 299; *Anderson v. Amette*, 27 La. Ann. 237; *Nixon v. Downey*, 42 Iowa 78; *Winters v. Means*, 25 Neb. 241; *Demoas v. Brewster*, 12 Miss. 661. Compare *Rice v. Doniphan*, 4 B. Mon. (Ky.) 123; *Russell v. Cambefort*, 23 Q. B. Div. 526 (service on foreign partnership); *Grady v. Gosline*, 48 Ohio St. 665 (service properly made on agent of firm); *Martin v. Burns*, 80 Tex. 676.

After the dissolution of a partnership, any member intended to be sued must be served with a separate citation. *Brashear v. Dwight*, 2 La. Ann. 403; *Anderson v. Amette*, 27 La. Ann. 237. Compare *Click v. Click*, Minor (Ala.) 79. See also *PARTNERSHIP*, vol. 17, p. 824.

Where the action is not against the firm by its firm name, but against the members constituting it, service must be made upon each individual member. *Bates' Law of Partnership*, §§ 1062-85, and cases cited; *Lagida Saw Mill Co. v. Smith*, 78 Ala. 108; *Haralson v. Campbell*, 63 Ala. 278; *Pollexfen v. Sibson*, L. R., 16 Q. B. Div. 792.

Service upon an alleged partner, the fact of partnership not being established, does not confer jurisdiction over his alleged partners. *Nixon v. Downey*, 42 Iowa 79.

Any method of service of process upon partnerships prescribed by statute does not exclude the method of service upon each individual partner, unless such statute specially declares it to be excluded. *Herron v. Cole*, 25 Neb. 692.

At Common Law.—The rule at common law was that all partners must be served before a judgment could be obtained against any of them. *Hall v. Lanning*, 91 U. S. 166; *Edwards v. Carter*, 1 Stra. 473; *Tidd's Pr.* 423; *Rice v. Doniphan*, 4 B. Mon. (Ky.) 123. See also *Houston v. Ward*, 8 Tex. 124; *Johnson v. Vaughan*, 9 B. Mon. (Ky.) 217; *Swift v. Green*, 20 Ill. 173; *Boaz v. Heister*, 6 S. & R. (Pa.) 18; *Murfrees on Sheriffs* (2d ed.), § 123a.

3. *Herron v. Cole*, 25 Neb. 692; *Bryndolf v. Wolf*, 32 Iowa 509.

In *Louisiana*, such constructive service upon any agent, etc., can be made only at the usual place of business of the firm. *Mitchell, etc., Furniture Co. v. Sampson*, 40 Fed. Rep. 805. See also *Michie v. Brown*, 20 La. Ann. 75; *Hefferman v. Brenham*, 1 La. Ann. 146.

Service upon the wife of one of the partners is wholly insufficient. *Bryndolf v. Wolf*, 32 Iowa 509.

ried out just as in the case of private persons.¹ A judgment based upon a service only upon one partner as managing agent for the firm, like a similar service upon corporations, is valid only as it affects firm property.²

Where the plaintiff commences his suit against certain persons as a partnership, and afterwards amends the process and sues them as a corporation, a new service is necessary.³

4. Upon Non-residents.—Subject to the constitutional provision that no State shall deprive any person of life, liberty or property without due process of law, any State has the right and power to subject the property of non-residents within its territorial limits to the satisfaction of the claims of its citizens by any mode of procedure which it may deem proper and convenient.⁴ But the judgment or decree of the court of a State can have no force beyond its own limits, unless the defendant was actually served with process, or unless he actually appeared.⁵

Service of process upon non-residents, when they cannot be found within the jurisdiction of the court, is usually made by publication of the summons, the fact of non-residence having been previously established, either by clear and undisputed evi-

1. *Weaver v. Carpenter*, 42 Iowa 343.

Any method of service, whether statutory or otherwise, is not exclusive of ordinary service on each partner in person. *Heron v. Cole*, 25 Neb. 692.

2. *Winters v. Means*, 25 Neb. 241; *Heron v. Cole*, 25 Neb. 692. A personal judgment against a non-resident partner cannot be based upon service merely on his resident partner. *U. S. v. American Bell Teleph. Co.*, 29 Fed. Rep. 17.

3. *Thompson v. Allen*, 86 Mo. 85.

4. *Galpin v. Page*, 3 Sawy. (U. S.) 110; 18 Wall. (U. S.) 350; *Thomas v. Mahone*, 9 Bush (Ky.) 111. See also cases cited in the next note.

In the language of the court by Beasley, C. J.: "Every independent government is at liberty to prescribe its own methods of judicial process, and declare by what means parties shall be brought before its tribunals." *Mackey ads. Gordon*, 34 N. J. L. 291. See also *Mutual L. Ins. Co. v. Pinner*, 43 N. J. Eq. 52. See also the language employed in *Freeman on Judgments* (3d ed.), § 570, quoted in *Nat. Bank v. Peabody*, 55 Vt. 492; 45 Am. Rep. 633.

5. *Pennoyer v. Neff*, 95 U. S. 719; *Hollingsworth v. Barbour*, 4 Pet. (U. S.) 466; *Harris v. Hardeman*, 14 How. (U. S.) 334; *D'Arcy v. Ketchum*, 11 How. (U. S.) 165, note; *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404; *Webster v. Ried*, 11 How. (U. S.) 437;

Galpin v. Page, 18 Wall. (U. S.) 350; *Thomas v. Whitman*, 18 Wall. (U. S.) 457; *Melhop v. Doane*, 31 Iowa 397; 7 Am. Rep. 147; *Gunn v. Plant*, 94 U. S. 664; *Bissell v. Briggs*, 9 Mass. 464; 6 Am. Dec. 88; 4 Minor's Insts. (2d ed.) 517, and cases cited; *Cooley's Prin. of Const. Law*, p. 186; *Gray v. Larrimore*, 2 Abb. (U. S.) 542. These authorities show that while "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State," still the jurisdiction of the court of another State may be inquired into, and if it appears that the parties were not properly summoned, or did not appear, the judgment or decree of such court will not be enforced. See ATTACHMENT, vol. 1, p. 934; JURISDICTION, vol. 12, p. 148; FOREIGN ATTACHMENT, vol. 8, p. 323.

In *Lockett v. Rumbaugh*, 45 Fed. Rep. 23, an action was commenced in a federal court against three partners, one of whom was not served and no *alias* summons was issued against him. The court held that as to such partner the suit was at an end, and that a subsequent attachment upon an affidavit of non-residence and service by publication was void, though authorized by the code of the State where the court was sitting, since the court could not thus acquire jurisdiction without service *in personam*.

dence, or by affidavit.¹ Such service, however, is unsatisfactory, since a judgment or decree based upon it can have no force except as regards property within the limits of the State within which it was rendered, and to reach and affect which was the object of the proceedings in which such judgment or decree was rendered.² If a defendant, although a non-resident, can be personally served with process within the territorial jurisdiction of the trial court, a judgment founded upon such service is available out of the State as well as within, and in proceedings *in personam* as well as those *in rem*.³ Personal service, however, cannot be

1. See NOTICE, vol. 16, pp. 808 *et seq.*; NON-RESIDENTS, vol. 16, p. 718. See also 4 Minor's Insts. (2d ed.), p. 535; Lawson v. Moorman, 85 Va. 880; National Typographic Co. v. New York Typographic Co., 44 Fed. Rep. 711; People v. Stanley, 6 Ind. 410.

Therefore where a person had left the State never intending to return, judgment rendered against him on service by copy on his wife at the place where they had resided prior to his leaving was void. Amsbaugh v. Exchange Bank, 33 Kan. 100.

2. Pennoyer v. Neff, 95 U. S. 714; Bates v. Chicago, etc., R. Co., 19 Iowa 260; Winfree v. Bagley, 102 N. Car. 515; Cloyd v. Trotter, 118 Ill. 391; Lydiard v. Chute, 45 Minn. 277; Process, vol. 19, p. 221; Cooley's Prin. of Const. Law, p. 186; Vorce v. Page, 28 Neb. 294. From these cases it will be seen, therefore, that where the proceeding is one purely *in personam*, the judgment rendered upon notice by publication is utterly invalid as being *coram non judice*.

By Pennoyer v. Neff, 95 U. S. 714, this principle, already well known and established, has been more firmly fixed, that case insisting that the principle is required by the Fourteenth Amendment if not before. See for a discussion of this case, 13 Va. L. J., p. 768. See also 9 Va. L. J., p. 385.

It has been held that, by the act of Tennessee of 1787, where process is served on one material defendant, the court obtains jurisdiction over all the others also, no matter where resident, and may proceed to decree the matter in dispute, although the rights of the non-residents are wholly distinct from those of the parties before the court. Jackson v. Tiernan, 10 Yerg. (Tenn.) 172.

But in such case, to give jurisdiction the "whole transaction," which is the ground of the action or proceeding,

must have taken place in Tennessee. Jackson v. Tiernan, 10 Yerg. (Tenn.) 172.

3. Peabody v. Hamilton, 106 Mass. 217; Reeder v. Holcomb, 105 Mass. 93; Webster v. Reid, 11 How. (U. S.) 437.

If a defendant whose residence is out of the State be served with process while temporarily in the State, such service will confer complete jurisdiction over his person, his presence being residence for such purposes. Alley v. Caspari, 80 Me. 234; Thompson v. Cowell, 148 Mass. 552.

A citizen of Missouri went to Illinois to attend the taking of depositions before a notary public, in an action pending in Missouri in which he was defendant. Soon after they were taken, and while he was in his attorney's office consulting concerning them, he was served, by reading the summons, in an Illinois suit brought against him by the same plaintiff for the same cause of action. It was held that this was a valid service. Greer v. Young, 120 Ill. 184.

In Massachusetts, if the defendant is not an inhabitant of the State, there must be actual service upon him, or some estate or effects of his must be attached, and a summons left at his last and usual place of abode, if he ever was an inhabitant of the State; if he never was an inhabitant, and his estate is attached, a summons may be left with his tenant, agent or attorney; but a summons left with his tenant, etc., is not a legal service, unless his estate or effects be attached. Any deficiency in these requisites of service is good ground for abating a writ. Gardner v. Barker, 12 Mass. 36; Jacobs v. Mellen, 14 Mass. 132; Guild v. Richardson, 6 Pick. (Mass.) 364; Lawrence v. Smith, 5 Mass. 362. See also Wright v. Oakley, 5 Met. (Mass.) 400; Tappan v. Bruen, 5 Mass. 193; Bank of Burlington v. Catlin, 11 Vt. 106.

made beyond the jurisdiction of the court whose process is to be served, and, therefore, if made out of the State in which the court sits, is invalid and of no effect,¹ except in cases where there is a statutory provision otherwise, and even then it would seem that such service is of no more effect than a mere notice by publication.²

1. *York v. State*, 73 Tex. 651; *Fisk v. Anderson*, 33 Barb. (N.Y.) 71; *Kimmarle v. Houston, etc.*, R. Co., 76 Tex. 686; *Maddox v. Craig*, 80 Tex. 600; *Masterson v. Little*, 75 Tex. 682; *Kelly v. Norwich Union F. Ins. Co.* (Iowa, 1891), 47 N. W. Rep. 986; *Pennoyer v. Neff*, 95 U. S. 714; *Harkness v. Hyde*, 98 U. S. 476; *Story's Conf. of Laws*, § 539; *Pratt v. Bank of Windsor*, 1 Harr. (Mich.) 254; *Dunn v. Dunn*, 4 Paige (N. Y.) 425; *Smith v. Gibson*, 83 Ala. 284; *Ford v. Adams* (Ark. 1891), 15 S. W. Rep. 186; *Eastman v. Dearborn*, 63 N. H. 364; *Maddox v. Craig* (Tex. 1891), 16 S. W. Rep. 328; *Cudabac v. Strong*, 67 Miss. 705; *Salisbury v. Sands*, 2 Dill. (U. S.) 270; *Claypoole v. Houston*, 12 Kan. 324; *Dillard v. Central Va. Iron Co.*, 82 Va. 734.

The same rule applies in the United States circuit and district courts. *Ex parte Graham*, 3 Wash. (U. S.) 456; *Toland v. Sprague*, 12 Pet. (U. S.) 300.

The *Pennsylvania* statute relating to divorce suits directs the service of subpoena on the defendant personally "wherever found." But a service beyond the limits of the State is not authorized, and confers no jurisdiction which the *New York* courts will respect. *Burton v. Burton*, 45 Hun (N. Y.) 68.

Service of process out of the territorial jurisdiction of the court from which it issues, at common law, is a nullity; and the defendant's admission of service not showing that it was made within the State is inefficacious. *Litchfield v. Burwell*, 5 How. Pr. (N. Y.) 341; *Weil v. Lowenthal*, 10 Iowa 575.

It is no objection, however, to the service of process in a civil action, that it was made upon the defendant while he was still on board a British mail steam vessel after she arrived at the dock, but before she was moored. *Peabody v. Hamilton*, 106 Mass. 217.

Mr. Cooley clears up this whole subject in his treatise on the Principles of Constitutional Law, p. 186, where he says: "Constructive service of pro-

cess by publication or attachment of property is sufficient to enable the courts of a State to subject property within it to their jurisdiction, in such cases as the statutes of the States may provide therefor; but such a service cannot be the foundation of a personal judgment. Process from the tribunals of one State cannot run into another State and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailable in proceeding to establish his personal liability. But in respect to the *res*, a judgment *in rem*, rendered with competent jurisdiction, is conclusive everywhere." *Citing D'Arcy v. Ketchum*, 11 How. (U. S.) 165, and other cases.

2. *Denny v. Ashley*, 12 Colo. 165; *Crouter v. Crouter*, 63 Hun (N. Y.) 630.

New York Code Civ. Proc., § 443. Under this section the plaintiff is required first to get an order of court for such service. See *Matthews v. Gilleran*, 58 Hun (N. Y.) 607.

Personal service out of the State is allowed by *Virginia* statute; but it is provided that its effect shall be only the same as that of publication. *Code of Virginia* (1887), § 2403.

See also *McCully v. Heller*, 66 How. Pr. (N. Y.) 468; *Masterson v. Little*, 75 Tex. 682; *Fetes v. Volmer* (Supreme Ct.), 8 N. Y. Supp. 294; *Gillespie v. Thomas*, 23 Kan. 138; *Hogle v. Mott*, 62 Vt. 255; 22 Am. St. Rep. 106. And when a summons has been personally served out of the State, it must be shown by affidavit that the person served is the identical person named in the action or proceeding; and it is not sufficient to show by affidavit that the person served acknowledged himself to be such identical person. *Cole v. Allen*, 51 Ind. 122.

If process is sent beyond the juris-

When personal service cannot be secured, and the defendant fails to appear after a publication of the summons, the proceeding against a non-resident defendant must be by attachment, or some similar proceeding *in rem* or *quasi in rem*, which must be confined to property within the State limits.¹ Service of process, either

diction of the court issuing it, the authority to do so must appear upon the face of the process. *Semple v. Anderson*, 9 Ill. 546.

An agreed statement that service was made "either in *New Hampshire* or in *Massachusetts*," does not of itself warrant a finding that the service was made in the latter State. *Rand v. Hanson*, 154 Mass. 87.

Rev. Laws of *Vermont*, §§ 1402, 1403, 1404, provide for service beyond the State. See *Hogle v. Mott*, 62 Vt. 255.

1. *Pennoyer v. Neff*, 95 U. S. 714; *Boswell v. Otis*, 9 How. (U. S.) 336; *Cooper v. Reynolds*, 10 Wall. (U. S.) 308; *Hanley v. Donoghue*, 116 U. S. 1; *Bias v. Vance*, 32 Miss. 198. See also in this connection *Hill v. Warren*, 54 Vt. 73; *Martin v. Central Vermont R. Co.*, 50 Hun (N. Y.) 347; *Fates v. Wolmer*, 55 Hun (N. Y.) 604; *New York Code Civ. Proc.*, § 440; *Gardner v. Barker*, 12 Mass. 36; *Brownell v. Troty*, etc., R. Co., 18 Blatchf. (U. S.) 243; *Spiers v. Halstead*, 71 N. Car. 209. See also JURISDICTION, vol. 12, p. 281; FOREIGN ATTACHMENT, vol. 8, p. 323. See also *infra*, this title, *Effect of Proceedings in Rem*.

When the real estate of a defendant who does not reside in the State, and has no known tenant, agent, or attorney, is attached under *Vermont Gen. Stat.*, ch. 83, § 37, it is not enough to leave an attested copy of the writ in the office where a deed of such estate would be recorded; but another copy with the officer's return thereon must be left in the same office, for the defendant. *Washburn v. New York*, etc., Min. Co., 41 Vt. 50.

In the well known case of *Pennoyer v. Neff*, 95 U. S. 714, the court by Field J., said: "The proceeding in such cases [*i. e.*, by foreign attachment], though in the form of a personal action, has been uniformly treated, where service was not obtained, and the party did not voluntarily appear, as effectual and binding, merely as a proceeding *in rem* and as having no operation beyond the disposition of the property or some interest therein. And the reason assigned for this conclusion has

been that which has been already stated, namely, that the tribunals of one State have no jurisdiction over persons beyond its limits, and can inquire only into their obligations to its citizens, when exercising its conceded jurisdiction over their property within its limits." See also *Heidretter v. Elizabeth Oil Cloth Co.*, 112 U. S. 294.

Rule to be Strictly Followed.—The rule, as stated in the text, is to be strictly followed. Thus it is held in *Hart v. Sansom*, 110 U. S. 151, where this whole subject is thoroughly considered, that a decree of a State court for the removal of a cloud upon the title of land within the State, rendered against a citizen of another State, who has been cited by publication only, as directed by the local statutes, is no bar to an action by him in the circuit courts of the United States to recover the land against the plaintiff in the former State. The court in this case, by Gray, J., said: "Generally, if not universally, equity jurisdiction is exercised *in personam* and not *in rem*, and depends upon the control of the court over the parties by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem*, establishing a title in the land, but operates *in personam* only, by restraining the defendant from asserting his claim and directing him to deliver up his deed to be canceled, or to execute a release to the plaintiff." *Langdell's Eq. Pl.* (2d ed.), §§ 43, 184; *Massie v. Watts*, 6 Cranch (U. S.) 148; *Orton v. Smith*, 18 How. (U. S.) 263; *Vandever v. Freeman*, 20 Tex. 334; 70 Am. Dec. 391. The court continuing said: "It would, doubtless, be within the power of the State within which the land lies to provide by statute that, if the defendant is not found within the jurisdiction, or refuses to make or cancel the deed, this should be done in his behalf by a trustee appointed by

on the person or the property of the defendant, is indispensable to give jurisdiction over the subject-matter of the controversy;¹ therefore, if there can be no personal service, and there is no property within the State subject to such process, the suit must fail.²

The law assumes that property is always in possession of its owner, either in person or by agent, and proceeds upon the theory that its seizure will inform him not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale.³

5. Service by Publication.—Closely allied to the subject of service of process on non-residents, is that of service by publication. In view of the difficulties existing in securing valid service upon defendants who cannot be reached and who have no residence within the State, statutes have been passed in almost every State providing for service by the publication of the summons or notice in a newspaper of proper circulation for a certain length of time. The character of the paper, the length of time the publication must continue, and other similar details, are set forth elsewhere.⁴ We may here examine the general nature and effect of such service. It is sometimes broadly stated that statutes providing for

the court for that purpose. *Felch v. Hooper*, 119 Mass. 52; *Ager v. Murray*, 105 U. S. 132. But in such a case, just as in the ordinary exercise of its jurisdiction, a court of equity acts *in personam*, by compelling a deed to be executed or canceled by or in behalf of the party.

"Such a decree being *in personam* merely, can only be supported against a person who is not a citizen or resident of the State in which it is rendered, by actual service upon him within its jurisdiction; and constructive service by publication in a newspaper is not sufficient. No court deriving its authority from another government will recognize a merely constructive service as bringing the person within the jurisdiction of the court. The judgment would be allowed no force in the courts of any other State; and it is of no greater force against a citizen of another State, in a court of the United States, though held within the State in which the judgment was rendered. *Hollingsworth v. Barbour*, 4 Pet. (U. S.) 466; *Boswell v. Otis*, 9 How. (U. S.) 336; *Bischoff v. Wethered*, 9 Wall. (U. S.) 812; *Knowles v. Logansport Gas Light, etc., Co.*, 19 Wall. (U. S.) 58; *Pennoyer v. Neff*, 95 U. S. 714. See also *Schibbsby v. Westenholtz*, L. R., 6 Q. B. 155; *City of Mecca*, L. R., 6 P. D. 106."

1. *Bell v. Ohio L., etc., Co.*, 1 Biss. (U. S.) 264; *Freeman v. Alderson*, 119 U. S. 185; *PROCESS*, vol. 19, p. 221; *Pennoyer v. Neff*, 95 U. S. 714; 4 *Minor's Insts.* (2nd ed.) 559; *Cooley's Prin. of Const. Law*, 186; *D'Arcy v. Ketchum*, 11 How. (U. S.) 165; *Melhop v. Doane*, 31 Iowa 397; 7 *Am. Rep.* 147.

2. *Cooper v. Reynolds*, 10 Wall. (U. S.) 308; *Lawrence v. Smith*, 5 Mass. 462; *Austin v. Bodley*, 4 T. B. Mon. (Ky.) 434; *Stow v. Chapin* (Supreme Ct.), 4 N. Y. Supp. 496.

In all cases, in order to render a valid personal judgment the court must have jurisdiction of the subject-matter and of the person. *Gray v. Hawes*, 8 Cal. 562.

3. *Pennoyer v. Neff*, 95 U. S. 719; *Hart v. Sansom*, 110 U. S. 151; *Thomas v. Mahone*, 9 Bush (Ky.) 111.

When once jurisdiction of the person is obtained of personal service or appearance, jurisdiction of the property follows. The converse, however, is not true, and in suits begun by attachment nothing is affected by the judgment rendered, except the property attached. *Gilman v. Gilman*, 126 Mass. 28; 30 *Am. Rep.* 646; *Peabody v. Hamilton*, 106 Mass. 217; *Cooper v. Reynolds*, 10 Wall. (U. S.) 308; *Wilbur v. Ripley*, 124 Mass. 468.

4. *NOTICE*, vol. 16, p. 808, *et seq.*

service of process by publication are constitutional,¹ but this is not necessarily true, and the constitutionality must in each case depend upon the character of the particular statute under examination. And it may be considered settled that any statute which provides for a method of service so as to authorize a judgment *in personam* against a party not actually summoned nor appearing, is violative of that provision of the constitution that no State shall deprive any person of life, liberty or property without due process of law, and will not, therefore, be upheld.² It lies solely within the province of the Federal Supreme Court to ultimately

1. NOTICK, vol. 16, p. 810; Mason v. Messenger, 17 Iowa 261 (a proceeding *in rem*). See also Palmer v. McCormick, 28 Fed. Rep. 541; Angell v. Angell, 14 R. I. 541; Robinson v. McKinney (Dak. 1886), 29 N. W. Rep. 658; Wardle v. Cummins (Mich. 1891), 49 N. W. Rep. 212.

In the case of Palmer v. McCormick, 28 Fed. Rep. 541, the decision was, that "in such cases [*i. e.*, where the proceedings were *in rem*] statutes authorizing service by publication when personal service cannot be had, are not unconstitutional." The same principle is upheld in Arndt v. Griggs, 134 U. S. 316 (authorizing service by publication in suits to determine the title to land).

In the case of *In re Empire City Bank*, 18 N. Y. 199, the court by Denio, J., has to say: "If we hold, as we must, in order to sustain this legislation, that the constitution does not positively require personal notice in order to constitute a legal proceeding due process of law, it then belongs to the legislature to determine in the particular instance whether the case calls for this kind of exceptional legislation, and what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against of the legal steps which are taken against him." And this language is quoted and approved in Mason v. Messenger, 17 Iowa 272. But both these cases were decided before the adoption of the 14th Amendment, at a time when the inhibition of the Federal constitution concerning due process of law was confined to the action of the Federal courts; and it may well be doubted whether the same reasoning would now be considered correct.

2. This idea is presented in 4 Minor's Inst. (2d ed.), [517] 559, where it is said: "There is probably no State,

however, which has empowered its courts to render any judgment without either a personal summons, actual or constructive, or without laying hold of property of some kind within its jurisdiction; and if there be in any State such a statutory provision, it would not only be condemned by the fundamental principles of justice which forbid that anyone should be deprived of any right, relating to person or property, without having an opportunity to make his defense, but it would be plainly contrary to Amendment XIV., U. S. Constitution." And this view is sustained in many well considered cases. *Pennoyer v. Neff*, 95 U. S. 719; *Cooper v. Reynolds*, 10 Wall. (U. S.) 308; *Fairfax v. Alexandria*, 28 Gratt. (Va.) 16; *Philadelphia R. Co. v. Trimble*, 10 Wall. (U. S.) 377; *Settlemyer v. Sullivan*, 97 U. S. 447; *Cooley's Prin. of Const. Law*, 186; *CONSTITUTIONAL LAW*, vol. 3, p. 712, and cases cited; *Gray v. Hawes*, 8 Cal. 562; *Pryor v. Downey*, 50 Cal. 388; 19 Am. Rep. 656.

In *Batt v. Procter*, 45 Fed. Rep. 515, it was held that statutes providing for service by publication are to be construed strictly.

There are some cases opposed to the doctrine announced in the text, but they were all decided either before the 14th Amendment, or before the definite settlement of the law by the case of *Pennoyer v. Neff*, 95 U. S. 714.

Thus, in the case of *Burnam v. Com.*, 1 Duv. (Ky.) 210, decided in 1864, it was held that the *Kentucky* act of March 15, 1862, authorizing proceedings against officers of the "provisional" government was constitutional and valid, though it authorized judgments *in personam* to be rendered upon service by publication.

An Exception.—To this general rule there is an apparent exception. Where the record on appeal shows that the defendant appeared in the subordinate

determine what is and what is not due process of law, and no legislature can, by enactment, lower the limit which that court chooses to fix as to what shall constitute such due process, though it seems a legislature may impose as many additional conditions upon the suitor or plaintiff as may seem fit.¹

a. EFFECT IN PROCEEDINGS IN PERSONAM.—It has already been seen that a judgment *in personam* based upon any other than actual personal service of process within the jurisdiction of the trial court, or upon an appearance by the defendant, is of no effect whatever.² Neither the principles of international comity, nor the full faith and credit clause of the constitution, require that a court of one State shall not inquire as to whether the courts of another State have jurisdiction in which the judgment sought to be enforced was rendered.³

court and there litigated the merits to final judgment, he cannot defeat an appeal by removing from the jurisdiction so as to render a personal service of the citation impossible. In such a case, service by publication, according to the law of the jurisdiction and the practice of the court, is free from objection, and amply sufficient to support the judgment of the appellate court. *Nations v. Johnson*, 24 How. (U. S.) 195; *Mandeville v. Biggs*, 2 Pet. (U. S.) 482.

1. This follows as a necessary consequence of the adoption of the 14th Amendment as a part of the Federal Constitution. The term "due process of law," as there used, means the law of the land; and it does not lie within the power of Congress or of any other legislative body to determine what shall constitute due process. Thus, in *Taylor v. Porter*, 4 Hill (N. Y.) 140; 40 Am. Dec. 274, the court, by Bronson, J., said: "The words 'by the law of the land,' as used in the constitution, do not mean a statute passed for the purpose of working a wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it.'" So in *Hoke v. Henderson*, 4 Dev. (N. Car.) 15; 25 Am. Dec. 677, it is said that the term "the law of the land" does not mean merely an act of the legislature.

If it did, every restriction upon the legislative authority would be at once abrogated. See also *Cooley's Const. Lim.* (4th ed.), p. 354; *Jones v. Perry*, 10 Yerg. (Tenn.) 59; 30 Am. Dec. 430; *Arrowsmith v. Burlingim*, 4 McLean (U. S.) 498; *Ervine's Appeal*, 16 Pa. St. 256; 55 Am. Dec. 499; *Com. v. Byrne*, 20 Gratt. (Va.) 165; *CONSTITUTIONAL LAW*, vol. 3, pp. 676, 726, *et seq.* Compare *Campbell v. Evans*, 54 Barb. (N. Y.) 566.

2. See *infra*, this title, *Service on Non-residents*. *Pennoyer v. Neff*, 95 U. S. 714; *Empire v. Darlington*, 101 U. S. 87; *Pana v. Bowler*, 107 U. S. 529; *Harkness v. Hyde*, 98 U. S. 476; *Bias v. Vance*, 32 Miss. 198; *Winfree v. Bagley*, 102 N. Car. 515; *Stow v. Chapin* (Supreme Ct.), 4 N. Y. Supp. 496; *Melhop v. Doane*, 31 Iowa 397; 7 Am. Rep. 147; *Robbins v. Martin* (La. 1891), 9 So. Rep. 108. The case of *Graves v. Cushman*, 131 Mass. 359, in so far as it attempts to establish a different doctrine, has been overruled. *Elliott v. McCormick*, 144 Mass. 10.

See also *Mastin v. Gray*, 19 Kan. 458; 27 Am. Rep. 149; *Price v. Hickok*, 39 Vt. 292; *Henderson v. Staniford*, 105 Mass. 504; 7 Am. Rep. 551.

3. See *CONFLICT OF LAWS*, vol. 3, p. 531, note, and cases cited; *CONSTITUTIONAL LAW*, vol. 3, p. 710-713; 4 *Minor's Insts.* (2nd ed.), [716] 795; *Thompson v. Whitman*, 18 Wall. (U. S.) 457; *Knowles v. Logansport Gas Light, etc., Co.*, 19 Wall. (U. S.) 58; *Webster v. Reid*, 11 How. (U. S.) 437; *D'Arcy v. Ketchum*, 11 How. (U. S.) 165; *Harris v. Hardeman*, 14 How. (U. S.) 334; *Gruner v. U. S.*, 11 How. (U. S.) 163; *Board of Public Works v. Columbia College*, 17 Wall. (U. S.) 521;

b. EFFECT IN PROCEEDINGS IN REM.—At common law no valid judgment affecting personal property could be rendered unless it was founded on an actual personal service of process, or on the defendant's appearance, or on the seizure of his property within the jurisdiction of the court.¹ And by virtue of the interpretation which has been given to the 14th Amendment, the same rule prevails in the United States;² so that service by publication is of no effect except where the proceeding is *in rem*. In such proceeding the property is either actually or constructively within the possession of the court, and the judgment is valid so far as it affects such property,³ though no further.⁴ The judgment

Salem v. Eastern R. Co., 98 Mass. 448; 96 Am. Dec. 650; *Fletcher v. Ferrill*, 9 Dana (Ky.) 372; 35 Am. Dec. 143, note; *Mackey ads. Gordon*, 34 N. J. L. 286; *Gilchrist v. West Va., etc., Oil Co.*, 21 W. Va. 115; 45 Am. Rep. 557; *National Bank v. Peabody*, 55 Vt. 492; 45 Am. Rep. 632.

Mr. Justice Bradley, in his opinion in *Thompson v. Whitman*, 18 Wall. (U. S.) 471, quotes and approves the language of Beasley, C. J., in *Mackay v. Gordon*, 34 N. J. L. 286, where it is said: "Every independent government is at liberty to prescribe its own methods of judicial process, and to declare by what forms parties shall be brought before its tribunals. But in the exercise of this power, no government, if it desires extra-territorial recognition of its acts, can violate those rights which are universally esteemed fundamental and essential to society. Thus a judgment by the court of a State against a citizen of such State in his absence and without any notice, express or implied, would, it is presumed, be regarded in every external jurisdiction as absolutely void and unenforceable. Such would certainly be the case if such judgment was so rendered against the citizen of a foreign State."

An appearance, however, by the defendant, or a personal service within the jurisdiction of the trial court renders the judgment valid *in personam* as well as *in rem*, and as regards property within the State as well as without. *Maxwell v. Stewart*, 21 Wall. (U. S.) 71; 22 Wall. (U. S.) 77; *Mutual L. Ins. Co. v. Harris*, 97 U. S. 331; *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404; *Barber v. Barber*, 21 How. (U. S.) 582.

1. Rule at Common Law.—4 Minor's Insts. (2d ed.), [517] 579; 3 Bl. Com. 283-4; *Kilburn v. Woodworth*, 5 Johns.

(N. Y.) 37; 4 Am. Dec. 321; *Fisher v. Lane*, 3 Wils. 297; *Borden v. Fitch*, 15 Johns. (N. Y.) 121; 8 Am. Dec. 225.

There was a qualification of this principle in cases of outlawry. 3 Bl. Com. 283-4.

The reasoning of the court in *Mason v. Messenger*, 17 Iowa 268, where it goes upon the presumption that this single exception constituted the rule at common law, is clearly erroneous.

2. *Pennoyer v. Neff*, 95 U. S. 714; *Brooklyn v. Aetna L. Ins. Co.*, 99 U. S. 370; *Settlemyer v. Sullivan*, 97 U. S. 447; *Freeman v. Alderson*, 119 U. S. 185; *Needham v. Thayer*, 147 Mass. 536; 4 Minor's Inst. (2d ed.), [517] 559; *Bartlett v. Spicer*, 75 N. Y. 534; *McKinney v. Collins*, 88 N. Y. 224; *Fairfax v. Alexandria*, 28 Gratt. (Va.) 16; *Peaslee v. Peaslee*, 147 Mass. 171; *Elliott v. McCormick*, 144 Mass. 10; *Lydiard v. Chute*, 45 Minn. 277; *Mastin v. Gray*, 19 Kan. 458; 27 Am. Rep. 149.

3. *Bias v. Vance*, 32 Miss. 198; *Porter Land, etc., Co. v. Baskin*, 43 Fed. Rep. 323 (proceeding to establish a trust in real estate); *Perkins v. Wakeham*, 86 Cal. 580 (action to quiet title); *Chicago, etc., Bridge Co. v. Anglo-American Packing, etc., Co.*, 46 Fed. Rep. 584; *Vorce v. Page*, 28 Neb. 294. See also *Ware v. Easton* (Minn. 1891), 48 N. W. Rep. 775; *Mobley v. Leophardt*, 47 Ala. 257.

4. *Bias v. Vance*, 32 Miss. 198; *Ridley v. Ridley*, 24 Miss. 648; *Vorce v. Page*, 28 Neb. 294; *Lydiard v. Chute*, 45 Minn. 277; *Cooley's Const. Lim.* (4th ed.), p. (404) 506.

In the case of *Ridley v. Ridley*, 24 Miss. 657, the court by Yerger, J., said: "In proceedings *in rem*, the seizure of the thing itself is deemed in most instances sufficient notice to all parties interested in it to come forward and assert their rights, and is substituted

in lieu of actual notice. In this class of cases the legislature sometimes directs a publication of some kind to be made; and, when the law makes such a provision, a judgment rendered without it would be erroneous, and perhaps void. But where no publication is required, a judgment condemning the thing is valid, without any other notice than its seizure according to law."

What Is a Proceeding in Rem.—It is not easy to give an accurate and comprehensive definition of what constitutes a proceeding *in rem*. The characteristics which belong to such a proceeding are that it is directed against certain property actually or constructively in the possession of the court, and the judgment or decree rendered is valid only so far as it affects such property; that it does not seek to establish any personal obligation. See 1 Greenl. Ev. (4th ed.), §§ 525, 541; Bouv. L. Dict. *In Rem*; Abb. L. Dict. *In Rem*; And. L. Dict. *Res*; The Sabine, 101 U. S. 388; The Propeller Commerce, 1 Black (U. S.) 580; Averill v. Smith, 17 Wall. (U. S.) 95; Day v. Micou, 18 Wall. (U. S.) 162.

Examples of a proceeding *in rem* might be multiplied. The following are instances of what has been held to constitute such a proceeding:

The condemnation and appropriation by a county of land for drainage purposes. Cupp v. Seneca Co., 19 Ohio St. 173; Miller v. Graham, 17 Ohio St. 1; Pasteur v. Lewis, 39 La. Ann. 5.

The probate of a will. Gaines v. Fuentes, 92 U. S. 21.

Appropriation of estrays. Campbell v. Evans, 45 N. Y. 356.

A bill to establish a trust in real estate. Porter Land, etc., Co. v. Bas-kin, 43 Fed. Rep. 328.

A proceeding to foreclose a lien or mortgage. Oswald v. Kampmann, 28 Fed. Rep. 36; Martin v. Pond, 39 Fed. Rep. 15.

The adjudication of title to real estate situated within the jurisdiction of the court making the adjudication. Arndt v. Griggs, 134 U. S. 316 (Hart v. Sansom, 110 U. S. 151, distinguished); Venable v. Dutch, 37 Kan. 515; Adams v. Cowles, 95 Mo. 501; 6 Am. St. Rep. 74; Duruy v. Musacchia, 42 La. Ann. 357; Young v. Upshur, 42 La. Ann. 362; Dietrich v. Lang, 11 Kan. 636. See also Lawson v. Moorman, 85 Va. 880; Mason v. Benedict, 43 La. Ann. 397.

Proceedings among heirs for parti-

tion. Glover v. Ruffin, 6 Ohio 255; Pillsbury v. Dugan, 9 Ohio 117; 34 Am. Dec. 427; Mason v. Messenger, 17 Iowa 261.

Proceedings by guardians to sell the land of their wards. Stall v. Macalester, 9 Ohio 19.

Suit to cancel conventional sale of land. Robbins v. Martin, 43 La. Ann. 488.

As to a suit to establish title to shares of stock in an incorporated company, see Kilgour v. New Orleans Gas Light Co., 2 Woods (U. S.) 144.

A bill for the specific execution of a contract to convey real estate is not strictly a proceeding *in rem* in ordinary cases; but where such a procedure is authorized by statute, on publication, without personal service of process, it is substantially of that character. Boswell v. Otis, 9 How. (U. S.) 336. See also Robbins v. Martin (La. Ann. 1891), 9 So. Rep. 108. Where a party to a contract of conventional sale sought its cancellation on the ground that he had been evicted from a portion thereof, it was held to be a proceeding substantially *in rem*.

Plaintiff and defendant being partners, a proceeding by the former praying for a dissolution, the appointment of a receiver and an accounting, etc., is not a proceeding *in rem*. Esbach v. Slonaker, 1 Pa. Dist. Rep. 32.

In the case of Cross v. Armstrong, 44 Ohio St. 623, a suit was brought against an insurance company by a widow upon a policy in which she was named as beneficiary. The company, by direction of the court, brought into court a sum of money sufficient to satisfy the amount due on the policy, and obtained an order requiring the administrator to appear and interplead with the widow as to their respective claims under the policy. The court, holding that such a proceeding was not *in rem*, by Spear, J., said: "*In rem*" is understood to be a technical term, taken from the Roman law, and there used to distinguish an action against the thing from one against the person, the terms *in rem* and *in personam*, always being the opposite one of the other; an act *in personam* being one done or directed against a specific person, while an act *in rem* was one done with reference to no specific person, but against or with reference to a specific thing, and so against whom it might concern, or 'all the world.' A proceeding brought to determine the

in such case is, therefore, of no effect beyond the limits of the

status of the thing itself, the particular thing, and which is confined to the subject-matter *in specie*, is *in rem*, the judgment being intended to determine the state or condition, and, *ipso facto*, to render the thing what the judgment declares it to be; while a proceeding which seeks the recovery of a personal judgment, is *in personam*. In the former, process may be served on the thing itself, and by such service and by making proclamation, the court is authorized to decide upon it without other notice to persons, all the world being parties; while in the latter, in order to give the court power to adjudge, there must be service upon those whose rights are sought to be affected."

Proceeding to Subject Decedent's Estate to Debts—Notice to Heirs.—A proceeding by an administrator to subject the estate of decedent to the payment of debts or legacies is one *in rem*, and jurisdiction is acquired without actual notice to the heirs or other parties whose interests are to be affected by the decree. *Grignon v. Astor*, 2 How. (U. S.) 338; *McPherson v. Cuneliff*, 11 S. & R. (Pa.) 422; 14 Am. Dec. 642; *Tongue v. Morton*, 6 Har. & J. (Md.) 21; *Adams v. Jeffries*, 12 Ohio 253; 40 Am. Dec. 477; *Paine v. Moreland*, 15 Ohio 442; 45 Am. Dec. 585; *Sheldon v. Newton*, 3 Ohio St. 500; *Benson v. Cilley*, 8 Ohio St. 604; *Perkins v. Fairfield*, 11 Mass. 228; *Rice v. Parkman*, 16 Mass. 332; *Poor v. Boyce*, 12 Tex. 449. See also DEBTS OF DECEDENTS, vol. 5, p. 278.

But there are numerous and high authorities to the effect that where a statute exists requiring notice to be given to the heirs or to other parties whose interests are to be affected by the decree sought, such notice must be given as the statute prescribes; and if it does not appear that it has been so given, the judgment or decree is void and of no effect. The case of *Grignon v. Astor*, 2 How. (U. S.) 338, in so far as it sustains an opposite view, has been much criticised. *Sitzman v. Pacquette*, 13 Wis. 291; *Gibbs v. Shaw*, 17 Wis. 201; 84 Am. Dec. 737; *Blodgett v. Hitt*, 29 Wis. 169; *Palmer v. Oakley*, 2 Doug. (Mich.) 477; 47 Am. Dec. 41; *Gwin v. McCarroll*, 1 Smed. & M. (Miss.) 351; *Planter's Bank v. Johnson*, 7 Smed. & M. (Miss.) 449; *Babbitt v. Doe*, 4 Ind. 355; *Doe v. Anderson*, 5 Ind. 33; *Doe v. Bowen*, 8

Ind. 197; *Corwin v. Merritt*, 3 Barb. (N. Y.) 341; *Rigney v. Coles*, 6 Bosw. (N. Y.) 486 (court of inferior jurisdiction); *Sheldon v. Wright*, 5 N. Y. 513.

In the case of *Sheldon v. Wright*, 5 N. Y. 513, the court by Foot, J., said: "A surrogate unquestionably acquires jurisdiction of the subject-matter on the presentation of the petition and account; but before he could grant a valid order of sale, he must also acquire jurisdiction of the person whose rights were to be affected by it, and this is accomplished by the publication of the order. Such publication must, therefore, be made before full jurisdiction is obtained, not because the statute directs it, for the statutory provision is merely directory, but because it is a great and fundamental principle in the administration of justice that no man can be divested of his rights until he has had the opportunity of being heard." Citing *Corwin v. Merritt*, 3 Barb. (N. Y.) 345.

In the case of *Doe v. Anderson*, 5 Ind. 36, the court by Davison, J., said: "The defendants insisted that as the court had jurisdiction of the cause, its order directing the sale of the land cannot be impeached collaterally. That position is not correct until the heirs are personally served 'with notice of the petition and of the time and place of hearing the same.' The court had no authority to order the sale of the premises. . . . It is true this court has ruled that 'where the record discloses nothing on the point, jurisdiction of the person will be presumed,' but such presumption will not be indulged against the direct admission of the defendant that the heirs had no notice of the suit in which the order of sale was made."

In the case of *Good v. Norley*, 28 Iowa 188, the question arose, and it was held by two of the judges, that a proceeding by an administrator to subject the decedent's lands to the payment of debts was not a proceeding *in rem*, but one in its nature adversary, and a sale made thereunder in the absence of any notice to the person whose interests are to be affected was absolutely void. The opinion of Beck, J., contains a lengthy review of the authorities. The other two judges refused to pass upon the question of jurisdiction, and decided the case upon another point.

State in which it was rendered.¹ Where the proceeding is *in rem*, no service of process other than a seizure *in rem* is essential to a valid judgment, unless required by statute.² Statutes providing for publication, therefore, have only the effect to add to the requirements imposed upon the plaintiff,—they cannot lower what has been declared by the highest court to be the limit of due process of law.³

c. IN DIVORCE PROCEEDINGS.—An apparent exception to the general rules exist in divorce cases, so that a divorce may be granted to a resident from a non-resident, even though the latter may have had no personal notice of the suit and may not have appeared.⁴

1. See CONFLICT OF LAWS, vol. 3, p. 531, and cases; CONSTITUTIONAL LAW, vol. 3, p. 710-713; 4 Minor's Inst. (2d ed.), [517] 560; Mills v. Duryee, 7 Cranch (U. S.) 484; Hampton v. McConnel, 3 Wheat. (U. S.) 234; Mayhew v. Thatcher, 6 Wheat. (U. S.) 129; Vorce v. Page, 28 Neb. 294.

2. Ridley v. Ridley, 24 Miss. 657; Paine v. Mooreland, 15 Ohio 444; 45 Am. Dec. 585; Hollingsworth v. Barbour, 4 Pet. (U. S.) 475. See also Cooley's Const. Lim. (4th ed.), p. 403.

It is believed, however, that there is no jurisdiction in which it is not required that notice by publication or a similar method is not required in proceedings *in rem* in addition to the mere seizure of property. See FOREIGN ATTACHMENT, vol. 8, p. 321.

3. See Pennoyer v. Neff, 95 U. S. 714; 4 Minor's Inst. (2d ed.), [517] 559. See also *supra*, this title, Service Upon Non-residents; FOREIGN ATTACHMENTS, vol. 8, pp. 291, 321.

4. In Pennoyer v. Neff, 95 U. S. 734, the court by Field, J., said: "We do not mean to assert, by anything we have said, that a State may not authorize proceedings to determine the status of one of its citizens toward a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses, to determine the civil status and capacities of all its inhabitants, involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions upon which the

marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties guilty of acts for which, by the law of the State, a dissolution may be granted, may have removed to a State where no dissolution is permitted. The complaining party would, therefore, fail if a divorce were sought in the State of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress." Bish. Marr. & Div., § 156. See also Cooley's Const. Lim. (4th ed.), (405) 507.

The determination of what is and what is not due process in divorce proceedings depends upon the light in which such proceedings are regarded. A divorce suit is properly partly *in rem* and partly *in personam*. So far as it affects the status of the parties, it is a proceeding *in rem*; and a valid decree may be made upon service by publication, it being immaterial whether or not notice was actually brought home to defendant. DIVORCE, vol. 5, p. 751; Cooley's Const. Lim. (4th ed.), (405) 507; Hull v. Hull, 2 Strobb. Eq. (S. Car.) 174; Hubbell v. Hubbell, 3 Wis. 662; 62 Am. Dec. 702; Ditson v. Ditson, 4 R. I. 99, *et seq.*; Harrison v. Harrison, 19 Ala. 499; Mansfield v. McIntire, 10 Ohio 27; Barber v. Root, 10 Mass. 260; Woodworth v. Spring, 4 Allen (Mass.) 321; Trubner v. Trubner, 15 Prob. Div. 24 (valid service made by registered letter); McFarland v. McFarland, 40 Ind. 458; Tolen v. Tolen, 2 Blackf. (Ind.) 407; 21 Am. Dec. 742; Hard-

6. Upon Private Persons—Residents.—In case of process against private persons, actual service is made merely by reading the summons or other process to the party, and by leaving with him a copy of the same. This is the simplest and plainest method, about which few difficulties can arise, since there can be no doubt as to whether the defendant was really informed of the proceeding against him.¹

ing *v. Alden*, 9 Me. 140; 23 Am. Dec. 549; *Colvin v. Reed*, 55 Pa. St. 375; *Cook v. Cook*, 56 Wis. 195; 43 Am. Rep. 706; *Pennoyer v. Neff*, 95 U. S. 734.

It is said by Mr. Cooley that such a service (*i. e.*, by publication alone) may be sufficient also to empower the court to pass upon the question of the custody and control of the children of the marriage, if they are within its jurisdiction at the time, but only so long as they remain there. *Cooley's Const. Lim.* (4th ed.), (405) 507. See also *DIVORCE*, vol. 5, p. 752, note 2; *Kline v. Kline*, 57 Iowa 386; 42 Am. Rep. 47 (a decree rendered in one State upon service by publication is of no effect, in so far as it attempts to fix the custody of the minor children who were then resident in another State); *Woodworth v. Spring*, 4 Allen (Mass.) 321; *Cook v. Cook*, 56 Wis. 195; 43 Am. Rep. 206.

In some cases, however, it is maintained that a decree of divorce, rendered without actual service upon the defendant, or without his appearance, is of no effect beyond the jurisdiction of the court rendering it. *O'Dea v. O'Dea*, 101 N. Y. 23; *People v. Baker*, 76 N. Y. 78; 32 Am. Rep. 274; *Hunt v. Hunt*, 72 N. Y. 217; 28 Am. Rep. 129; *Platt's Appeal*, 80 Pa. St. 501; 22 Am. L. Rev., p. 579.

But in so far as the suit seeks to affect the parties otherwise than as just stated, it is a proceeding *in personam*, and a valid decree can be rendered only when the defendant has been actually served with process within the jurisdiction of the trial court or when he has actually appeared. *DIVORCE*, vol. 5, p. 751, and cases cited; *Cooley's Const. Lim.* (4th ed.), (406) 508; *Crossman v. Crossman*, 33 Ala. 486; *Turner v. Turner*, 44 Ala. 437; *Parrish v. Parrish*, 32 Ga. 653; *Harding v. Alden*, 9 Me. 140; 23 Am. Dec. 549; *Com. v. Blood*, 97 Mass. 538; *Hood v. Hood*, 11 Allen (Mass.) 196; *Borden v. Fitch*, 15 Johns. (N. Y.) 121; 8 Am. Dec. 225; *Pawling v. Wilson*, 13 Johns.

(N. Y.) 192; *People v. Baker*, 76 N. Y. 78; 32 Am. Rep. 274; *Colvin v. Reed*, 55 Pa. St. 375; *Van Storck v. Griffin*, 71 Pa. St. 240; *Platt's Appeal*, 80 Pa. St. 501.

Compare Beard v. Beard, 21 Ind. 321. It is said that the injured party "must seek redress in the forum of the defendant, unless where the defendant has removed from what was before the common domicile of both." *Reel v. Elder*, 62 Pa. St. 308. See also *Denton v. Denton*, 41 How. Pr. (N. Y.) 221; *Phelps v. Baker*, 41 How. Pr. (N. Y.) 237.

1. *New York Code Civ. Proc.*, § 426; *Murfree on Sheriffs* (2d ed.), § 119; *Matthews v. Blossom*, 15 Me. 400; *Borden v. Borden*, 63 Wis. 374; *Dresser v. Wood*, 15 Kan. 344; *Carter v. Daizy*, 42 Miss. 501; *Gregory v. Harmon*, 10 Iowa 445; *People v. Applegarth*, 64 Cal. 229; *Casteel v. Hiday*, 13 Ind. 536.

When a defendant refuses to accept a copy of the summons which is decorously offered him, after being informed of what the paper is; or if he runs off while the same is being read to him, the service may be made by depositing the process in some appropriate place in his presence, or where it will be likely to come to his possession. *Borden v. Borden*, 63 Wis. 374; *Van Rensselaer v. Petrie*, 2 How. Pr. (N. Y.) 94; *Norton v. Meader*, 4 Sawy. (U. S.) 603; *Slaght v. Robbins*, 13 N. J. L. 340; *People v. Bernal*, 43 Cal. 385.

In case of service by a person other than the sheriff, it is in some States required that a copy of the summons be both read to the defendant and left with him. *Wilkinson v. Bailey*, 71 Wis. 131.

In case of service by leaving a copy, it is not necessary that the copy should be certified, or that it should contain any endorsement put on the summons by the sheriff. *Dresser v. Wood*, 15 Kan. 344.

Where a party when served with process is too drunk to understand anything of what is done, such service, though properly made, will not be valid. *Murphy v. Loos*, 104 Ill. 514.

The precise manner of personal service varies according to the practice in different States, some allowing reading alone,¹ some leaving a copy and that alone, some requiring both.² The safest method is, therefore, both to read the process to defendant and also to leave with him a copy.

So, also, service by merely laying the summons on the body of a man too sick to know anything, is invalid. *People v. Judge*, 38 Mich. 310.

Under a statute in *Pennsylvania*, which requires service of process against one engaged in business in another county to be made "at the usual place of business or residence, etc.," a mere personal service is insufficient. *Lehigh Valley Ins. Co. v. Fuller*, 81 Pa. St. 398.

An important case in *Illinois*, has established it that an arrest on a *capias* without reading is not a service of process, where the defendant is discharged. But, in such case, if the defendant had been kept in jail until court, he would have been before the court. *McNab v. Bennett*, 66 Ill. 157.

In *Rhode Island*, a single attested copy of a writ, containing summons and attachment, left with the defendant, constitutes a sufficient service of the summons under the statute. *Greenwich Nat. Bank v. Hall*, 11 R. I. 124. See also *Sheldon v. Comstock*, 3 R. I. 84; *Conlon v. Cassidy* (R. I. 1891), 23 Atl. Rep. 100.

Article 1220 Rev. Stat. of *Texas*, requires that where a citation is served outside the county in which the suit is pending, the officer must deliver to defendant in person a certified copy of the petition accompanying the citation. As to a return in this method of service, see *Graves v. Drane*, 66 Tex. 658.

1. *Hickman v. Barnes*, 1 Mo. 156; *Watts v. White*, 12 Iowa 330; *Cicero Tp. v. Shirk*, 122 Ind. 572; *Kirkland v. Hogan*, 65 N. Car. 144; *Waddingham v. St. Louis*, 14 Mo. 190.

Defendant may waive the reading, and service in such case without it is valid. *Casteel v. Hiday*, 13 Ind. 536; *Gregory v. Harmon*, 10 Iowa 445.

It has been held under the *Ohio* statute, providing that summons shall be served by delivering a certified copy to the defendant, or leaving the same at his usual place, a return of service "by reading" showed an entire want of service, and a judgment thereunder, by default, was void. *Robbins v. Clemmens*, 41 Ohio St. 285.

But to constitute a valid service by

reading, the whole of the writ must be read, and not merely the material parts. *Crary v. Barber*, 1 Colo. 172.

The *North Carolina* statute does not require a copy of the summons in a civil action before a justice of the peace to be left with defendant. *Kirkland v. Hogan*, 65 N. Car. 144. See also *Ghiradelli v. Greene*, 56 Cal. 629.

Where, however, a printed declaration and notice in ejectment were served upon a tenant, who was an illiterate man, by telling him that they were a declaration in ejectment, without further reading or explaining them; but it appeared from other circumstances that he must have understood the nature of the papers served upon him, it was considered to be equivalent to a technical service. *Jackson v. Stiles*, 1 Cow. (N. Y.) 222.

If a defendant refuses to receive a summons offered him by the officer having the writ for service, the officer may return that he delivered the summons or he may return the facts specifically, and they will be held to be a delivery. *Fuller v. Kenney*, 32 Me. 334. Or in such a case, the officer may deposit the copy in any convenient place in the presence of the party and the service will be good. *Norton v. Meader*, 4 Sawy. (U. S.) 603.

Where the officer is required to deliver a copy of the process to the defendant, the return sufficiently shows that he did so where it avers that a copy was "left with defendant." *Buck v. Buck*, 60 Ill. 105. *Contra*, *Hall v. Graham*, 49 Wis. 553. See also *Niles v. Vanderzee*, 14 How. Pr. (N. Y.) 547.

2. *Case v. Colston*, 1 Metc. (Ky.) 145; *Hendley v. Baccus*, 32 Tex. 328; *Noleman v. Weil*, 72 Ill. 502; *Cairo*, etc., *R. Co. v. Joiner*, 72 Ill. 520. See also *Brown v. Miner*, 21 Ill. App. 60; *Greenwich Nat. Bank v. Hall*, 11 R. I. 124; *Newlove v. Woodward*, 9 Neb. 502.

In attachment cases, under the *Louisiana* practice, service of citation must be made in strict compliance with the law, and must be proved by the sheriff's return. Service cannot be proved as matter *in pais*, nor aided by presumption. *Woolridge v. Monteuze*, 27 La. Ann. 79.

When there is no statutory provision as to the mode of service, personal service, it seems, is requisite.¹ A subpoena for witnesses must be served personally.² The great object of service of process should be kept in view and the spirit of the requirements complied with; any trick or subterfuge which deprives defendant of fair notice of the action commenced against him is a fraud, and invalidates the service.³

a. SUBSTITUTED SERVICE.—But it often happens that the officer is unable to make actual personal service, owing to the absence of the defendant or inability to find him, and then it is necessary that constructive or substituted service be made. In cases of substituted service the summons or other process is left with some suitable person, a member of defendant's family, at his last and usual place of residence.⁴ It is important to remember,

1. *Romain v. Muscatine Co.*, Morr. (Iowa) 357; *People v. Hurlburt*, 5 How. Pr. (N. Y.) 446; *Wright v. Douglass*, 3 Barb. (N. Y.) 554; *Sleeper v. Free Baptist Assoc.*, 58 N. H. 27.

2. *Subpoena*.—Greenl. Ev. (14th ed.), § 315, and authorities cited. The reason there given for requiring personal service is, that "otherwise he (the witness) cannot be chargeable with a contempt in not appearing upon the summons." See also 1 Starkie's Ev. 77; *SUBPOENA. Compare Southern Steam Packet Co. v. Roger*, 1 Cheves Eq. (S. Car.) 48.

3. Placing, therefore, in the defendant's possession a summons disguised in such a manner as to conceal from her its nature, just as she is entering on a sea voyage, is not a good service; and a subsequent discovery by the defendant of the contents does not make it good. *Bulkley v. Bulkley*, 6 Abb. Pr. (N. Y.) 307. See also, in this connection, *Mather v. Parsons*, 32 Hun (N. Y.) 338; *Mason v. Libby*, 1 Abb. N. Cas. (N. Y.) 354; *People v. Judge*, 38 Mich. 310.

Mere manual delivery of the summons and complaint, which the defendant returns without being informed that he was entitled to keep them, or that service was intended, is not a good service. *Beekman v. Cutler*, 2 Code R. (N. Y.) 51; *Niles v. Vanderzie*, 14 How. Pr. (N. Y.) 547; *Davison v. Baker*, 24 How. Pr. (N. Y.) 39.

4. *Ames v. Winsor*, 19 Pick. (Mass.) 247; *Augusta v. Windsor*, 19 Me. 317; *Orcutt v. Ranney*, 10 Cush. (Mass.) 183; *Frederick v. Clark*, 5 Wis. 191; *King's Election Case*, 19 Can. Sup. Ct. Rep. 526; *Compare Cost v. Rose*, 17 Ill. 276.

The provision under most statutes is that when defendant is "not found," service may be made by leaving a copy of the process with any member of the defendant's family over fourteen years of age at his usual or last place of residence, and explaining to such person its purport. And if no member of his family be found or none be willing to receive it, service may be made by posting a copy at defendant's last and usual place of residence. *New York Code Civ. Proc.*, § 436; 4 *Minor's Inst.* (2d ed.) 533; *Settlemyer v. Sullivan*, 97 U. S. 444; *Succession of McCalop*, 10 La. Ann. 224; *Frederick v. Clark*, 5 Wis. 191; *Spiegelberg v. Sullivan*, 1 N. Mex. 575 (service of attachment); *Harris v. Hardeman*, 14 How. (U. S.) 334.

Where the statute provides for constructive service of legal process, the terms and conditions of such service must be strictly observed. Where only one copy was left for two defendants, separate copies being necessary, the judgment will be reversed on appeal. *Stewart v. Stringer*, 41 Mo. 400; 97 Am. Dec. 278; *Brownfield v. Dyer*, 7 Bush. (Ky.) 505.

Wherever a judgment is founded upon a constructive service, the record must show all the facts necessary to authorize such service (*i. e.* that the defendant was not found after diligent search, etc.), and the regulations concerning that method of service must appear to have been strictly followed. *Settlemyer v. Sullivan*, 97 U. S. 444; *Mullins v. Sparks*, 43 Miss. 129; *Cole v. Hocha*, 21 La. Ann. 613; *Noyes v. Hillier*, 65 Mich. 636; *Sidles v. Reed*, 10 Iowa 589; *Brownfield v. Dyer*, 7 Bush. (Ky.) 505; *Hass v. Sedlak*, 9

Oregon 462; Israel *v.* Arthur, 7 Colo. 5; Romain *v.* Muscatine Co., Morr. (Iowa) 357; *infra*, this title, *Return*.

How Substituted Service Is Made.—Substituted service is service made upon one other than the defendant, when he cannot be found. The term is here used as distinct from the term "constructive service," although it is really nothing more than a particular kind of constructive service. The general rule in regard to substituted service is that it must be made upon some person, a member of the defendant's family, over fourteen years of age, at his (the defendant's) usual place of residence. It seems that a failure in any one of these requisites will invalidate the service. Mullins *v.* Sparks, 43 Miss. 129; Bustamente *v.* Bescher, 43 Miss. 172; Cole *v.* Hocha, 21 La. Ann. 613.

The contents or purport of the writ which is left with a member of defendant's family should be stated and explained to such person. Diltz *v.* Chambers, 2 Greene (Iowa) 479.

With Whom Copy Must be Left.—In some States it is required that the person with whom a copy of the process is left shall be over fifteen years of age, others over sixteen, and still others require that it shall be a white person. This is immaterial here, however, since it can be found in the code of each State. See Dobbins *v.* Thompson, 4 Mo. 118; 4 Minor's Inst. (2d ed.) 533; Diltz *v.* Chambers, 2 Greene (Iowa) 479; Weber *v.* Weber, 49 Mo. 45; Phillips *v.* Evans, 64 Mo. 17.

Such person must be a member of defendant's family, and the return must so state. Mack *v.* Brown, 73 Ill. 295; Von Roy *v.* Blackman, 3 Woods (U. S.) 98; *infra*, this title, *Requisites of Return*.

The defendant is not bound by the service of a writ upon a person with whom there is no evidence to connect him. Adams *v.* Town, 3 Cal. 247.

A writ served on a school district by attaching certain personal property of the district and leaving a true and attested copy of the writ, with the officer's return thereon, at the house of the then usual abode of the clerk of said district in the hands of his wife, constitutes a valid service. Dow *v.* School Dist. No. 12, 46 Vt. 108.

Copy Must be Left at Defendant's Usual or Last Place of Residence.—A copy left with defendant's wife, but not at his usual place of residence, did not constitute a valid service. Hewitt

v. Weatherby, 57 Mo. 276. The same principle in Amault *v.* St. Julien, 21 La. Ann. 630; Wheeler *v.* Wilkins, 19 Mich. 78; Castleton *v.* Weybridge, 46 Vt. 474; Adams *v.* Abram, 38 Mich. 302.

Leaving a copy of process with defendant's clerk, at his store, is not a valid service, since such clerk is not a member of defendant's family, nor is the copy left at his usual place of abode. Winchester *v.* Cox, 3 Iowa 575.

The same doctrine was held to apply where a copy of the summons was left at the defendant's workshop with his journeyman or his foreman. Mayer *v.* Griffin, 7 Wis. 82; McConkey *v.* McCraney, 71 Wis. 576; and where the copy was left at defendant's place of business. Lambert *v.* Sample, 25 Ohio St. 336.

Where process was left with a member of defendant's family, at a distance of 120 feet from his dwelling, but in the yard of the dwelling, it was not a sufficient service under a statute prescribing that, in the absence of a defendant, the process should be left with some member of his family "at the dwelling house of such defendant." Kibbe *v.* Benson, 17 Wall. (U. S.) 624.

In this connection, see Succession of McGalop, 10 La. Ann. 224; Rousseau *v.* Gayarre, 24 La. Ann. 355. See also Lee *v.* Macfee, 45 Minn. 33 (defendant's boarding house held to be his last and usual place of abode); Laney *v.* Garbee, 105 Mo. 355; Thomas *v.* Richards, 69 Wis. 671; Earle *v.* McVeigh, 91 U. S. 503.

A hotel or boarding house for transient guests where a stranger is stopping for a few days cannot be considered his usual place of abode. White *v.* Primm, 36 Ill. 416. Compare Lee *v.* Macfee, 45 Minn. 33.

In a suit to enforce the lien of a mortgage on property in L county, the return of the sheriff showed that the defendant could not be found, and that a copy of the summons was delivered to a "member" of the family, "at his usual place of abode in said (L) county;" on which service the court gave a decree by default for the sale of the property under which the defendants claimed. It was held, that the service was invalid, and the decree of sale thereon null and void, because the return did not show that the substituted service of the summons was

however, that the person upon whom such substituted service is made must be some one other than the plaintiff in the action.¹ The term "usual or last place of residence" means the residence

made at the defendant's usual place of abode in the State, in whatever county it might be, but only at his usual place of abode in L county. *Swift v. Myers*, 37 Fed. Rep. 37.

Where a party leaves his house, being a fugitive from justice, and there are no indications that he intends to return, service cannot be made on him by leaving a copy at his former home, since that is no longer his place of residence. *Wolff v. Shenandoah Nat. Bank* (Iowa, 1891), 50 N. W. Rep. 561. The same is true where a party leaves the State to reside elsewhere permanently. *Schlawig v. De Peyster*, (Iowa, 1891), 49 N. W. Rep. 843.

Requisites of Copy.—It is not essential that the copy left with the defendant should have the seal of the original writ copied; nor will a variance as to the title of the court between the copy of the summons and the complaint be sufficient ground for setting aside the service. *Hughes v. Osborn*, 42 Ind. 450; *Glasscock v. Shell*, 57 Tex. 215; *Dresser v. Wood*, 15 Kan. 344. See also *State v. Pennsylvania R. Co.*, 41 N. J. L. 250; *Fraser v. Oakdale, etc., Lumber Co.*, 73 Cal. 187; *Collins v. Merriam*, 31 Vt. 622; *Adams v. Adams*, 64 N. H. 224 (original instead of copy left).

The failure of the officer to state that the copy delivered was a "true copy" of the writ, renders the service voidable only. *Friend v. Green*, 43 Kan. 167. But in *Lauderdale v. Ennis Stationery Co.*, 80 Tex. 496, a failure to state that "certified copies" were left, was held to invalidate the service.

When Allowed.—Substituted service will not be allowed unless it appears that diligent search was made for the defendant until the time allowed for personal service had expired. *Brown v. Williams*, 39 Mich. 755.

The revised statutes of *Montana* provide for personal service always, except in certain specified cases. A substituted service on defendant's agent is, therefore, utterly void, unless the case is within the statutory exceptions. *Davidson v. Clark*, 7 Mont. 100.

Where a defendant leaves his State merely temporarily, no other service is necessary other than the ordinary

substituted service. *Giles v. Hicks*, 45 Ark. 271.

Under § 89 of Code of *North Carolina*, requiring "personal service or a written admission thereof," leaving copy with defendant's wife at his place of abode is not sufficient, notwithstanding proof of delivery to him by her and his verbal assent thereto. *Charlotte Bank v. Wilson*, 80 N. Car. 200. But in the case of *Dunkle v. Elston*, 71 Ind. 585, the words "personally served" as used in the statute were held to have reference to personal service as distinguished from service by publication; and in this sense service by copy left at defendant's residence is personal.

Substituted service by leaving copy at defendant's usual place of abode has been held valid and sufficient to support a judgment, although defendant was absent from home at the time and his wife, with whom the copy had been left, being illiterate, could not read, so that he had no actual notice of the proceeding until after judgment. *Lucas v. Wilson*, 67 Ga. 356. See also *Hurlbut v. Thomas*, 55 Conn. 181.

Substituted service is proper when a bill is brought to obtain a new trial of a cause at law in the same court. *Oglesby v. Attrill*, 14 Fed. Rep. 214.

In the federal courts, on a bill to enjoin a suit at law, if the defendant cannot be found in the district, process may be served on his attorneys in the lawsuit. *Bartlett v. Sultan*, 19 Fed. Rep. 346.

Where the defendant voluntarily left the county of his residence and remained within the lines of the confederate army, judgments rendered against him based upon constructive process, were held valid. *Thomas v. Mahone*, 9 Bush (Ky.) 111.

In Federal Courts.—A substituted service under State laws is not allowable in suits in equity in the United States courts. The manner of serving a subpoena is regulated by the acts of Congress and the rules of the supreme court. *Hyslop v. Hoppock*, 5 Ben. (U. S.) 533. Compare *Harris v. Hardeman*, 14 How. (U. S.) 334.

1. This is true, no matter if the person who is so served is "a member of defendant's family, and the defendant

into which the person, still a resident of the State, has moved, in that State, last before the service of process.¹

In *New York*, however, when substituted service is necessary to be made, an order of the court is required, which order issues from the court where the action is triable, upon satisfactory proof, either by the affidavit of a person not a party to the action, or by the return of the sheriff of the county where the defendant resides, that proper and diligent effort has been made to serve the process upon the defendant, and that the place of his sojourn cannot be ascertained, or, if he is within the State, that he avoids service so that personal service cannot be made.² The proof must be such as to satisfy the mind of the judge that such a state of facts as entitles him to make the order exists.³

is a minor." *Hemmer v. Wolfer* (Ill. 1887), 11 N. E. Rep. 885.

1. **Usual and Last Place of Residence.**—*Sturgis v. Fay*, 16 Ind. 429; 79 Am. Dec. 440; *Foot v. Harris*, 2 Abb. Pr. (N. Y.) 454; *Earl v. McVeigh*, 91 U. S. 503.

This is well explained in *Hyslop v. Hoppock*, 5 Ben. (U. S.) 447; 6 Nat. Bankr. Reg. 552, where the court declares that a subpoena to appear and answer a bill in equity cannot be served at the last, or last usual, place of abode, but must be left at the existing, present dwelling house, or the existing, present, usual, customary place of abode of the defendant.

Where the defendant resided at his mother's home in New Jersey during the summer, though his own house in New York was open and in charge of his servant, service may be made on him by leaving a copy at the house of his mother before his leaving to reside in New York. *Harrison v. Farrington*, 35 N. J. Eq. 4.

As to what are the exact limits of a person's usual place of abode it has been held that service made within the inclosures of a plantation on which defendant resides, on a person apparently above the age of fourteen years, shown to have resided at the time on the same plantation but not in the dwelling house with the defendant, is sufficient. The whole plantation is defendant's domicile, and service on a person living on it is good. *Succession of McCalop*, 10 La. Ann. 224; *Rousseau v. Gyarre*, 24 La. Ann. 355. Compare *Kibbe v. Benson*, 17 Wall. (U. S.) 624.

See also, in this connection, *Winchester v. Cox*, 3 Iowa 575; *Mayer v. Griffin*, 7 Wis. 82; *McConkey v. McCra-*

ney, 71 Wis. 576; *Hewitt v. Weatherby*, 57 Mo. 276.

2. *New York Code Civ. Proc.*, §§ 435-7; *McCarthy v. McCarthy*, 16 Hun (N. Y.) 546; 2 Bouv. L. Dict., *Substituted Service*.

The provisions of this section apply only to cases in which the defendant cannot be found either in or out of the State, or where, being in the State, he avoids or evades service; plaintiff is not entitled to an order for substituted service where the papers show where the absent defendant may be found. *Foot v. Harris*, 2 Abb. Pr. (N. Y.) 454; *Collins v. Campbell*, 9 How. Pr. (N. Y.) 519; *Jones v. Derby*, 1 Abb. Pr. (N. Y.) 458. See also *Clare v. Lockard*, 21 Abb. N. Cas. (N. Y.) 173.

Under this rule an order may be made in a case where defendant being sick and confined to his bed at his residence, the persons in charge of him refused to permit the officer to make service. Two of the judges were of the opinion that in such a case the defendant was "not found" within the meaning of the statute, while another considered that it was a case of avoidance of service by defendant's agents. *Carter v. Youngs*, 42 N. Y. Super. Ct. 169.

3. This question of proof is fully discussed in *McCarthy v. McCarthy*, 55 How. Pr. (N. Y.) 418; 84 N. Y. 671. See also *Collins v. Ryan*, 32 Barb. (N. Y.) 647; *Haswell v. Lincks*, 87 N. Y. 637; *Simpson v. Burch*, 4 Hun (N. Y.) 315; *Bixby v. Smith*, 3 Hun (N. Y.) 60; 49 How. Pr. (N. Y.) 50; *Buswell v. Lincks*, 8 Daly (N. Y.) 518.

An affidavit of sheriff's effort to serve which stated that he had made proper and diligent efforts, that the defendant could not be found or the papers served personally, and that he had left to avoid

b. CONSTRUCTIVE SERVICE.—If the defendant has no family, or there is no suitable person to receive it, constructive service may be made by leaving a copy in some conspicuous part of the premises of his "last and usual place of residence."¹

trouble with creditors, was held not sufficient and to give no jurisdiction. *Gere v. Gunlach*, 57 Barb. (N. Y.) 13.

Proof that his wife stated that he had gone to Ohio and that she did not expect him back this summer, except on a visit, was considered not sufficient to authorize the order. *Collins v. Campfield*, 9 How. Pr. (N. Y.) 519.

1. The copy must be left at defendant's last and usual place of residence, not at his store or office. *Lambert v. Sample*, 25 Ohio St. 336; *Hays v. Bank of U. S.*, 1 Wright (Ohio) 563. *Compare Phoenix Mut. L. Ins. Co. v. Wulf*, 9 Biss. (U. S.) 285. *Compare*, also, *Smith v. Parke*, 2 Paige (N. Y.) 298; *Hyslop v. Hoppock*, 5 Ben. (U. S.) 447.

And the term "usual place of abode or residence," means his place of abode at the time of service of the process. *Gadsden v. Johnson*, 1 Nott & M. (S. Car.) 89; *Capehart v. Cunningham*, 12 W. Va. 750. A return stating that a copy was left at defendant's last and usual place of abode in C. county does not show proper service, since it failed to show that such abode in C. county was his "last and usual place of abode." *Sanborn v. Stickney*, 69 Me. 343. *Contra*, *Healey v. Butler*, 66 Wis. 9.

A notice posted upon a house seven months after it had been vacated by the defendant and his family, and while they were residing within the confederate lines, was not posted up on his "usual place of abode," and a judgment founded on such defective notice was absolutely void. *Earle v. McVeigh*, 91 U. S. 503.

Where a sheriff by mistake left the copy of a writ against J at the house of J's brother, but met and told J of the fact on the same evening, and J replied that he would get the copy and accept the service, whereupon the sheriff returned the writ "served the within by personal service," it was held that J was estopped from denying the service. *Johnson v. Johnson*, 52 Ga. 449.

When a defendant resides alternately in two counties or parishes, without having made a declaration of residence, he must be cited where he appears to have his principal establishment or habitual residence. If his residence in

each parish seems to be nearly of the same nature, he may be cited in either, as the plaintiff may elect. *Evans v. Payne*, 30 La. Ann. 498; *Taylor v. Bach*, 17 La. Ann. 61.

A hotel or boarding house, at which a stranger from another State is sojourning for a few days, cannot be considered as his "usual place of abode." *White v. Primm*, 36 Ill. 416.

Nor can one's berth in a ship be considered his "usual and last place of residence." *Craig v. Gisborne*, 13 Gray (Mass.) 270.

If a summons be left at a certain place agreeably to the defendant's directions, he cannot take advantage of its not having been left at his usual place of abode. *Taylor v. Cook*, 1 N. J. L. 54.

The process when left at the abode of the defendant must be left in a conspicuous place—one where he would be likely to see it; *e. g.*, fastening it to his front door, or leaving it lying on his table, etc. *Ramsey v. Barbaro*, 12 Smed. & M. (Miss.) 293; *Castleton v. Weybridge*, 46 Vt. 474; *Wistar v. Philadelphia*, 86 Pa. St. 215.

Giving a copy of the writ to one of defendant's negro servants on the piazza of his dwelling house is a sufficient compliance with a statute requiring it to be left "at some obvious part of the house." *Alston v. Bowers*, 1 Nott & M. (S. Car.) 458.

The statutory provision in *New York* that every notice or other paper required to be served upon a sheriff may be served by leaving the same at his office, is to be construed as referring to papers in respect to which it is the sheriff's duty to provide official care and attention, and which are served on him as sheriff by virtue of his office; not to those which concern him personally. *Sherman v. Conner*, 16 Abb. Pr. N. S. (N. Y.) 396; 50 How. Pr. (N. Y.) 29.

As to service upon sheriff, see also *Dunford v. Weaver*, 84 N. Y. 445.

A law of *Ohio*, authorizing a service of process to be made, where the defendant had absented himself to avoid process, by leaving a true copy at his dwelling house, will not be held invalid in *Kentucky*, as between two citizens of

The statute allowing substituted or constructive service, being a departure from the common law, must be strictly observed and its requirements carefully complied with.¹

Another mode of constructive service is that by publication of the summons in a newspaper for a certain length of time. The character and effect of this mode of service is set forth elsewhere.²

c. UPON SEVERAL DEFENDANTS.—Where an action is brought against several defendants jointly, and only a portion of the number are served, such service will not sustain a judgment against those who are not served. The mere fact that these latter are joined in an action with the former does not deprive them of their constitutional right to have service of process.³ The common law rule requires that before any proceedings can be had, all

Ohio. Biesenthall v. Williams, 1 Duv. (Ky.) 329; 85 Am. Dec. 629.

A writ cannot be served upon three defendants by leaving a single copy at the house where they all reside, although they may all be of the same family and there is no other family in the house. Rogers v. Buchanan, 58 N. H. 47.

Where an original probate petition and order of notice instead of copies, were left at the defendant's place of abode, it was a valid service. Adams v. Adams, 64 N. H. 224.

1. 4 Minor's Inst. (2d ed.) 533; Settemier v. Sullivan, 97 U. S. 447; Galpin v. Page, 18 Wall. (U. S.) 350; McDonald v. Vaughan, 13 La. Ann. 405; Boyland v. Boyland, 18 Ill. 551; Brownfield v. Dyer, 7 Bush (Ky.) 505; Scorpion, etc., Min. Co. v. Marsano, 10 Nev. 370; Likens v. McCormick, 39 Wis. 313; Brown v. Tucker, 7 Colo. 30; Snyder v. Snyder, 25 Ind. 399; Eskridge v. Jones, 1 Smed. & M. (Miss.) 595.

Statutes authorizing constructive service are to be strictly construed. Pollard v. Wegener, 13 Wis. 569; and such service can never be allowed except where personal service is shown to be impracticable. Knox v. Miller, 18 Wis. 397.

2. *Service by Publication.*—The effect of such service is treated *supra*, this title, *Service Upon Non-residents; Service by Publication.*

Concerning the manner and character of, and mode of carrying out, such service, see NOTICE, vol. 16, pp. 808, *et seq.*

3. Anderson v. Brown, 16 Tex. 554; Central, etc., R. Co. v. Morris, 68 Tex. 49; 28 Am. & Eng. R. Cas. 50; Fulton v. State, 14 Tex. App. 32; Covington

v. Burleson, 28 Tex. 368 (although defendants are husband and wife); Tay v. Hawley, 39 Cal. 95; Gay v. Richardson, 18 Pick. (Mass.) 417; Curtis v. Gaines, 46 Ala. 455; Oliver v. Hutto, 5 Ala. 211; *overruling* Williams v. Lewis, 2 Stew. (Ala.) 41; Whitney v. Silver, 22 Vt. 634; Hubbard v. Dubris, 37 Vt. 94; Grider v. Payne, 9 Dana (Ky.) 188; Ford v. Munson, 4 N. J. L. 93; Snow v. Grace, 25 Ark. 570; Barton v. Pettit, 7 Cranch (U. S.) 194; Hall v. Lanning, 91 U. S. 166. See also Burnett v. Menifee, 4 Ark. 140; Dresser v. Wood, 15 Kan. 344; Connor v. Madden, 57 Me. 410; Hawes on Jurisdiction, § 238. Compare Whitney v. Silver, 22 Vt. 634.

In a case where there were two defendants having the same name, and service was made upon one only, and one had died, and it did not appear upon which one service had been made, the service was held insufficient for any purpose whatever. Grider v. Payne, 9 Dana (Ky.) 188.

In no case can a personal judgment be rendered against a person not actually served with process. If a court attempt to assume jurisdiction over a joint obligor not served with process, the judgment rendered is absolutely void as regards such obligor not served. Word v. Watkinson, 17 Conn. 500; 44 Am. Dec. 570, note; McDoel v. Cook, 2 N. Y. 110; Allen v. Chadsey, 1 Ind. 399; Brockman v. McDonald, 16 Ill. 112; Johnson v. Vaughan, 9 B. Mon. (Ky.) 217; Board of Public Works v. Columbia College, 17 Wall. (U. S.) 527; Phelps v. Brewer, 9 Cush. (Mass.) 390; 57 Am. Dec. 56; Mason v. Eldred, 6 Wall. (U. S.) 239.

In this last case the effect of a judgment obtained under the *Michigan*

of several joint defendants must have been served, and this rule remains in force, where there is no statutory provision otherwise.¹ In many States it is provided that in an action against several joint contractors, service upon such as can be found within the State will authorize proceedings to be had against those who are so served.²

joint debtor act which provided that "Such judgment should be conclusive evidence of the liabilities of the defendant who was served with process in the suit or who appeared therein; but against every other defendant it shall be evidence only of the extent of the plaintiff's demand after the liability of such defendant shall have been established by other evidence," was considered. The court, by Field, J., said:

"Judgments in cases of this kind against the parties not served with process or who do not appear therein, have no binding force upon them personally. The principle is as old as the law that no one shall be personally bound until he has had his day in court, which means until citation is issued to him and opportunity to be heard is afforded. Nor is the demand against the parties not served merged in the judgment against the party brought into court." See also *Baxter v. Grove* (Mich. 1892), 52 N. W. Rep. 294; *Oakley v. Aspinwall*, 4 N. Y. 521; *Carman v. Townsend*, 6 Wend. (N. Y.) 206; *Bruen v. Bokee*, 4 Den. (N. Y.) 56; 47 Am. Dec. 239; *Wood v. Watkinson*, 17 Conn. 500; 44 Am. Dec. 562, 570, note. Compare, as to effect of such judgment on joint property, *Magovern v. Robertson*, 59 Hun (N. Y.) 627.

In a suit against two defendants, the fact that no summons was served on one, nor judgment rendered against him, does not invalidate the judgment against the other, who was properly served. *Wise v. Hyatt* (Miss. 1891), 10 So. Rep. 37.

1. *Barton v. Pettit*, 7 Cranch (U. S.) 194; *Edwards v. Carter*, 1 Stra. 473.

But a defendant who is liable for an injury to the full extent of the damages without right of contribution or other defense cannot object that summons has not been served upon him. *McKenzie v. Hackstaff*, 2 E. D. Smith (N. Y.) 75.

In a joint action on a promissory note against third parties, if the summons is executed on two of the defendants, and return not found as to the third, and in that posture of the case

the plaintiff continues the cause as to the defendant not found, and takes a judgment against the other two, the entire case is thereby discontinued. *Curtis v. Gaines*, 46 Ala. 455.

In the case of *McBeath v. Spann*, 7 Ala. 201, a writ was issued against three persons, and served upon one, and returned not found as to the other two; thereupon, an *alias* was issued against all without noticing the partial service and returned executed as to the latter two, and not found as to the one previously served. It was held that the service of the original writ was not vacated by the *alias* or the proceedings thereon.

2. See *Gay v. Richardson*, 18 Pick. (Mass.) 417; *Central, etc., R. Co. v. Morris*, 68 Tex. 49; *Head v. Daniels*, 38 Kan. 1; *Call v. Hagger*, 8 Mass. 423; *Denny v. Ward*, 3 Pick. (Mass.) 199; *Houston v. Pepperl*, 32 Neb. 828; *Parker v. Danforth*, 16 Mass. 299; *Kennedy v. Patton*, Minor (Ala.) 77; *Morris v. Knight*, 1 Blackf. (Ind.) 106. Compare *Bartlett v. Robbins*, 5 Met. (Mass.) 184; *Pegram v. U. S.*, 1 Marsh. (U. S.) 261; *Craig v. Cummings*, 2 Wash. (U. S.) 505; *Aukeny v. Blackiston*, 7 Oregon 407. Under such statutes a resident defendant cannot have a process quashed because there was no service upon a non-resident co-defendant. *Comins v. Jones*, 54 Vt. 560.

In *Connecticut*, there is a statute which provides that "in actions on joint contracts, if all the defendants are not inhabitants of this State, service upon such as are inhabitants shall be sufficient notice to maintain the suit against all the defendants." Under this statute it is said to be not necessary that the defendant on whom service is made should be an inhabitant of the State, but it is sufficient if he is temporarily within the State at the time when service is made upon him; and the judgment rendered under the provisions of this statute against all the defendants is conclusive upon the defendant upon whom service was made, and holds for the purposes of execu-

Proper service is made upon several defendants by actual personal service upon each, or, if service be made by copy, a separate copy must be furnished to each, and one copy for all is not sufficient.¹

In a case where there are two defendants, and upon one personal service has been made, and upon the other substituted service, the plaintiff cannot proceed to judgment until the time allowed after the substituted service has expired, when he must enter judgment against both at the same time.²

d. UPON INFANTS.—The matter of service of process upon infants is one regulated almost exclusively by statute. It is a universal requirement that service shall be made not only upon the infant himself generally, but also upon some person connected with him as guardian. It is sufficient here to state the decisions which have been made upon the subject, the statutory regulations being found in the various codes.³

tion the property of any of the other defendants that may have been attached in the suit. *Bishop v. Vose*, 27 Conn. 1. See also same principle in *Southmayd v. Backus*, 3 Conn. 474; *Mills v. Bishop, Kirby* (Conn.) 4; *Bishop v. Bull*, 1 Day (Conn.) 141. See also *Wood v. Watkinson*, 17 Conn. 500; 44 Am. Dec. 562.

A suit was brought by a citizen of *Illinois* in the southern district of *Ohio*, upon a joint contract against two defendants, one of whom resided in that district and the other in the State of *Indiana*. The declaration averred the residence of the defendants, and the return of the marshal showed service on both, but the declaration did not aver that the defendant residing in *Indiana* was served within the southern district of *Ohio*. It was held that in such a case it was not necessary to aver on the record that the defendant residing in *Indiana* was served within the said district, and that by virtue of § 1, act February 28, 1839, jurisdiction was conferred on the court to proceed to the trial and adjudication of such suit as against all parties regularly served with process. *McCloskey v. Cobb*, 2 Bond (U. S.) 16.

In some of the States, statutes have been passed which permit judgment to be entered in form against all of several joint defendants, but which limit the execution to be issued thereon to the joint property of all the defendants and to the separate property of the defendants actually served with process in the suit. In several of the States, the constitutionality of such statutes

has been either impliedly or expressly upheld. See *Johnson v. Lough*, 22 Minn. 203; *Lahey v. Kingon*, 13 Abb. Pr. (N. Y.) 192; *Kidd v. Brown*, 2 How. Pr. (N. Y.) 20; *Guimond v. Nast*, 44 Tex. 114; *Whitmore v. Shiverick*, 3 Nev. 288.

But even under such statutes, the defendant may show in avoidance of the judgment that he was not a joint contractor, since it is this fact alone which makes the judgment binding. *Harper v. Brink*, 24 N. J. L. 333.

But in the case of *Tay v. Hawley*, 39 Cal. 95, such a statute as mentioned above was held unconstitutional in the most express terms. See also *Hancock v. Preuss*, 40 Cal. 572; *Mason v. Denison*, 15 Wend. (N. Y.) 64; *Treat v. McCall*, 10 Cal. 511; *Bowen v. May*, 12 Cal. 349; *Bonesteel v. Todd*, 9 Mich. 371; 80 Am. Dec. 90. Compare *Sacramento Sav. Bank v. Spencer*, 53 Cal. 737 (service on one of three defendants held to be sufficient).

1. *Bugbee v. Thompson*, 41 N. H. 183; *Thompson v. Griffie*, 19 Tex. 115; *Holliday v. Steel*, 65 Tex. 88.

2. *Orr v. McEwen*, 16 Hun (N. Y.) 625. See also *Kernochan v. Bland*, 59 How. Pr. (N. Y.) 97.

3. Thus, Civil Code *Kentucky*, § 52, as amended January 16, 1883, requires a summons against an infant under fourteen years of age to be served upon his father, then upon his guardian; if there be none, then upon his mother, etc. If it is shown by affidavit that all the persons above named are plaintiffs to the action, the court shall appoint a guardian *ad litem*, and the summons

c. UPON PERSONS CONFINED.—Where a person is in confinement in the jail or State prison, service upon him may be made by serving a copy of the process upon the keeper of the jail or prison, or in some cases it may be served upon the prisoner himself.¹ In the case of insane persons who are undergoing confine-

shall be served on him. See *Donaldson v. Stone* (Ky. 1889), 11 S. W. Rep. 462.

In *Missouri*, service on infants is to be made precisely as if they were adults. *Baumgartner v. Guessfeld*, 38 Mo. 36. But acknowledgment in writing, on the writ, of the service of summons can only be made by adults or those capable of acting for themselves. A minor may not do it, nor his guardian for him. *Kansas City, etc., R. Co. v. Campbell*, 62 Mo. 585.

So also substituted service may be made upon two minors by leaving a copy with their mother as a member of the family of each. *Weber v. Weber*, 49 Mo. 45.

In *Indiana*, it is held that process should be served on infant defendants in chancery, in the same manner as if they were adults; and to enable them to plead, answer, or demur, a guardian *ad litem* for them, should be appointed. *Hough v. Canby*, 8 Blackf. (Ind.) 301; *De La Hunt v. Holderbaugh*, 58 Ind. 285.

In nearly all the other States, service upon infants, in actions wherein they are defendants, is required to be made in a way different from that upon adults; generally by service upon the infant and upon its parent or guardian. *New York Code Civ. Proc.*, § 426; *Moulton v. Moulton*, 47 Hun (N. Y.) 606; *Hogle v. Hogle*, 49 Hun (N. Y.) 313; *Tyler v. Jewell* (Ky. 1889), 11 S. W. Rep. 25; *Donaldson v. Stone* (Ky. 1889), 11 S. W. Rep. 462; *Hemmer v. Wolfer*, 124 Ill. 435; *Sanders v. Godley*, 23 Ala. 473; *Faust v. Faust*, 31 S. Car. 576; *Gay v. Grant*, 101 N. Car. 206; *Richardson v. Loupe*, 80 Cal. 490; *Stearns v. Wallace*, 58 N. H. 228; *Dohms v. Mann*, 76 Iowa 723. *Compare Schwartz' Estate*, 14 Pa. St. 42.

In *Maine*, the creditor of a ward may sue him by serving a notice of such suit upon the guardian. The omission of such notice is a ground for reversal. *Homstead v. Loomis*, 53 Me. 549.

Civil Code Kentucky, before the amendment of January 16, 1882, required the summons to be served on the father of an infant under fourteen

years of age. It has been held, that service on the father of several defendants under that age is good as to an unchristened infant described in the summons, where a guardian *ad litem* is appointed and defense is made for all, though the father is a party plaintiff, and the sheriff's return mentions the other children, but does not mention such infant. *Donaldson v. Stone* (Ky. 1889), 11 S. W. Rep. 462. Service on the infant herself under this statute is entirely insufficient. *Jenkins v. Crofton* (Ky. 1888), 9 S. W. Rep. 406.

It Must be Upon Some One Other than the Plaintiff.—The principle that service upon the plaintiff in an action is never sufficient, applies here as well as elsewhere. Thus on a bill in chancery by a stepfather against his stepchildren, to subject their lands to sale, the service of summons by delivery of a copy thereof to the complainant, informing him of its contents, will confer no jurisdiction on the court as to the persons of the defendants, and a decree of sale upon such service will be void as to them. *Hemmer v. Wolfer*, 124 Ill. 436.

1. *Johnson v. Johnson, Walker* (Mich.) 309; *Dunn's Appeal*, 35 Conn. 82; *Smith v. McGlasson*, 7 J. J. Marsh. (Ky.) 154; *Hix v. Sumner*, 50 Me. 290 (service within the prison to be by deputy warden upon the prisoner).

As to service upon defendant personally while in prison, see *Davis v. Duffie*, 8 Bosw. (N. Y.) 617; 1 Abb. App. Dec. (N. Y.) 486; *State v. Washington*, 37 La. Ann. 828; *Phelps v. Phelps*, 7 Paige (N. Y.) 150; *New York Code Civ. Proc.*, § 429; *Bland v. Bland*, L. R., 3 P. & D. 233; 12 Moak's Rep. 688; *Smith v. McGlasson*, 7 J. J. Marsh. (Ky.) 154.

In one case, the defendant was sentenced to the State prison for four years; during that time his family resided in the dwelling house which he had occupied previously to his sentence. The court held that service in such a case by leaving a copy of the writ of attachment at such dwelling place was a legal service. *Grant v. Dalliber*, 11 Conn. 234.

ment in a jail or prison, it is usually required that the service be made upon the custodian or committee of such insane person.¹

f. UPON HUSBAND AND WIFE.—It was a rule at common law that in case of service of summons or other process against husband and wife, proper service might be made by service upon the husband alone;² but this rule is so far changed by statute in this country that whenever it is sought by any means to affect the separate property rights of the wife, not only her husband, but she herself, also, must be personally served with process.³

In *New York*, it is provided for such cases that "a sheriff or jailer, upon whom a paper in an action or special proceeding directed to a prisoner in his custody, is lawfully served, or to whom such a paper is delivered for the prisoner, must within two days thereafter deliver the same to the prisoner with a note therein of the time of the service thereof upon, or receipt thereof by, him." *New York Code Civ. Proc.*, § 131.

It is held that an execution against a person is not a paper within the meaning of this section. *In re Johnson*, 21 Abb. N. Cas. (N. Y.) 172.

1. *Cates v. Woodson*, 2 Dana (Ky.) 452; *New York Code Civ. Proc.*, § 429; *Sacramento Sav. Bank v. Spencer*, 53 Cal. 740.

A summons is not properly served on such person by delivering a copy to a relative where she resides. *Heller v. Heller*, 6 How. Pr. (N. Y.) 194.

See also *Sanford v. Sanford*, 62 N. Y. 553; *In re Heller*, 3 Paige (N. Y.) 199; *In re Hopper*, 5 Paige (N. Y.) 489; *Bean v. Haffendorfer*, 84 Ky. 685.

Where no guardian was appointed for an insane person, it was held that he must be served personally. *Sacramento Sav. Bank v. Spencer*, 53 Cal. 740.

2. *Pigott v. Suell*, 59 Ala. 106; *Ferguson v. Smith*, 2 Johns. Ch. (N. Y.) 138 (in which case Chancellor Kent states the common-law doctrine); *Leavitt v. Cruger*, 1 Paige (N. Y.) 421; *Wynn v. Williams, Minor* (Ala.) 136; *Robinson v. Cathcart*, 2 Cranch (C. C.) 590; HUSBAND AND WIFE, vol. 9, pp. 789, 828; MARRIED WOMEN, vol. 14, pp. 650, *et seq.*

But in no case can the service upon the wife be valid as against the husband except when made at his usual place of abode, etc., as prescribed in the regulations concerning substituted service. See *infra*, this title, *Substituted Service*. See also *Hackettstown Bank v.*

Mitchell, 28 N. J. L. 516; *Hess v. Cole*, 23 N. J. L. 116.

3. *Rowland v. Perry*, 64 N. Car. 578; *Leavitt v. Cruger*, 1 Paige (N. Y.) 421; *Pigott v. Snell*, 59 Ala. 106; *Leonard v. Villars*, 23 Ill. 322; *Covington v. Burleson*, 28 Tex. 368; *Jones v. Harris*, 9 Ves. 488; *Carper v. Woodford*, 24 Neb. 135; *Taggart v. Rogers*, 49 Hun (N. Y.) 265; MARRIED WOMEN, vol. 14, pp. 650, *et seq.*

Under this rule it was held in *New York* that, in an action to foreclose a mortgage given by a husband and wife upon the land of the husband, service of summons upon the husband was sufficient and service upon the wife was unnecessary to bar her dower interest, and that, too, although she was an infant, since it did not relate to her separate estate. *Feitner v. Lewis*, 119 N. Y. 131; *Forté v. Lathrop*, 53 Barb. (N. Y.) 183; *Eckerson v. Vollmer*, 11 How. Pr. (N. Y.) 42.

In a suit against J. W. L. and wife, the summons to answer plaintiff's bill was returned "executed and delivered copy of bill to J. W. L." It was held, that only J. W. L. was summoned. *Leftwick v. Hamilton*, 9 Heisk. (Tenn.) 310.

In *Connecticut*, it is held that an acknowledgment of service made by husband and wife, defendants in a suit, on the back of a writ, does not dispense with actual service upon her. *Gaylord v. Payne*, 3 Conn. 258.

A subpoena in chancery may be served upon a wife by delivery to her husband, a co-defendant, in the manner provided for service by delivery to a person above fifteen years of age, a member of her family, etc. *McLane v. Piaggio*, 24 Fla. 71; *Oglesby v. Sillom*, 4 Woods (U. S.) 72.

But when the husband and wife are both sought to be served by leaving an attested copy of the process with them, or at their last and usual place of abode, the process cannot be served by merely leaving one copy for both.

g. UPON AGENTS OR ATTORNEYS.—It is provided in some jurisdictions that proper service upon a defendant may be made by service upon his agent or attorney; but such service is available only when the defendant himself cannot be reached,¹ and in all cases it must clearly appear, either in the petition which accompanies the process or in the officer's return, that the person served was the proper and duly qualified agent of the defendant;² a party cannot be bound by service upon one with whom there is

Such copy for both would be service upon neither. *Versepuy v. Watson*, 12 R. I. 342; *Stewart v. Stringer*, 41 Mo. 400; 97 Am. Dec. 278; *Holliday v. Brown* (Neb. 1892), 50 N. W. Rep. 1042; 51 N. W. Rep. 839.

In a foreclosure brought in 1838, the plaintiff's husband was served with subpoenas for himself and plaintiff, who was a minor; it was held that the court acquired jurisdiction to proceed against both, and that she was bound by the decree. *Feitner v. Hoeger*, 14 Daly (N. Y.) 470; 121 N. Y. 660; *Feitner v. Lewis*, 119 N. Y. 131; *Foot v. Lathrop*, 53 Barb. (N. Y.) 183; *Eckerson v. Vollmer*, 11 How. Pr. (N. Y.) 42.

In a foreclosure of a mortgage made by husband and wife on husband's lands to secure husband's debts, service upon husband is good both as to him and to his wife. *Nagle v. Taggart*, 4 Abb. N. Cas. (N. Y.) 144.

In a foreclosure of a purchase-money mortgage, service upon the husband binds the whole estate, except the possibility of the wife surviving him, and even if to this extent it does not fully bind her, the defect will not be a ground for a motion to set aside a judgment. *White v. Coulter*, 1 Hun (N. Y.) 357.

1. *Kamm v. Stark*, 1 Sawy. (U. S.) 547; *McLamore v. Heffner*, 31 Tex. 189; *Fisher v. Battaile*, 31 Miss. 471; *Gilmer v. Bird*, 15 Fla. 410; *Rossner v. New York Museum Assoc.*, 20 Hun (N. Y.) 182.

Therefore, a return which states that the officer "being unable to find the defendant at his last and usual place of abode," summoned him by serving his agent, who accepted the summons as agent, does not show a valid service, as the statute permits service on an agent only when there cannot be personal service on the defendant, and when he has no known last and usual place of abode. *Fall River v. Riley*, 140 Mass. 488.

And where a resident is temporarily absent, leaving an agent, valid service cannot be made upon him by leaving a summons at the last and usual place of the abode of the agent. *Holmes v. Fox*, 19 Me. 107.

Service made upon one who was duly appointed the agent of non-resident railroad trustees, and recognized by them as such agent, but whose certificate of appointment was not renewed as required by the statute, is a sufficient service to bind such trustees in the same manner as if they had been summoned personally. *Hamilton v. Wilder*, 31 Vt. 695.

See also *Aldige v. Knox*, 16 La. Ann. 180; *Segee v. Thomas*, 3 Blatchf. (U. S.) 11; *Frink v. Sly*, 4 Wis. 310; *Eckert v. Bauert*, 4 Wash. (U. S.) 370; *Abraham v. North German F. Ins. Co.*, 37 Fed. Rep. 731 (service on attorney of defendant in reformed bill); *Noyes v. Hillier*, 65 Mich. 636.

In *Iowa*, it is held that service upon a defendant's agent is illegal though it was permitted to such agent to appear and consent to judgment. *Brown v. Newman*, 13 Iowa 546. Such service is not authorized in *Arkansas*. *Smith v. Woolfolk*, 115 U. S. 143.

In a proceeding to restrain the prosecution of a suit by a non-resident, service may properly be made upon the attorney of such non-resident. *Segee v. Thomas*, 3 Blatchf. (U. S.) 11. One named as executrix in a will but over whose appointment a controversy is pending, a special administrator having been appointed, does not so represent the testator as to authorize service upon her of an attachment against the estate. *In re Flandrow*, 92 N. Y. 256, *aff'd* 28 Hun (N. Y.) 279.

2. *First Municipality v. Christ Church*, 3 La. Ann. 453; *American Bell Telep. Co. v. Pan Electric Telep. Co.*, 28 Fed. Rep. 625.

Where the return states that the petition and citation were served on defendants through their agent, A, this

no evidence to connect him.¹ It has been held that, in the absence of proof, an attorney will be presumed to have authority to accept service for his client;² but the correctness of this view may be questioned.³

7. Double Service.—It sometimes occurs that the same process is served more than once; in such case it is the general rule that the latter service is of no effect. The rule arises from this: after a summons has been once served, the presumption is that it has performed its functions, and it is thenceforth *functus officio*, and no subsequent service of it can be valid; and no *alias* can issue unless the first process has been returned not executed, or not found, etc.⁴

8. Service by Mail.—In some instances service of mesne process may be made by mail. This is statutory and unknown to the

is no evidence of the agency; if the agency is not alleged in the petition, nor proved, plaintiff must be non-suited. *Jacobs v. Sartorius*, 3 La. Ann. 9; *Municipality No. 1 v. Christ Church*, 3 La. Ann. 453; *Aldige v. Knox*, 16 La. Ann. 180; *Shampeau v. Connecticut River Lumber Co.*, 37 Fed. Rep. 771.

For the rule in the United States courts concerning service upon an agent or attorney, see *Cortes Co. v. Thannhauser*, 9 Fed. Rep. 226; *Bartlett v. Sultan of Turkey*, 19 Fed. Rep. 346; *Lowenstein v. Glidewell*, 5 Dill. (U. S.) 325.

1. *Adams v. Town*, 3 Cal. 247; *Ward v. Seabry*, 4 Wash. (U. S.) 426; *Eckert v. Bauert*, 4 Wash. (U. S.) 370; *Bennet v. Howard*, 2 Day (Conn.) 416; *Bulkley v. Starr*, 2 Day (Conn.) 552; *Frink v. Sly*, 4 Wis. 310; *Davidson v. Clark*, 7 Mont. 100.

Service of summons by leaving copy with defendant's partner with whom he lived before he went abroad on a trading tour, from which he was daily expected to return, and with whom his children were living, was held valid in *Bujac v. Morgan*, 3 Yeates (Pa.) 258; and in *Hamilton v. Wilder*, 31 Vt. 695, it is held that service may properly be made on the duly appointed agent of non-resident trustees.

2. Presumption as to Attorney's Authority to Accept Service for Client.—*Marling v. Robrecht*, 13 W. Va. 440; *Goodell v. Ehresnan*, 11 Pa. Co. Ct. Rep. 400. See also *Nelson v. Omaley*, 6 Me. 218.

An order for defendant to answer or be attached may be served upon his solicitor. *Stafford v. Brown*, 4 Paige (N. Y.) 360.

3. See *First Municipality v. Christ Church*, 3 La. Ann. 453; *Blake v. Baker*, 1 R. I. 285 (service on special attorney held insufficient).

4. Thus, if a party be served with summons out of the district, and afterwards served with summons in the district, for the purpose of shortening the time allowed him to answer, the second service is an absolute nullity. *Mayenbaum v. Murphy*, 5 Nev. 383. See also, upon the general rule, *Stevens v. Thompson*, 5 Kan. 305; *Dresser v. Wood*, 15 Kan. 344. Compare *Central, etc., R. Co. v. Morris*, 68 Tex. 49; 28 Am. & Eng. R. Cas. 50.

This rule is partly borne out by the case of *Bogue v. Prentis*, where there were two writs of summons simultaneously issued in the same case by different officers. The plaintiff in error, in a record that exhibited them only as allied proceedings in one case, was not allowed to claim that they began two distinct suits, if only one was practically instituted. The court further decided that such defect of procedure was within the statute of amendments. *Bogue v. Prentis*, 47 Mich. 124.

An injunction and a subpoena may be served upon a defendant at the same time, and such service may be made by the sheriff of a county other than that from which the writs issued. *Thebaut v. Canova*, 11 Fla. 143.

In Case of Final Process.—Where more than one service is made in case of final process, the rule stated in the text invariably applies. See *ATTACHMENT*, vol. 1, p. 926; *EXECUTION*, vol. 7, p. 143-5. See also *Averill v. Steamer Hartford*, 2 Cal. 308; *Dubois v. Harcourt*, 20 Wend. (N. Y.) 41.

common law, and, as in other cases of departure from the common law, it must be strictly followed. It is used almost entirely to supplement service by publication. Whether such service is allowed in any special State, and the manner and effect of it, can only be determined by a consultation of the statutes.¹ Generally to perfect service by mail, the summons or other process must be inclosed in an envelope,² addressed to the defendant at his proper place of residence,³ and mailed, postage prepaid.⁴

Such service is complete from the time the process to be served is deposited in the post-office at the residence of the party making the service. When thus deposited and properly inclosed, addressed, and posted, the party to whom it is addressed incurs the risk of the failure of the mail.⁵

1. See also 4 Wait's Pr. 619-20; 4 Minor's Inst. (2d ed.) 839; Bausman v. Tilley, 46 Minn. 66 (service by mail not sufficient); Stacy v. Jefferson Co., 69 Wis. 215; Likens v. McCormick, 39 Wis. 313; Sherry v. Gilmore, 58 Wis. 324; Hog's Back, etc., Min. Co. v. New Basil, etc., Min. Co., 63 Cal. 121; Marcele v. Saltzman, 66 How. Pr. (N. Y.) 205; Steinic v. Bell, 12 Abb. Pr. N. S. (N. Y.) 172 (proof of mailing, etc.); NOTICE, vol. 16, p. 825. Thus, it is held in *Mississippi*, that courts may direct service of an order, directing a defendant to appear and defend, to be made by mail upon a non-resident defendant—as well as published; and upon such summons, if a decree be entered against such defendant by default, it will not be void as for non-service of summons. *Wilson v. Basket*, 47 Miss. 637.

Where service is made by mail, it must appear that the conditions exist which authorize such service. *Clark v. Adams*, 33 Mich. 159; *Marcele v. Saltzman*, 66 How. Pr. (N. Y.) 205 (service by mail held invalid).

A statute providing that, when service is made by mail, the time shall be double that prescribed in other cases, can be applied only to notices of an act to be done in the future; it has no application to a notice that an act has already been done. It cannot aid service of a notice of appeal, mailed on the evening of the last day allowed for appealing, and not received till some days after the time has expired. *Stevens v. Wheeler*, 43 Wis. 91.

2. 4 Wait's Pr. 619-20; Anonymous, 25 Wend. (N. Y.) 677; 1 Hill (N. Y.) 217. Compare *Chautauqua Co. Bank v. Risley*, 6 Hill (N. Y.) 375. See also NOTICE, vol. 16, p. 819.

Service of papers by mail is not vitiated by the fact that the envelope containing them bore a special request—"Return, if not called for in five days, to," etc., unless proof is made that, in consequence of the papers being returned as directed, the person to be served failed to receive them. *Gaffney v. Bigelow*, 2 Abb. N. Cas. (N. Y.) 311.

3. *Foley v. Connelley*, 9 Iowa 240; *Aldige v. Knox*, 16 La. Ann. 180.

4. Unless the postage is prepaid, the party to whom the papers are addressed may refuse to take them from the office, and his omission to do so is the default of the party mailing the papers. 4 Wait's Pr. 619-20; Anonymous, 19 Wend. (N. Y.) 87; 1 Hill (N. Y.) 217.

It is held in an English case that sending process by the post in a letter which the defendant refuses to receive is not a good service, although the refusal may have been willful and accompanied with a long avoidance of service. *Redpath v. Williams*, 3 Bing. 443; 11 Moore 333. Compare, however, *Aldred v. Hicks*, 5 Taunt. 186.

5. 4 Wait's Pr. 622; *Schenck v. McKie*, 4 How. Pr. (N. Y.) 246; *Radcliff v. Van Benthuyssen*, 3 How. Pr. (N. Y.) 67. And it is said that, to constitute proper service by mail, the mailing must always be at the place of residence of the attorney or other party making the service. *Van Aernam v. Winslow*, 37 Minn. 514.

In one case, however, it is said that the delivery of process sealed up in a letter, in the absence of the person to whom it is addressed, is no service, except from the time when the letter is opened. *Arrowsmith v. Ingle*, 3 Taunt. 234. For other cases on this subject, see *Rhodes v. Innes*, 1 D. P.

9. Distinction Between Defective Service and Total Want of Service.

—There is a distinction to be observed between a total want of service and an actual service which is defective merely as to the effect on the subsequent proceedings. In the one case the judgment is void, while in the other the defective service may give actual notice, so that the judgment may be valid until set aside in direct proceedings, and valid as against a collateral contract.¹

VI. PRESUMPTION OF PROPER SERVICE.—There is a presumption in favor of the regularity of judicial proceedings,² and this presumption becomes conclusive after the lapse of time without objection being made.³

In *Illinois*, it has been held repeatedly that a defect of process or service is cured by a recital in the decree of the court that the defendant was duly served;⁴ but it is doubtful whether this view

C. 215; 7 Bing. 329; *Steinle v. Bell*, 12 Abb. Pr. N. S. (N. Y.) 172.

1. *Harrington v. Wofford*, 46 Miss. 41; *Smith v. Bradley*, 6 Smed. & M. (Miss.) 492. See also *Simpson v. Burch*, 4 Hun (N. Y.) 315; 6 *Thomp. & C.* (N. Y.) 560.

Thus a service made on Sunday is merely an irregularity which may be pleaded in abatement or set aside on motion, but it does not render a judgment by default either void or reversible. *Comer v. Jackson*, 50 Ala. 384. So where a return is required to be made under oath, the omission to so make it does not affect its validity unless special objection is made. *Forbes v. McHaffie*, 32 Neb. 742. Where a service is defective in having been made too near the return day, the proper remedy is by motion to set aside the service and not to dismiss the action. *Foster v. Markland*, 37 Kan. 32.

2. *Sander v. Harris*, 59 Hun (N. Y.) 628; *Wilson v. Holt*, 83 Ala. 528; 3 Am. St. Rep. 768; *State v. Still*, 11 Mo. App. 283; *Dodge v. Butler*, 42 N. J. L. 370; *Kirby v. Gates*, 71 Iowa 100; *Murfrees on Sheriffs*, § 846. See *PRESUMPTIONS*, vol. 19, p. 38.

3. Thus after the lapse of twenty years, no objection having been made, it will be conclusively presumed that defendant was properly served, although the record fails to show service. *Wilson v. Holt*, 83 Ala. 528; 3 Am. St. Rep. 768; *Clyburn v. Reynolds*, 31 S. Car. 91; *Best v. Vanhook* (Ky. 1890), 13 S. W. Rep. 119.

4. **Defective Process or Service Cured by a Recital in the Decree.**—*Hunter v. Stonehimer*, 92 Ill. 75; *Freeman v. Karr*, 34 Ill. App. 646; *Hemmer v.*

Wolfer, 124 Ill. 435. The same view is taken in *Ford v. Delta, etc., Land Co.*, 43 Fed. Rep. 181. And it is said that where a decree recites that defendants were duly served, but the service, as shown by the record, is insufficient, it will be presumed in favor of such finding that a second summons was issued and served to the subsequent term. *Hemmer v. Wolfer*, 124 Ill. 435.

A decree of a court below which recites that the defendant was duly served, cures a defect in the summons in not stating the date of service. *Rivard v. Gardner*, 39 Ill. 125.

Where there is a finding by the court that a defendant had been duly served with process, such finding cannot be impeached by the evidence of such defendant. And if the impeachment is in a collateral proceeding, the finding can only be contradicted by other portions of the record. *Russell v. Baptist Theological Union*, 73 Ill. 337; *Davis v. Dresback*, 81 Ill. 393; *Botsford v. O'Conner*, 57 Ill. 72; *Hunter v. Stoneburner*, 92 Ill. 75; *Freeman v. Carr*, 34 Ill. App. 646.

Where a decree recites that publication of notice was duly made, this will be deemed sufficient, in the appellate court, unless something in the record shows that the fact was positively otherwise. *Gilchrist v. Cannon*, 1 Coldw. (Tenn.) 581.

An entry by the clerk, of proof of publication of notice, is not conclusive; but a finding by the court, of due service, will, on appeal, raise a presumption of such service, sufficient to give jurisdiction. *State v. Elgin*, 11 Iowa 216.

Where the record shows a particular

is sustained elsewhere, seeing that such a recital is merely a formal part of the decree.¹

VII. PARTIES PRIVILEGED FROM SERVICE OF PROCESS² (see ARREST³)

—1. **Ambassadors, Public Ministers, etc.**—According to the law of nations, ambassadors and public ministers are exempt from the jurisdiction of the courts of the country to which they are sent, and are, therefore, privileged from service of the process of such courts.⁴ The exception does not extend to consuls, for while it may once have been true that they were exempt, it is not so now.⁵

2. **Legislators, Judges, Officers.**—Members of Congress and of State legislatures are generally exempt from service of process during the session, and just before and after.⁶ A similar exemption applies sometimes to judges, particularly those of the higher

service it will be presumed that no other service was made. *Godfrey v. Valentine*, 39 Minn. 336.

1. In *Coffee v. Gates*, 28 Ark. 43, where it is maintained that the mere recital, in the formal part of a judgment or decree, that the defendant was legally served with notice, is not a necessary part thereof; the record made by the official indorsement of return upon the writ is the proper evidence of due service, and, when it appears from such return that no sufficient service has been had, the court acquires no jurisdiction of the person of the defendant. See also *Settlemyer v. Sullivan*, 97 U. S. 444; *Weems v. Raiford* (Miss. 1890), 8 So. Rep. 260; *Oxford Iron Co. v. Spradley*, 42 Ala. 24.

In *Norton v. Meader*, 4 Sawy. (U. S.) 618, it is said that a recital in the record is only *prima facie* proof of service.

2. **Exemption Does Not Apply to Criminal Process.**—In all the cases to be mentioned, it must be borne in mind that the exemption extends only to civil process and does not embrace criminal process. See ARREST, vol. 1, p. 724.

The rule has an exception in case of ambassadors; they are free from all process except that of their own country. See AMBASSADORS, vol. 3, pp. 772-75.

3. *Arrest*, vol. 1, p. 724.

4. Kent's Com. (13th ed.), pp. 39, *et seq.*; Vattel's Law of Nations, bk. 4; AMBASSADORS, vol. 1, p. 524; CONSULS AND AMBASSADORS, vol. 3, pp. 772, *et seq.*

5. 1 Kent's Com. (13th ed.) 44-45; CONSULS AND AMBASSADORS, vol. 3, pp. 774, 775, and cases cited. Vattel lays down the doctrine that this im-

munity is as applicable to consuls as to other ministers of foreign states. Law of Nations, bk. 4, ch. 2. But the authorities just cited sustain another doctrine.

6. U. S. Const., art. 1, § 6; *Lyll v. Goodwin*, 4 McLean (U. S.) 29 (judge); *Tillinghast v. Carr*, 4 McCord (S. Car.) 152; *King v. Coit*, 4 Day (Conn.) 129 (privilege extends to service of writ of error, though the writ is not returnable until after the end of the session); *Cook v. Gibbs*, 3 Mass. 193; 4 Minor's Inst. (2d ed.) 826; *Sperry v. Willard*, 1 Wend. (N. Y.) 32 (counselor of court exempt from arrest during term of court); *Stimson's Stat. Law*, p. 68, § 273; *Murfree on Sheriffs* (2d ed.), § 122.

In some States the provisions in this regard are very broad, including all kinds of civil process, mesne as well as final, while in others they are much more narrow. For this, the statutes of each particular State must be consulted. See *Stimson's Stat. Law*, p. 68, § 273.

In *Kentucky*, this privilege has been held to extend only to cases where the process is a civil process requiring bail. *Catlett v. Morton*, 4 Litt. (Ky.) 122; *Johnston v. Offutt*, 4 Met. (Ky.) 19.

Remedy.—The proper way in which one privileged from service must avail himself of his privilege is by motion to set aside the service. *Williams v. McGrade*, 13 Minn. 174; *Wood v. Kinsman*, 5 Vt. 588; and such motion must be made promptly. *Pollard v. Union Pac. R. Co.*, 7 Abb. Pr. N. S. (N. Y.) 70; *Lederer v. Adams*, 58 Hun (N. Y.) 603; *Bucklin v. Strickler*, 32 Neb. 602 (technical objections to service must be clearly stated).

courts,¹ and sometimes to persons in the military service,² and to officers of election.³

3. Persons Under Another Process.—A witness who has been brought into a jurisdiction outside of that of his residence, by a subpoena to testify, is generally exempt from service of process in another proceeding.⁴

1. Judges.—A justice of the supreme court of a State, privileged from arrest, cannot be served with process of summons while engaged in the discharge of his official duties, or while traveling to or from his court; and such writ of summons will be vacated on motion. Such justice may, however, be served with process of summons when not engaged in the discharge of his judicial duties, or actually traveling to or from his court. *Lyell v. Goodwin*, 4 McLean (U. S.) 44.

The mode of redress when the privilege is infringed is by a motion to the court whence the process issued. *Lyell v. Goodwin*, 4 McLean (U. S.) 29. See also *King v. Coit*, 4 Day (Conn.) 129; *Harris v. Grantham*, 1 N. J. L. 142.

2. Persons in Military Service.—For instances, see *Gregg v. Summers*, 1 McCord (S. Car.) 461; *Williams v. McGrade*, 13 Minn. 174; *Hickman v. Armstrong*, 2 Brev. (S. Car.) 177; *Greening v. Sheffield*, Minor (Ala.) 276; *Davidson v. Barclay*, 63 Pa. St. 406.

An act staying civil process against those in the military service for a definite particular time is not unconstitutional. *Britenbach v. Bush*, 44 Pa. St. 313; 84 Am. Dec. 442.

The time, however, must be definite and not unreasonable. *Williams' Appeal*, 72 Pa. St. 220; *Sayres v. Com.*, 88 Pa. St. 308.

3. Electors.—But the service of a declaration on a defendant in a suit, commenced by the filing and service of a declaration, is not a violation of the statute of *New York*, forbidding the service of civil process on an elector during the time appointed for the election of State and county officers. *Corlies v. Holmes*, 20 Wend. (N. Y.) 681.

Attorneys.—As to exemption of attorneys, see an isolated case, *Secor v. Bell*, 18 Johns. (N. Y.) 52. Revised Statutes of *Illinois*, ch. 12, § 8, exempts attorneys from arrest while attending court. It does not extend, however,

to exemption from service of summons in a civil suit, even though the attorney be from a foreign State attending court in *Illinois*. *Robbins v. Lincoln*, 27 Fed. Rep. 342.

4. Witnesses.—The doctrine is thus stated by Mr. Murfree in his work on *Sheriffs* (2d ed.), § 122a: "Witnesses in giving testimony in a foreign State in good faith are held to be exempt from summons in civil cases in going, while in attendance, and for a reasonable time thereafter, in which to return to the State of their residence." *Citing Wilson v. Donaldson*, 117 Ind. 356; *Atchison v. Morris*, 11 Biss. (U. S.) 191; *In re Healey*, 53 Vt. 694; 38 Am. Rep. 713; *Matthews v. Tufts*, 87 N. Y. 568. "The immunity does not depend upon statutory provisions, but is necessary for the due administration of justice, the object being to encourage witnesses from abroad to come forward voluntarily and testify, since non-residents cannot be compelled to attend." *Sherman v. Gundlach*, 37 Minn. 118; *Massey v. Colville*, 45 N. J. L. 119; 46 Am. Rep. 754; *Merrill v. George*, 23 How. Pr. (N. Y.) 332; *Sanford v. Chase*, 3 Cow. (N. Y.) 382.

And the doctrine of the text is sustained by many cases. *Meekins v. Smith*, 1 H. Bl. 636; *Atchison v. Morris*, 11 Biss. (U. S.) 191; *Randall v. Gurney*, 3 B. & Ald. 252; 5 E. C. L. 271; *Sherman v. Gundlach*, 37 Minn. 118; *Shaver v. Letherby* (Mich. 1889), 41 N. W. Rep. 677; *Hollender v. Hall*, 58 Hun (N. Y.) 604; *Day v. Harris*, 59 Hun (N. Y.) 628; *Kaufman v. Kennedy*, 25 Fed. Rep. 785; *Small v. Montgomery*, 23 Fed. Rep. 707; *Sheehan v. Bradford*, etc., R. Co. (Supreme Ct.), 3 N. Y. Supp. 790; *Brooks v. Farwell*, 2 McCrary (U. S.) 220; *Martin v. Ramsey*, 7 Humph. (Tenn.) 260; *Matthews v. Puffer*, 20 Blatchf. (U. S.) 233; 1 Greenl. Ev., § 316, note.

The exemption applies, although the witness attends voluntarily and without a subpoena. *Dungan ads. Miller*, 37 N. J. L. 182; *Massey v. Colville*, 45 N. J. L. 119; 46 Am. Rep. 754; *Wilson*

This exemption applies more particularly to witnesses who are non-residents of the State into which they thus come, but is not confined wholly to such witnesses.¹ So the parties to the action are generally exempt from service in the jurisdiction to which they go to attend the trial of the cause.² It has been questioned

v. Donaldson, 117 Ind. 356; *Huddeson v. Prizer*, 9 Phila. (Pa.) 65; *Taylor on Ev.*, § 1330; 1 *Greenl. on Ev.*, § 316; 1 *Tidd's Pr.* 195-6; *Walpole v. Alexander*, 3 Doug. 45; *Norris v. Beach*, 2 Johns. (N. Y.) 294; *Dixon v. Ely*, 4 Edw. Ch. (N. Y.) 557. Compare *Christian v. Williams* (Mo. 1892), 20 S. W. Rep. 96; *Fletcher v. Franko*, 15 N. Y. Supp. 674.

In the case of *Pope v. Negus* (Supreme Ct.), 3 N. Y. Supp. 795, the defendant came into the State to testify in two cases that were on the calendars in two different courts. Upon the call of the calendars, both cases were set for other days, but the witness did not appear to have been notified of the fact. It was held that the defendant by remaining in the State during the day's session of the court did not waive his privilege as witness from service of process.

The exemption applies so far as to exempt one from service in a suit not against himself, but against a corporation of which he is the chief officer or managing agent, etc. *Sheehan v. Bradford, etc., R. Co.* (Supreme Ct.), 3 N. Y. Supp. 790; FOREIGN CORPORATIONS, vol. 8, p. 384.

The privilege of the witness is not affected by the fact that he is also a party to the suit and has been served with summons in that capacity. *Christian v. Williams*, 35 Mo. App. 297; reversed 20 S. W. Rep. 96.

But the exemption of a witness or party to a suit from service does not extend to service of a subpoena to testify in the same cause on which he is giving attendance. *Norris v. Hassler*, 23 Fed. Rep. 581.

Where A, of *Minnesota*, while in attendance at court in *Iowa*, telegraphed home to a sheriff to attach B's goods, whereupon B at once sued A in *Iowa*, it was held that A could not plead the privilege of a witness in attendance at a trial, the suit against him being a natural and necessary consequence of his own act. *Nichols v. Horton*, 14 Fed. Rep. 327.

Exemption May be Waived.—Exemption is a mere personal privilege which

may be waived by the party entitled to it. *Gracie v. Palmer*, 8 Wheat. (U. S.) 699.

Such Service Voidable Only.—In the case of *Massey v. Colville*, 45 N. J. L. 119; 46 Am. Rep. 754, it is said that service upon the resident of a State while voluntarily attending as a witness, is not void, but the court may set it aside, or change the venue, or grant other appropriate relief. See also *Rogers v. Bullock*, 2 N. J. L. 516.

1. In many cases it has been held that the privilege is not confined to witnesses who are non-residents of the State, but extends also to non-residents of the county or of the jurisdiction of a particular court. *Gregg v. Summer*, 21 Ill. App. 110; *Larned v. Griffin*, 12 Fed. Rep. 590; *Person v. Grier*, 66 N. Y. 124; 23 Am. Rep. 35; *Matthews v. Tufts*, 87 N. Y. 568; *Thorp v. Adams*, 58 Hun (N. Y.) 603; *Thompson's Case*, 122 Mass. 428; 23 Am. Rep. 370; *Jacobson v. Hosmer*, 76 Mich. 234; *Christian v. Williams*, 35 Mo. App. 297.

But in *New York*, it is held to apply only to non-resident witnesses, and therefore, if a witness is a resident of the State, the fact that the summons was served on him while he was in attendance at the court is not ground for setting aside the service. *Jenkins v. Smith*, 57 How. Pr. (N. Y.) 171; *Frisbie v. Young*, 11 Hun (N. Y.) 474; *Sheehan v. Bradford, etc., R. Co.* (Supreme Ct.), 3 N. Y. Supp. 790; *Hopkins v. Coburn*, 1 Wend. (N. Y.) 292.

2. *Meekins v. Smith*, 1 H. Bl. 636; 1 *Greenl. Ev.*, § 316, note. Compare *Atlantic, etc., Tel. Co. v. Baltimore, etc., R. Co.*, 46 N. Y. Super. Ct. 377.

The exemption applies to a non-resident creditor attending proceedings in bankruptcy. *Matthews v. Tufts*, 87 N. Y. 568; *Tribune Assoc. v. Sleeman*, 12 Civ. Pro. Rep. (N. Y.) 20; *Ex parte List*, 2 Ves. & B. 373. Otherwise, as to a resident party. *Jenkins v. Smith*, 57 How. Pr. (N. Y.) 171; *Frisbie v. Young*, 11 Hun (N. Y.) 476.

Thus, it is said: "This privilege is granted in all cases where the attendance of the party or witness is given

sometimes whether this exemption applies to both plaintiff and defendant or to the defendant only, but on principle, as well as by the weight of authority, it seems that there is no distinction.¹

And so of those who have been brought into the jurisdiction by a compulsory or criminal process.² The principle is extended

in any matter pending before a lawful tribunal, having jurisdiction of the cause." 1 Greenl. on Ev. (14th ed.), § 317.

That the privilege belongs to defendants in an action is unquestioned. *Wilson Sewing Mach. Co. v. Wilson*, 22 Fed. Rep. 803; 51 Conn. 595; *Ellis v. De Garmo* (R. I. 1892), 24 Atl. Rep. 579; *Wilson v. Donaldson*, 117 Ind. 356 (party defendant attending trial to testify in his own case, privileged); *Christian v. Williams*, 35 Mo. App. 297 (Mo. 1892), 20 S. W. Rep. 96; *Andrews v. Lembeck*, 46 Ohio St. 38; *Parker v. Hotchkiss*, 1 Wall Jr. (C. C.) 269; *Plimpton v. Winslow*, 20 Blatchf. (U. S.) 82; *Dungan ads. Miller*, 37 N. J. L. 182; *Juneau Bank v. McSpedan*, 5 Biss. (U. S.) 64.

One who goes into another jurisdiction merely to take depositions is not exempt from service. *Greer v. Young*, 120 Ill. 184 (reversing 17 Ill. App. 106); 26 Am. Law Reg. (N. S.) 372 note, 377, *et seq.*; *Parker v. Manco*, 61 Hun (N. Y.) 519. In *Finch v. Gallagher* (Supreme Ct.), 12 N. Y. Supp. 487, it is held that such person is exempt, but that he loses his privilege by remaining several days after he has finished his business.

One who is a mere spectator in court is, of course, not entitled to claim the privilege. *McIntire v. McIntire*, 5 Mackey (D. C.) 344.

1. **Extends to Both Parties.**—In the case of *Halsey v. Stewart*, 4 N. J. L. 366, the court, by Southard, J., after holding that the exemption extended in favor of the plaintiff as well as the defendant, went on to say: "Courts of justice ought everywhere to be open, accessible, free from interruption, and to cast a perfect protection around every man who necessarily approaches them. The citizen in every claim of right which he exhibits, and any defense which he is obliged to make, should be permitted to approach them, not only without subjecting himself to evil, but even free from incumbrance or hindrance." And this opinion is upheld in many cases. *Shaver v. Letherby* (Mich. 1889), 41 N. W. Rep.

677; *Huddeson v. Prizer*, 9 Phila. (Pa.) 65; *Cole v. Hawkins*, 2 Stra. 1094; *First Nat. Bank v. Ames*, 39 Minn. 179. See also *Ellis v. Reynolds*, 35 Fed. Rep. 394.

This doctrine is also well sustained in the case of *Andrews v. Lembeck*, 46 Ohio St. 38, the court, by Owen, C. J., holding that a person attending the hearing of an application for an injunction, in a case in which he was interested as a party, in a county other than that of his residence, was privileged from the service of summons while attending and while going to and from the place of hearing. It was there observed: "This question is one which profoundly concerns the free and unhampered administration of justice in the courts. That suitors should feel free and safe at all times to attend within any jurisdiction outside of their own upon judicial proceedings in which they are concerned, and which require their presence, without incurring the liability of being picked up and held to answer to some other adverse judicial proceeding against them, is so far a rule of public policy that it has received almost universal recognition wherever the common law is known and administered." *Citing Lyell v. Goodwin*, 4 McLean (U. S.) 29; *Matthew v. Tufts*, 87 N. Y. 568; *Seaver v. Robinson*, 3 Duer (N. Y.) 622, and other cases. "The contention that the application of this principle should be or is confined to cases where the suitor is served with process while attending upon judicial proceedings without his State, is not supported by sufficient force of reason to justify the distinction. The cases may differ in degree but not in the principle involved." See also *Compton v. Wilder*, 40 Ohio St. 130 (extradition); *Parker v. Hotchkiss*, 1 Wall, Jr. (U. S.) 269. Compare, however, *Bishop v. Vose*, 27 Com. 1; *Baldwin v. Emerson*, 16 R. I. 304; *Capwell v. Sipe* (R. I. 1891), 23 Atl. Rep. 14.

2. **Parties Under Criminal Process.**—*Palmer v. Rowan*, 21 Neb. 452; 59 Am. Rep. 844; *Christian v. Williams* (Mo. 1892), 20 S. W. Rep. 96; *Byler v.*

to property as well as to the person, where the jurisdiction of another court has attached to the property.¹

The examination of the person, witness, or party, exists not only while he is in attendance upon the court on whose process he comes, but also for a reasonable time before and after; that is, *eundo, morando, et redeundo*.² The exemption embraces not only freedom from arrest, but also from all kinds of civil process.³

4. Parties Decoyed.—Where a party has been decoyed into another jurisdiction in order that he may be served with process, it

Jones, 79 Mo. 261; 22 Mo. App. 623; Jacobson v. Hosmer, 76 Mich. 234; Murphy v. Sweezy (Supreme Ct.), 2 N. Y. Supp. 241; Benninghoff v. Os- well, 37 How. Pr. (N. Y.) 235.

And in this case, "criminal process" includes extradition and requisition. Compton v. Wilder, 40 Ohio St. 130; Moelter v. Sinnen, 76 Wis. 308.

In *Illinois*, it has been held how- ever, that although a person cannot be brought by force into the jurisdiction of a court on a criminal charge, and be amenable to its process in a civil suit; yet a creditor who had nothing to do with such forcible bringing in may have service of process in his civil action against the debtor. Nich- ols v. Goodheart, 5 Ill. App. 574.

A citizen of *Massachusetts* was in- dicted in the federal court in *Wiscon- sin*, and under an arrangement with the United States attorney that he might within a prescribed time appear without arrest and plead to the in- dictment and give bail, he came to *Wisconsin* for that purpose. It was held that his appearance in court was compulsory, and that during that time he was exempt from liability to civil process. *U. S. v. Bridgman*, 9 Biss. (U. S.) 221.

But a person for whom requisition has been made to attend court in an- other State, but who has never been in the custody of any officer of the State, must be supposed to be in it voluntarily, and therefore amenable to suit. *King v. Phillips*, 70 Ga. 409.

It is held in *New York*, that a de- fendant, in order to establish the ob- jection that he was brought by criminal proceedings and against his will within the civil jurisdiction of the courts of this State, must establish two things, viz.: that the criminal pro- ceedings were instigated by the cred- itor or person who attempts to subject him to the civil jurisdiction, and that such creditor or person was guilty of

a wrongful act in the instigation of the criminal proceedings. *Martin v. Wood- hall*, 56 N. Y. Super. Ct. 439.

1. Property Under Process of Another Court.—It is a well settled principle that property in possession in one court is not liable to seizure under process of any other court. *Tua v. Carriere*, 117 U. S. 201; *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 294; *Covell v. Heyman*, 111 U. S. 176; *Freeman v. Howe*, 24 How. (U. S.) 450; *Taylor v. Carryl*, 20 How. (U. S.) 583; *Pulliam v. Osborne*, 17 How. (U. S.) 471; *Peck v. Jenness*, 7 How. (U. S.) 612; *Brown v. Clarke*, 4 How. (U. S.) 4; *Hagan v. Lucas*, 10 Pet. (U. S.) 400.

2. Duration of the Exemption.—The time during which the exemption ap- plies is that required for his attendance at the court, together with a reasonable time before and after. Exactly what is a reasonable time depends, of course, upon the peculiar circumstances of each individual case. 1 *Greenl. Ev.* (14th ed.), § 316; *Gregg v. Sumner*, 21 Ill. App. 110; *Muller v. Higgins*, 13 Abb. Pr. N. S. (N. Y.) 297; *Bolgians v. Gilbert Lock Co.*, 73 Md. 132 (pro- vided he be guilty of no unreasonable delay); *Sherman v. Gundlach*, 37 Minn. 118; *Palmer v. Rowan*, 21 Neb. 452; 59 Am. Rep. 844; *Moelter v. Sin- nen*, 76 Wis. 308; *Jacobson v. Hosmer*, 76 Mich. 234; *Andrews v. Lemback*, 46 Ohio St. 38; *People v. Judge*, 40 Mich. 729. An unreasonable time oc- curred in *Randall v. Gurney*, 3 B. & Ald. 252; 5 E. C. L. 271; *Marks v. La Société*, 19 N. Y. Supp. 410.

3. What Process the Exemption In- cludes.—There is some difference of opinion as to whether the privilege of witnesses and parties to the action ex- empts them from service of all kinds of process, summons as well as arrest. In 1 *Greenl. Ev.*, § 316, it is said that "It is deemed a contempt to serve pro- cess upon a witness even by summons, if it be done in the immediate and con-

is universally held that service under such circumstances is in the nature of a fraud, and therefore invalid and of no effect.¹ The

structive presence of the court upon which he is attending, though any service elsewhere without personal restraint, it seems, is good." And the same view is taken in the case of *Pollard v. Union Pacific R. Co.*, 7 Abb. Pr. N. S. (N. Y.) 70.

But the more correct view seems to be that the exemption includes all process, as is held in the case of *Mitchell v. Huron Circuit Judge*, 53 Mich. 541, where the court, by Cooley, C. J., observes: "Public policy, the due administration of justice and protection to parties and witnesses alike demand it (i. e., the exemption). There would be no question about it if the suit had been commenced by arrest; for the reasons for exemption are applicable, though with much less force, in other cases also." This view is sustained in *Matthews v. Tufts*, 87 N. Y. 568; *Person v. Grier*, 66 N. Y. 124; 23 Am. Rep. 35; *Van Liew v. Johnson*, 6 Thomp. & C. (N. Y.) 648; *Dungan ads. Miller*, 37 N. J. L. 182; *Halsey v. Stewart*, 4 N. J. L. 182; *First Nat. Bank v. Ames*, 39 Minn. 179; *Shaver v. Letherby* (Mich. 1889). 41 N. W. Rep. 677; *Christian v. Williams*, 35 Mo. App. 297; *Martin v. Ramsey*, 7 Humph. (Tenn.) 260 (subpoena in chancery); *Gregg v. Sumner*, 21 Ill. App. 110; *Larned v. Griffin*, 12 Fed. Rep. 590.

Does Not Protect from Criminal Process.—The exemption certainly does not extend so far as to exempt any party from arrest on criminal process. ARREST, vol. 1, p. 724, and cases cited.

1. *Blair v. Turtle*, 1 McCrary (U. S.) 372; *Wood v. Wood*, 78 Ky. 624; *Wyckoff v. Packard*, 20 Abb. N. Cas. (N. Y.) 420; *Hevener v. Heist*, 9 Phila. (Pa.) 274; *Nichols v. Goodheart*, 5 Ill. App. 574; *Nason v. Esten*, 2 R. I. 337; *Baker v. Wales*, 14 Abb. Pr. N. S. (N. Y.) 331; *Williams v. Reed*, 29 N. J. L. 385; *Metcalf v. Clark*, 41 Barb. (N. Y.) 45.

To serve process upon one who has thus been decoyed by false representations into a jurisdiction is an abuse of judicial process. *Chubbuck v. Cleveland*, 37 Minn. 466; *Van Horn v. Great Western Mfg. Co.*, 37 Kan. 523. And this is true, although the design of the representations was to obtain his arrest upon a criminal charge, and the institution of the civil action was an

afterthought. *Townsend v. Smith*, 47 Wis. 623; 32 Am. Rep. 793.

The doctrine is thus stated in *New York*: "Where the evidence is sufficient to show that deceit has been used for the purpose of bringing a person within the jurisdiction of the court, that he may be served with a summons and thus subjected to an action, the service of the summons will be set aside and vacated as irregular." *Baker v. Wales*, 45 How. Pr. (N. Y.) 137; 14 Abb. Pr. N. S. (N. Y.) 331; *Wyckoff v. Packard*, 20 Abb. N. Cas. (N. Y.) 420; *Allen v. Wharton*, 59 Hun (N. Y.) 622. See also *Lagrange's Case*, 14 Abb. Pr. N. S. (N. Y.) 333, note. *Dunham v. Cressy*, 51 Hun (N. Y.) 641. Consult, also, *Steiger v. Bonn*, 59 How. Pr. (N. Y.) 496 (forged telegram case).

The doctrine of the *Indiana* courts is the same. *Duringer v. Moschino*, 93 Ind. 495.

But where one has legitimately and voluntarily come within the jurisdiction, the fact that service is obtained upon him afterwards by fraud, trick or device, is not ground for holding such service invalid. *Atlantic, etc., Tel. Co. v. Baltimore, etc., R. Co.*, 46 N. Y. Super. Ct. 377. Compare *Dunham v. Cressy*, 51 Hun (N. Y.) 641.

An inventor having assigned his invention to third parties, invited the defendant, who had infringed the patented invention, into the jurisdiction where the assignees resided. The purpose of the visit was for the settlement of the difficulty arising out of the infringement. The assignees were ignorant of the intended visit, until called upon by the inventor and defendant. At the close of the interview the defendant was served with process for infringement of the patent, by the assignees; but there was no collusion between the latter and the inventor. The process was issued under section 11 of the Judiciary Act of 1789, providing that a party defendant found in the district where the process is issued, although not a resident thereof, may lawfully be served with process. It was held that in such a case there was not sufficient evidence to dismiss the action on the ground that the defendant, through deceit, was enticed into the jurisdic-

same principles apply to a case of replevin where property is fraudulently decoyed into another jurisdiction.¹

VIII. WAIVER OF IRREGULARITIES OR OF SERVICE—1. In General.—The whole object of mesne process being to inform the defendant of the action to be commenced against him, in order to prevent his being taken by surprise, or being proceeded against without having been heard, it is manifest that whatever irregularities may occur, either in the form of the process or in the manner of service, may be waived by the defendant's appearance; indeed, service itself may be entirely waived.² For similar reasons, all irregularities or defects in the manner of service, of whatever nature, can be waived by a written acknowledgment of service.³

tion where the plaintiffs lived. *Union Sugar Refinery v. Mathiesson*, 2 Cliff. (U. S.) 304.

There are a few cases, however, which hold that service of process regular on its face is not void merely because the defendant was induced to come within the jurisdiction of the court by a letter inviting him there for another purpose, where no injury is occasioned thereby. *Hanna v. Pearl*, 129 Pa. St. 588; *Duringer v. Moschino*, 93 Ind. 495; *Commercial Nat. Bank v. Davidson*, 18 Oregon 57. *Compare Greer v. Young*, 120 Ill. 184.

1. *Moynahan v. Wilson*, 2 Flip. (U. S.) 130.

2. This principle is beyond controversy, having been settled by many cases in every jurisdiction. *Penrice v. Wallis*, 37 Miss. 172; *Bustamente v. Bescher*, 43 Miss. 172; *State v. Clark*, 44 Vt. 636; *Cropsey v. Wiggenhorn*, 3 Neb. 108; *Louisville, etc., R. Co. v. Stover*, 57 Ind. 559; *New York Code Civ. Proc.*, § 424; *Hill v. Mendenhall*, 21 Wall. (U. S.) 453; *Edwards v. U. S.*, 103 U. S. 471; *Belt v. Blackburn*, 28 Md. 227; *Yturri v. McLeod*, 26 Tex. 84; *Barber v. Knickerbocker L. Ins. Co.*, 24 Wis. 630; *Williams v. Browning*, 45 Mo. 475; *Harrison v. Rowan*, Pet. (C. C.) 489; *Nelson v. Moon*, 3 McLean (U. S.) 319; *Woodman v. Smith*, 37 Me. 21; *Gracie v. Palmer*, 8 Wheat. (U. S.) 699; *Farrar v. U. S.*, 3 Pet. (U. S.) 459; *Pollard v. Dwight*, 4 Cranch (U. S.) 421; *Bishop v. Carpenter*, 1 Houst. (Del.) 526; *Murat v. Hutchinson*, 16 N. J. L. 46; *Schober v. Mather*, 49 Pa. St. 21; *Kittredge v. Emerson*, 15 N. H. 227; *Dix v. Palmer*, 5 How. Pr. (N. Y.) 233; *Van Vark v. Van Dam*, 14 Iowa 232; *Millette v. Mehmke*, 26 Minn. 306 (waiver service of copy of complaint);

Hayes v. Shattuck, 21 Cal. 51; *Smith v. Robinson*, 13 Met. (Mass.) 165; *Meng v. Houser*, 13 Rich. Eq. (S. Car.) 210; *Livingston v. Dick*, 1 La. Ann. 323; *Rogue River Min. Co. v. Walker*, 1 Oregon 341; *Townsend v. Stoddard*, 26 Ga. 430; *Kennedy v. Young*, 25 Ala. 563; *Ewbanks v. Ashley*, 36 Ill. 177; *Tuberville v. Long*, 3 Hen. & M. (Va.) 309; *Duncan v. Ripley*, 7 Ark. 100; *Keirn v. Carson*, 12 Smed. & M. (Miss.) 431. *Compare Cobb v. Decker*, 4 N. J. L. 119; *Beall v. Blake*, 13 Ga. 217; 58 Am. Dec. 513.

Exceptions.—It is held, however, that an appearance after a default on the service of a void summons, and making an unsuccessful motion to set aside the default, and contesting the damages, will not waive the error in the invalidity of the summons. *Briggs v. Sneghan*, 45 Ind. 14. And it is held that a voluntary appearance or acknowledgment of service made by defendant after judgment against him is not equivalent to a personal service as required by Code of *South Carolina*, § 162. *State v. Cohen*, 13 S. Car. 198.

The distinction between a general and special appearance is to be made, for an appearance by defendant in an action will not be held to waive defects in service of process unless a general appearance is entered, or some act amounting to an appearance is done, not referring to the particular right or remedy to be saved by a special appearance. *Muller v. Higgins*, 13 Abb. Pr. N. S. (N. Y.) 297.

3. This doctrine is also well established, though it has more complexities. *Earbee v. Ware*, 9 Port. (Ala.) 291; *Cheney v. Harding*, 21 Neb. 68; *Lewis v. State Bank*, 4 Ark. 443; *Hendrix v. Cawthorn*, 71 Ga. 742; *Battle*

2. By Appearance.—That the defendant's appearance in court waives all irregularities of process is undoubted. The difficulty lies in defining what is an "appearance," such as is sufficient to constitute a waiver of process. Properly, it is any pleading to the merits of the cause, or any proceeding for a purpose other than to take advantage of the defective process.¹ If defendant appears in order to take advantage of a defective process or

v. Eddy, 31 Tex. 368; *Bartlett v. Wheeler*, 31 La. Ann. 540; *State v. Cohen*, 13 S. Car. 198.

1. See Bouv. L. Dict., "*Appearance*." See also *ACTIONS*, vol. 1, p. 182; *Bank of the Valley v. Bank of Berkeley*, 3 W. Va. 386; *Bartlett v. Robbins*, 5 Met. (Mass.) 184; *Wiest v. Layendyk*, 73 Mich. 661; *Collier v. Morgan's, etc., R. Co.*, 41 La. Ann. 37 (putting to issue some matter presented by the petition); *Sears v. Starbird*, 78 Cal. 225; *Parrott v. Housatonic R. Co.*, 47 Conn. 575; *Lovell v. Sabin*, 15 N. H. 29; *Brewer v. Sibley*, 13 Met. (Mass.) 175. *Compare Beall v. Blake*, 13 Ga. 217; 58 Am. Dec. 513; *Abeel v. Conhyser*, 42 How. Pr. (N. Y.) 252 (effect of appearance where wrong party was served); *Clark v. Morrison*, 30 Ga. 393.

Instances of Appearance.—Following are cases in which it has been determined what proceedings constitute an appearance.

Application for Continuance.—In *Thayer v. Dove*, 8 Blackf. (Ind.) 567, the defendant moved for a dismissal of the suit, on the ground that the service of the summons was insufficient. This motion being overruled, the defendant moved for and obtained a continuance. The cause, on the day to which it was continued, was tried, and judgment rendered for the plaintiff. The defendant appealed to the circuit court, and there moved for a dismissal of the suit, on the same ground on which his motion to dismiss before the justice was made. It was held that the defendant, by moving for and obtaining the continuance, waived the objection as to the service of the summons. The same principle was upheld in *Peters v. St. Louis, etc., R. Co.*, 59 Mo. 406; *Ard v. State*, 114 Ind. 542; *Harvey v. Skipwith*, 16 Gratt. (Va.) 410; *State v. McCullough*, 3 Nev. 202. *Compare Bell v. Good*, 19 N. Y. Supp. 693.

And filing an affidavit for continuance is such an appearance as waives defects in process. *Stockdale v. Buckingham*, 11 Iowa 45; *Southern*

Bank v. Mechanics' Sav. Bank, 27 Ga. 252.

But a mere entry in the record that a cause was continued by consent of the parties does not constitute a waiver of service, and will not give the court jurisdiction if the process is defective. *Snow v. Grace*, 25 Ark. 570. *Compare Womack v. Shelton*, 31 Tex. 592.

Putting in a Demurrer.—After filing a demurrer the defendant cannot object that the process or service was defective. *Beard v. Smith*, 9 Iowa 50; *Hust v. Conn*, 12 Ind. 257; *Williams v. Miller*, 1 Wash. 88; *Large v. Bristol Steam Tow Boat Co.*, 2 Ashm. (Pa.) 394. *Compare State Ins. Co. v. Gran-ger*, 62 Iowa 272.

And also a motion to dismiss in the nature of a demurrer waives defects of service. *Townsend v. Stoddard*, 26 Ga. 430.

Filing a Plea.—The filing of a plea by the defendant is a waiver of defect or irregularity in the service of process. *Davis v. Patty*, 42 Miss. 509; *Bowin v. Sutherlin*, 44 Ala. 278; *Smith v. Gibson*, 83 Ala. 284; *Fitzgerald, etc., Const. Co. v. Fitzgerald*, 137 U. S. 98.

It may be a plea to the merits or otherwise. *Sears v. Starbird*, 78 Cal. 225; *O'Halloran v. Sullivan*, 1 Greene (Iowa) 75; *Whitaker v. Patton*, 1 Port. (Ala.) 9; *Briggs v. Humphrey*, 1 Allen (Mass.) 371; *Gilson v. Powers*, 16 Ill. 355; *Gay v. Hanger*, 3 Ark. 436.

An entry of record, "Came the parties by their attorneys, and defendant waives all service of writ, pleading, etc.," estops the defendant to object to the want of a writ, pleading, or want of authority in attorney of record. *Walker v. King*, 1 How. (Miss.) 17.

Likewise where a non-resident defendant is proceeded against as the statute directs by advertisement, and he afterwards appears and is allowed to plead, his appearance and answer constitute a waiver of objection to any irregularity of the previous proceedings. *Stone v. Welling*, 14 Mich. 514.

In *McGuire v. Church*, 49 Conn.

248, a factorizing process, with the officer's return of service on the garnishee, was signed with the officer's name by his clerk, and left by the officer with defendant. It was held by the court: 1. That the signature was invalid, rendering the service defective and the attachment void; 2. That defendant's appearing in court and pleading to the merits was a waiver of service upon himself personally, but did not validate the attachment.

If, however, a party have not legal notice of the suit, his appearance for the purpose of taking an exception, by plea in abatement, or otherwise, is not a waiver of the ground of exception. *Tingley v. Bateman*, 10 Mass. 343; *Gardner v. Barker*, 12 Mass. 36; *Bernard v. Brewer*, 2 Wash. (Va.) 76; *Wheeler v. Lampman*, 14 Johns. (N. Y.) 481; *Malcom v. Rogers*, 1 Cow. (N. Y.) 1.

Putting in an Answer.—*Sprague v. Sprague*, 7 J. J. Marsh. (Ky.) 331; *State v. Bacon Club*, 44 Mo. App. 86; *Com. v. Helms*, 8 Pa. Co. Ct. Rep. 410 (*quo warranto* case). Compare *Christian v. Williams*, 35 Mo. App. 297 (Mo. 1892), 20 S. W. Rep. 96.

And if defendants answer without indicating wherein the service of summons upon them was defective, any objection on the ground of such defect is waived. *Randall v. Meredith* (Tex. 1889), 11 S. W. Rep. 170; *Ahner v. New York, etc., R. Co.*, 14 N. Y. Supp. 365.

Entering Into a Recognizance.—Where a defendant is arrested and brought into court, and at his own suggestion enters into a recognizance for his appearance at a subsequent time, he waives all defects and irregularities of the warrant and arrest. *Junction City v. Keefe*, 40 Kan. 275; *Ard v. State*, 114 Ind. 542.

Securing a Change of Venue.—*Radcliff v. Noyes*, 43 Ill. 318; *Craig v. Smith*, 10 Colo. 220. This is true whether the venue be changed by agreement of parties or by order of court.

Making a motion and giving the bond for the removal of a case is an appearance. *Atchison v. Morris*, 11 Fed. Rep. 582. Compare, however, *Sayles v. Northwestern Ins. Co.*, 2 Curt. (U. S.) 212; and this latter case is said to state the better doctrine. *Porter Land, etc., Co. v. Baskin*, 43 Fed. Rep. 327.

Submitting to a Trial Upon the Merits.

—Even though a motion to dismiss the suit for the irregularities had been previously made and wrongly overruled. *Heeron v. Beckwith*, 1 Wis. 17; *Seymour v. Bradfield*, 35 Barb. (N. Y.) 49; *Moss v. Raynor*, 1 How. Pr. (N. Y.) 110; *Johnson v. MacCoy*, 32 W. Va. 552; *White v. Rankin*, 2 Blackf. (Ind.) 78.

Other Cases.—A defendant was absent in the military service, and therefore was privileged from service of process during that time; a subpoena in chancery was served by leaving a copy at his residence; but he afterwards conferred with the plaintiff upon a foreclosure sale made in pursuance of a decree obtained on such service, and became a purchaser thereat. By such action any right to question the regularity of the service was waived. *Meng v. Houser*, 13 Rich. Eq. (S. Car.) 210.

To appear merely to ask for an adjournment is a waiver of objection to proof of service. *Utica City Bank v. Buell*, 9 Abb. Pr. (N. Y.) 385; *Com. v. Helms*, 8 Pa. Co. Ct. Rep. 410; *Palmer v. Sanders*, 51 N. J. L. 408.

The prosecution of a writ of error will operate to cure a defective service or return of process. *Bustamente v. Bescher*, 43 Miss. 172.

An error in a citation to an executor, to account, is waived by an appearance of the executor and his submitting to account. *Sankey v. Sankey*, 6 Ala. 607; *Davis v. Davis*, 6 Ala. 611.

See also, in this connection, *Womack v. Shelton*, 31 Tex. 592; *State v. Clark*, 44 Vt. 636; *Dugan v. Mayor, etc., of Baltimore*, 70 Md. 1; *Low v. Mills*, 61 Mich. 35 (waiver implied from failure to make objection).

Irregularities in a summons are also considered as waived by appealing after default, though defendant appear specially in the appellate court to move to dismiss the action. *Gage v. Maryatt*, 9 Mont. 265.

In *Texas*, it is a statutory rule that if a defendant appears and moves to quash the service or citation, he is deemed to enter an appearance to the merits for the next term of court, whether his motion is sustained or not. *Central, etc., R. Co. v. Morris*, 68 Tex. 49; 28 Am. & Eng. R. Cas. 50. See also *Feibleman v. Edmunds*, 69 Tex. 334.

Instances of Non-appearance.—In order to take advantage of a defect in

service, and his motion to dismiss the suit on that ground is overruled, he cannot even then proceed to trial without making a virtual waiver of his original objections. If he desires to insist upon the defective process for the defense, he must rely upon the appellate court to sustain his original motion.¹

process it is evident that the defendant must appear in court; but an appearance for this purpose alone is not such an appearance as waives the want of proper process or service.

Motion to Dismiss the Suit.—Thus where the defendant appeared by his attorneys and moved the court to set aside the summons, and to dismiss the action, because the service was made on the return day of the summons; and the appearance was made expressly for the purposes of such motion only, and the motion was signed by the attorneys as attorneys for the purposes of the motion only; and no other appearance was made by the defendant in the case, it was held that such an appearance did not have the effect to waive service, or to cure the irregular service already made. *Senicock v. First Nat. Bank*, 14 Kan. 529; *Lyman v. Milton*, 44 Cal. 635.

In a somewhat similar case it was held that a special appearance by a defendant for the sole purpose of moving to set aside the service of the summons, is not a waiver of the defect objected to, and if the court, on overruling such motion, adds a provision to the order giving the defendant ten days' time to answer, and staying judgment in the meantime, it not appearing that such provision was asked for by the defendant, such provision does not give any additional effect to the special appearance, nor justify the conclusion that the defendant waived his objection. *Upper Mississippi Transp. Co. v. Whittaker*, 16 Wis. 220. If such provision, however, was incorporated in the order overruling the motion to dismiss on application of the defendant, it was a waiver of previous defects in the service of the process, and an appearance in the cause. *Upper Mississippi Transp. Co. v. Whittaker*, 16 Wis. 220.

Again, on the return-day of the writ, defendant moved to quash it, as not having been served a sufficient number of days before the return day; the magistrate took time to consider the motion, the complainant then agreed to submit the motion without argument if the defendant would plead to

the complaint, whereupon defendant pleaded not guilty, and it was continued. It was held that the defendant had not waived his motion, and that the plea was provisional merely; and since the decision on the motion was rightly for defendant, that the magistrate did not acquire jurisdiction. *Sal-lee v. Ireland*, 9 Mich. 154.

This main principle has been decided in many other cases. A motion to set aside a judgment by default, or to quash the writ, or to dismiss the suit, is not an appearance waiving process. *Gray v. Hawes*, 8 Cal. 562; *Schoonhoven v. Gott*, 20 Ill. 46; 71 Am. Dec. 247; *ACTIONS*, vol. 1, p. 183.

In *Deidesheimer v. Brown*, 8 Cal. 339, this principle was carried so far as to induce the court to hold that proceeding to trial after first appearing with a motion to dismiss for defect in the summons, which is overruled, is no waiver of the irregularity. But this carries the doctrine to an extreme, and cannot be considered as stating the law correctly, being opposed by numerous cases, including those just cited.

An omission to serve petition and citation is not cured by service of a writ of arrest; nor can defendant's appearance, by counsel, on motion to set aside the arrest, be considered a waiver of service, nor as authorizing the presumption of its acknowledgment. *Jacobs v. Sartorius*, 3 La. Ann. 9.

Taking Depositions.—If a defendant, pending his motion to quash the plaintiff's writ, take depositions to be used in the cause, he does not thereby waive his motion. *Briggs v. Davis*, 34 Me. 158. See also *ACTIONS*, vol. 1, p. 183.

Asking for Removal.—An appearance merely to ask for a removal of the cause to the federal court is not a waiver of service. *Reifsnider v. American Imp. Pub. Co.*, 45 Fed. Rep. 433.

1. *Briggs v. Sneghan*, 45 Ind. 14; *Ard v. State*, 114 Ind. 542; *Muller v. Higgins*, 13 Abb. Pr. N. S. (N. Y.) 297; *Sweeney v. Schultes*, 19 Nev. 53; *Peters v. St. Louis, etc., R. Co.*, 59 Mo. 406; *Harvey v. Skipnith*, 16 Gratt. (Va.) 410.

The fact that the process was void and that the defendant was ignorant of it at the time, does not prevent his appearance being a waiver of all defects.¹

3. By Acceptance or Acknowledgment.—Defects or irregularities in the service or return of process may also be waived by admission or acceptance of service, generally indorsed upon the writ;² and when such an admission is made, the party is considered to

1. *Pixley v. Winchell*, 7 Cow. (N. Y.) 366; 17 Am. Dec. 525. *Compare*, however, *Voorhies v. Scofield*, 7 How. Pr. (N. Y.) 51, where it is said that an appearance only waives such defects as appear upon the face of the summons. Nor is the legal effect of a general appearance changed by the fact that the defendant appeared because his right to attach was imperiled by the proceedings. *Olcott v. MacLean*, 73 N. Y. 223.

2. *Carter v. Penn*, 79 Ga. 747; *New York Code Civ. Proc.*, § 434; *Metz v. Bremond*, 13 Tex. 394; *Jewett v. Miller*, 19 Tex. 290; *Montgomery v. Tutt*, 11 Cal. 307; *Earbee v. Ware*, 9 Port. (Ala.) 291; *Woodward v. Clegge*, 8 Ala. 317; *Cheney v. Harding*, 21 Neb. 65; *Ayres v. Hill*, 82 Ala. 401; *Young v. South Tredegar Iron Co.*, 85 Tenn. 189. *Compare* *Garner v. Gantt*, 7 Port. (Ala.) 452.

The genuineness of the acknowledgment of service must be shown by a return of the officer, and it is not sufficient to show that the writ has been in his hands. And a written acknowledgment of service of a subpoena, without proof of its genuineness, is not sufficient service to authorize a decree. *Jackson v. Speed*, 3 J. J. Marsh. (Ky.) 56; *Gatewood v. Rucker*, 1 T. B. Mon. (Ky.) 21; *Norwood v. Riddle*, 9 Port. (Ala.) 425; *Ex parte Gibson*, 10 Ark. 572; *Segars v. Segars*, 76 Me. 96.

A paper reading as follows was found in the record with no file mark: "B, administrator, having instituted suit on a note given by N, R and W for \$950, due 1st of March, 1860; now I, said N, hereby acknowledge service of said suit, and waive all process, this 8th of April, 1860. (Signed) A N." Such a paper could not be taken as a waiver of process in a suit two days after its date, on two notes of nearly double \$950. *Neill v. Baker*, 28 Tex. 345.

In *Clary v. Morehouse*, 3 Ark. 261, this indorsement appeared upon a declaration in debt. "We, D, C and A W, the within defendants, do hereby

acknowledge service of the within declaration and waive the necessity of any process issuing thereon. Given under our hands this 23d day of March, 1838." The declaration was entitled of the term of the court to be held on the first Monday after the fourth Monday in April, 1838. No writ was issued in the case, nor was any appearance to the action ever entered by C and W or either of them; but they being called and not appearing, final judgment was given against them by default. The court held, however, that such indorsement was a mere simple agreement entered into by the parties, which could not dispense with a service of process, and could not authorize a judgment by default. It is doubted whether the doctrine of this case can be sustained, since it seems contrary both to principle and the doctrine of many cases. The object of process, as before stated, is merely to give the defendant notice; and if he agrees to appear without being served, it would seem that he cannot claim the defense of no service made. See in addition to the foregoing cases, *Ex parte Gibson*, 10 Ark. 572; *Humphreys v. Humphreys*, Morr. (Iowa) 359. See also *Alderson v. Bell*, 9 Cal. 315, where it is held that the recital in the decree of foreclosure that the defendants had been regularly served with process or had waived service by their acknowledgment, was sufficient evidence that the requisite proof was produced to establish the genuineness of the signatures of the defendants to the admission; and even if there were no such recitals in the decree, and there was an entire absence of evidence in the record on the point, that still the presumption would be in favor of the jurisdiction of the court and of the regularity of its proceedings. *Maples v. Mackey*, 15 Hun (N. Y.) 533; *Cook v. Darling*, 18 Pick. (Mass.) 393; *Crane v. Brannon*, 3 Cal. 192; *Woodward v. Clegge*, 8 Ala. 317.

have notice of, and to be bound by all proceedings under the process served;¹ but an admission of service is not to be confounded with an express waiver of service of process. Where the acknowledgment is properly made—that is in writing and by the defendant himself—there is little question as to its effect;² but where the acknowledgment is made by some one other than defendant—for example, by his attorney or agent—its effect depends upon the character of the agency, and whether the agent or attorney is one authorized to make an acknowledgment of service.³ If it is made by anyone other than the defendant, or his attorney of record, or specially authorized agent, it is of no effect. A husband cannot acknowledge service for his wife,⁴ nor will an admission of service by one of two defendants dispense with the necessity of proper service on the other.⁵

1. *Gay v. Grant*, 101 N. Car. 206.

2. *Montgomery v. Tutt*, 11 Cal. 307; *Segars v. Segars*, 76 Me. 96; *Carter v. Penn.* 79 Ga. 747; *Battle v. Eddy*, 31 Tex. 368; *Jewett v. Miller*, 19 Tex. 290; *Boyman v. Brower*, 6 How. (Miss.) 43 (acknowledgment written on process must be proved); *Johnson v. Dilbridge*, 35 Mich. 436.

Compare *Chapman v. Allen*, Morr. (Iowa) 23, which holds that where service of process is required to be by copy, it may be waived by the defendant by parol.

Under the *Texas* statute, a defendant's acceptance of service and waiver of process, indorsed on the petition in the suit against him, before it was filed, will not support a judgment by default. *McAnelly v. Ward*, 72 Tex. 342. And in *Johnson v. Delbridge*, 35 Mich. 436, it was held that an acknowledgment of service would not support a judgment by default in the absence of proof of the authenticity of such indorsement. *Bozman v. Brower*, 6 How. (Miss.) 43.

3. The attorney must be an attorney of record. *Segars v. Segars*, 76 Me. 96. Indeed, it is said that an attorney in order to accept service for his client, must be specially authorized to do so. *Whitly v. Barker*, 1 Root (Conn.) 406. See also *Clark v. Morrison*, 85 Ga. 229.

In the absence of any showing to the contrary, an attorney acknowledging service on the back of a summons, will be presumed to have had authority for so doing. *Marling v. Robrecht*, 13 W. Va. 440; *Ingram v. Richardson*, 2 La. Ann. 839.

A judgment *in personam* has been held to be based upon sufficient service where the acknowledgment of service

was made by defendant's attorney.

Hendrix v. Cawthorn, 71 Ga. 742.

4. *Gaylord v. Payne*, 3 Conn. 258; *Clark v. Morrison*, 85 Ga. 229. A written acknowledgment, however, by a *curator ad hoc*, of service of petition and citation addressed to him as such, brings the defendant into court and interrupts prescription. *Bartlett v. Wheeler*, 31 La. Ann. 540; *Ingram v. Richardson*, 2 La. Ann. 839.

A letter authorizing a person to acknowledge service of the declaration on behalf of a defendant, invests him with no authority to waive process. *Clark v. Morrison*, 85 Ga. 229.

"Legal service" of summons issued against a defendant was accepted by his son, who was not a member of his family, and who had no authority to accept service of process for him; neither was defendant informed of nor did he consent to said acceptance. Under such circumstances it was very properly held that there was no legal service on defendant, and the judgment had thereon was void. *Finney v. Clark*, 86 Va. 344.

Gen. Laws *Texas* 1885, art. 1347a, provide that the acceptance of service and waiver of process shall not in any action be authorized by an instrument sued on or executed prior to the institution of such suit, nor shall it be made until after suit brought. Under this the defendant's acceptance of service and waiver of process indorsed on the petition in the suit against him, before it was filed, will not support a judgment by default. *McAnelly v. Ward*, 72 Tex. 342.

5. *Hendrix v. Fuller*, 7 Kan. 331; *supra*, this title, *Upon Several Defendants*.

It is not essential that the admission or acceptance of service should be in writing, unless the statute requires it to be so;¹ nor that the written acceptance indorsed on the process should state the time and place of service.²

An acceptance of service induced by fraud or imposition is not binding, unless by failure to object, the right to object is waived.³

a. EFFECT OF ACKNOWLEDGMENT OF SERVICE.—A mere acknowledgment of service cures defects in the manner of service only, or in the officer's return; it does not cure a defect or irregularity in the process itself; so that an acceptance of service of a summons which gave no notice of the time of appearance is no waiver of such a defect.⁴ An acknowledgment of service made by a defendant is conclusive against him, and he is estopped to deny it, though, if he improperly makes an admission in order to benefit one of the plaintiffs to the injury of another, the court will correct it.⁵ This principle has been carried so far as to

1. *Chapman v. Allen*, 1 Morr. (Iowa), 23 (parol waiver held sufficient); *Montgomery v. Tutt*, 11 Cal. 307; *Godwin v. Monds*, 106 N. Car. 448 (verbal acknowledgment insufficient); *Wade v. Wisenart*, 86 Ga. 482.

In *Godwin v. Monds*, 106 N. Car. 448, the sheriff served a summons on the defendants while they were out of his jurisdiction. He informed them of the fact and said that he would send it to the proper sheriff to serve. They then told him not to do that but to mark it "served" and that they would accept service in that way. It was held that this was not a sufficient compliance with the statute which required a "written" admission of service. Compare *Johnson v. Johnson*, 52 Ga. 449; where a similar admission was held to estop the defendant to deny service.

2. *Nicholson v. Cox*, 83 N. Car. 44; 35 Am. Rep. 556; *Alderson v. Bell*, 9 Cal. 315.

A failure to waive process in the acceptance of service may be cured by amendment. *Scudder v. Massengill*, 88 Ga. 245.

3. *Acceptance Induced by Fraud*—*Void*.—*Pfiffner v. Krapfel*, 28 Iowa 27 (evidence of fraud); *Trolan v. Fagan*, 48 How. Pr. (N. Y.) 240 (acceptance antedated).

4. *Falkner v. Guild*, 10 Wis. 563; *Donlevy v. Cooper*, 2 Nott & M. (S. Car.) 548; *Aycock v. Leitner*, 29 Ga. 197; *New York Code Civ. Proc.*, § 434.

The Code of Civil Procedure of *Nebraska* declares an acknowledgment of service endorsed upon the back of

a summons to be equivalent to a service. Under this statutory rule it is held that such an acknowledgment is equivalent to an actual legal service of the summons by the sheriff to whom it is directed; and is not merely equivalent to a substituted or constructive service. *Cheney v. Harding*, 21 Neb. 65.

Where the sheriff, as defendant in an action for wrongful seizure, acknowledges service in writing, and waives service of a copy of the summons and complaint, he thereby waives any irregularity in the form of the summons—*e. g.*, that he being sheriff and defendant, the summons ought to have been addressed to the coroner. *Ayres v. Hill*, 82 Ala. 401.

Where the defendant acknowledges service of the complaint and waives a summons, the cause will stand in court as if it had been commenced by a summons issued on the day when the service of the complaint was acknowledged and the summons waived. *Tuscaloosa, etc., Co. v. Tuscaloosa*, 38 Ala. 514.

5. For example, where an admission of personal service of a summons and complaint is antedated by the defendant, for the purpose of giving the plaintiff preference over another judgment creditor of the defendant, in an entry of judgment by default, although the defendant might be estopped from questioning the date of the admission, not so with the subsequent judgment creditor, who is authorized to have the first judgment set aside on his motion, as against his judgment. *Trolan v. Fagan*, 48 How. Pr. (N. Y.) 240.

render an acceptance of service valid as against a defendant, even though made outside of the State from whence the process issued.¹

IX. RETURN OF PROCESS.²—No valid judgment can be based upon any service of process unless it appears that a proper return has been made.³ This return is virtually an indorsement in writing on the back of the writ, or on a schedule attached to it,⁴ made by the sheriff or other officer serving the writ,⁵ stating the manner of service. The indorsement does not assume the character

Where the defendant, in an action to recover lands bought under execution, was a purchaser from the judgment debtor, and had accepted service as attorney in fact for the debtor, of the original process in the suit in which the execution was issued, he could not, in defense of the suit for possession, set up an insufficient service of process on the judgment debtor. *Adicks v. Lowry*, 12 S. Car. 97.

1. Thus, although a subpoena to answer cannot be served upon a defendant out of the State, yet if he accepts the service as regular, he cannot afterwards object to the regularity of the subsequent proceedings, on account of such service. *Dun v. Dun*, 4 Paige (N. Y.) 425; *Cheney v. Harding*, 21 Neb. 65; *Talman v. Barnes*, 12 Wend. (N. Y.) 227.

The principle is, however, by no means universally recognized. It is held in *Wisconsin* that in a suit for a divorce, service of the summons upon the defendant in another State is void. And a written admission of service, in such a case, signed by the defendant in another State, with an agreement to "waive any other service," was held not sufficient to give the court here jurisdiction, but that it could be given only by an appearance. *Weatherbee v. Weatherbee*, 20 Wis. 499. This case is strongly upheld in *Litchfield v. Burwell*, 5 How. Pr. (N. Y.) 341. See also *Hulbert v. Hope Mut. Ins. Co.*, 4 How. Pr. (N. Y.) 275.

2. **Meaning of "Process."**—The term "process" in this connection is intended to include only original and mesne process, unless otherwise stated. For the character of a return on final process, see *EXECUTIONS*, vol. 7, p. 155; *REPLEVIN*; *SHERIFFS*.

As to the character of the return on various particular writs see *HABEAS CORPUS*, vol. 9, pp. 184-195; *MANDAMUS*, vol. 14, pp. 230-238; *CERTIORARI*, vol. 3, p. 61; *ATTACHMENT*, vol. 1, p. 921; *FOREIGN ATTACHMENT*, vol. 8,

p. 323. See also *DUE*, vol. 6, p. 42, note; *FILE*, vol. 7, p. 963.

3. **Necessity of Return.**—A court has no jurisdiction over a cause, where the writ served therein has not been returned to court. *Dunn v. Ball*, 2 R. I. 450; *Bradley v. Lamb*, Hard. (Ky.) 536. This principle is undoubtedly true of mesne process; but in case of final process, the writ takes effect from the time of the levy or of its delivery to the officer, so that the process begins to operate before the return is made.

"An execution executed is the end of the law." See *ATTACHMENT*, vol. 1, p. 921; *EXECUTION*, vol. 7, p. 155; 4 *Minor's Inst.* (2d ed.), p. 839. Thus, in a *California* case it is held that the lien of an attachment takes effect immediately upon the levy and the record thereof, and is not divested by a failure of the sheriff to make the proper return; the facts can be established by other evidence. The deposit of the writ, etc., is what operates as a notice to the world. *Ritter v. Scannell*, 11 Cal. 238; 70 Am. Dec. 775. Compare *Offterdinger v. Ford* (Va. 1890), 12 S. E. Rep. 1.

4. *Dickson v. Peppers*, 7 Ired. (N. Car.) 429. And if made on a schedule attached, a reference to it should appear in the writ. *Watson on Sheriffs* 68. An indorsement of the return of attachment upon the petition annexed to the writ instead of the writ itself is only an irregularity of form which will not avoid the jurisdiction of the court. *Johnson v. Gilkeson*, 81 Mo. 55; *Murfree on Sheriffs* (2d ed.), § 836a.

5. *Murfree on Sheriffs* (2d ed.), §§ 835-6; 3 Bl. Com. 275; *Watson on Sheriffs* 68; *State v. Melton*, 8 Mo. 417. In this case it was defined thus: "The statement by the officer, upon a writ, of the manner in which it has been executed, and filing it in the clerk's office, constitute the 'return' in law."

The statutes almost invariably require the return of the officer upon a

of a return, however, until the writ is actually returned into the office out of which it issued.¹

In the United States it is generally the duty of the sheriff or other officer to make a return upon process served by him officially. At common law, however, if either the plaintiff or defendant desired a return, the sheriff must be ruled to make one.²

The return is made by the officer serving the process, but it seems to be a usual requirement that the name of the sheriff shall be signed in all cases where no one other than the sheriff or his deputized officer is authorized to execute the process.³ The officer need not state in his return the county of which he is an officer, or where the writ was served, since it will be presumed that he has acted within his jurisdiction.⁴ A marshal's return,

writ to be in writing, and where this is the case the whole must be in writing. Parol evidence is not admitted to contradict or explain it. *Purington v. Loring*, 7 Mass. 388; *Wilson v. Loring*, 7 Mass. 392; *Wellington v. Gale*, 13 Mass. 483.

1. *Nelson v. Cook*, 19 Ill. 440; *State v. Melton*, 8 Mo. 417; *Welsh v. Jay*, 13 Pick. (Mass.) 482; *Garlick v. Sangster*, 9 Bing. 46; 23 E. C. L. 259.

2. *Murfree on Sheriffs* (2d ed.), § 853; *U. S. v. Scroggins*, 3 Woods (U. S.) 529; *Frances v. Clarkson*, 2 Dowl. P. C. 532; *Lewis v. State Bank*, 4 Ark. 447; *Edmunds v. Watson*, 7 Taunt. 5; 2 E. C. L. 5; *Richardson v. Trundle*, 8 C. B. N. S. 474; 98 E. C. L. 474. See also *SHERIFFS*.

3. *Return Where Service Is Made by Deputy*.—*Gray v. Wolf*, 77 Iowa 630; *Thomas v. Colorado Nat. Bank*, 11 Colo. 611; *Reinhart v. Lugo*, 86 Cal. 395; *Martin v. Gray*, 142 U. S. 236. If the process is served by a deputy it should be signed with the sheriff's name, with the deputy's added. *Glencoe v. People*, 78 Ill. 382; *Briggs v. Greenlee, Minor* (Ala.) 123; *Murfree on Sheriffs* (2d ed.), § 836; *Sheppard v. Hill*, 5 Ark. 308; *Rowley v. Howard*, 23 Cal. 401; *Reinhart v. Lugo*, 86 Cal. 395; *Johnson v. Johnson*, 23 Fla. 413; *Dennison v. Story*, 1 Oregon 272; *Emley v. Drum*, 36 Pa. St. 123.

In *Barber v. Goodell*, 56 How. Pr. (N. Y.) 364, the deputy had died before making proof of service of summons and other papers served by him. On affidavits showing statements made by him during his illness as to the time and place of service, the sheriff was directed to make a return of service in accordance with the facts stated in the affidavits.

In the four States of *Michigan, Tex-*

as, South Carolina and Vermont, the rule is different from that of the text. *Calendar v. Olcott*, 1 Mich. 344; *Towns v. Harris*, 13 Tex. 507; *De Villiers v. Ford*, 2 McCord (S. Car.) 144; *Eastman v. Curtis*, 4 Vt. 616. So in the federal courts, *Hill v. Gordon*, 45 Fed. Rep. 276.

Thus where a sheriff authorized, by indorsement on a writ, another to execute it, and the writ was returned served, and the return signed by the person authorized as "deputy sheriff," it was held that the return should have been in the name of the sheriff. *Bolard v. Mason*, 66 Pa. St. 138. See also *Bennethum v. Bowers*, 133 Pa. St. 332. Compare *Nelson v. Nye*, 43 Miss. 124. But in *Illinois* it is held that in such a case the return need not be in the name of the sheriff. The reason, however, for not requiring it was, that the return by such person must be under oath. *Glencoe v. People*, 78 Ill. 382. A sheriff's return needs no proof of his signature in the court of which he is an officer. *McDonald v. Carson*, 94 N. Car. 497.

An averment that a sheriff's return was signed is unnecessary; this will be presumed. *Rives v. Kumler*, 27 Ill. 291.

In *Thomas v. Goodman*, 25 Tex. Supp. 446, it is said that the omission of the signature is a fatal defect, which cannot be cured by a subsequent affidavit of the officer. *Simmes v. Simmes* (Tex. 1889), 11 S. W. Rep. 665. But it seems that if the return is correct in other particulars a failure by the deputy to affix his principal's name is a mere irregularity which may be amended. *Hill v. Gordon*, 45 Fed. Rep. 276.

4. *Whiting v. Hagerty*, 5 La. Ann. 686; *Gilbert v. Brown*, 9 Neb. 90;

however, must show that it was executed within his district.¹ In case of process issuing from a justice's court, the constable, being the ministerial officer of the court whose duty it is to serve process, should sign the return.²

In some States, notably *New York* and others, where a new system of practice has been introduced, the return on process is substituted by the sheriff's certificate, which he is required to attach to whatever process he serves. Its character and effect is virtually that of the old return. In case of service made by a private person, the return is replaced by such person's affidavit of service. The rules, however, which apply to returns generally will also apply to such certificates or affidavits.³

Calderwood v. Brooks, 28 Cal. 151; *Baltimore, etc., R. Co. v. Brant* (Ind. 1892), 31 N. E. Rep. 464; *Knowles v. Logansport Gaslight, etc., Co.*, 19 Wall. (U. S.) 59; *Davis v. Burt*, 7 Iowa 56; *Crane v. Brannan*, 3 Cal. 192; *Henry v. Ward*, 4 Ark. 150; *Crowley v. Wallace*, 12 Mo. 143; *Richardson v. Smith*, 1 Allen (Mass.) 541; *Bushey v. Rathes*, 45 Mich. 181; *McAbee v. Parker*, 78 Ala. 573; *Davis v. Richmond*, 35 Vt. 419. Consult, also, *Zwickey v. Haney*, 63 Wis. 464, and *Higgins v. Bullock*, 66 Ill. 37, where it is said that a court will always take judicial notice of the counties of the State. But in *Gully v. Sanders*, Litt. Sel. Cas. (Ky.) 424, a return by a deputy sheriff that defendant is "no inhabitant of my bailiwick," is not equivalent to a return that he is no inhabitant of the county.

The service of a decree *nisi*, or other paper by a sheriff, which is not directed to him in his official capacity, should be authenticated by affidavit. *Anonymous*, 1 Hen. & M. (Va.) 206.

1. *Allen v. Blunt*, 1 Blatchf. (U. S.) 480; 8 N. Y. Leg. Obs. 105.

2. The statutory requirement, that the return of process to a justice's court shall be signed by the constable serving the same, is satisfied, for the purpose of supporting a judgment attacked collaterally, by a return made out in the presence of the constable, by the justice. *Reno v. Pinder*, 20 N. Y. 298, reversing 24 Barb. (N. Y.) 423.

The constable's certificate of service of a paper is no evidence of such service unless it was his duty to make such service. *Pool v. Wedemeyer*, 56 Tex. 287.

3. *New York Code Civ. Proc.*, § 434; *Litchfield v. Burwell*, 5 How. Pr. (N.

Y.) 341; *Morrell v. Kimball*, 4 Abb. Pr. (N. Y.) 352; *Sayles v. Davis*, 20 Wis. 302; *Wostenholm v. State*, 71 Ga. 669 (service of bill of exceptions by attorney).

Certificate of Service.—This certificate is made in like manner and form, and has the same requisites as an ordinary return. *Larned v. Wilcox*, 4 Mich. 333. See also, as to sufficiency of such certificates, *Clark v. Lichtenberg*, 33 Mich. 307; *Elliot v. Preston*, 44 Mich. 189; *Taylor v. Taylor*, 64 Ind. 356; *McMullen v. Mackey*, 53 Hun (N. Y.) 638; *Friend v. Green*, 43 Kan. 167; *Norton v. Meader*, 4 Sawy. (U. S.) 618; *Pool v. Wedemeyer*, 56 Tex. 287 (effect of constable's certificate); *Robinson v. McManus*, 4 Lans. (N. Y.) 380 (same, oral proof of service); *Roberts v. Burris*, 12 Iowa 394 (proof of service by mail cannot be shown merely from certificate of the clerk of the court).

A sheriff's certificate of service does not lose its force by lapse of time or by being used upon the entry of a judgment afterwards vacated. It may be used upon a second application for judgment. *Brien v. Casey*, 2 Abb. Pr. (N. Y.) 416.

A sheriff's certificate is not proof of service of an order in supplementary proceeding; such order is not process, and the statute does not authorize its service to be proved by certificate. *Utica City Bank v. Buell*, 9 Abb. Pr. (N. Y.) 385; 17 How. Pr. (N. Y.) 498. Nor is the official certificate of a sheriff of another State evidence in *New York* of service of papers from the courts of the latter; his affidavit should be presented. *Thurston v. King*, 1 Abb. Pr. (N. Y.) 126; *Morrell v. Kimball*, 4 Abb. Pr. (N. Y.) 352.

It has been held in *New York* that "the defendant's affidavit as to the time of service upon him is conclusive against a deputy sheriff's certificate. In such a case the sheriff is put to his affidavit." *Campbell v. Self*, 2 How. Pr. (N. Y.) 35. Compare *Sargent v. Meade* (Supreme Ct.), 1 N. Y. Supp. 589.

Affidavit of Service.—This is of purely statutory origin, service by any one other than the sheriff being unknown at common law. It is usually required that the affidavit of service should state the time, place, and manner of service, no distinction appearing to be made between the affidavit in case of personal service and that in constructive service. And, where a summons is served by any person other than the sheriff, and the affidavit of such person fails to show at what place it was served, and in case of personal service that he knew the person served to be the person mentioned in the summons, there being no appearance by defendant before judgment, there is nothing to show that the court acquired jurisdiction of his person. *Sayles v. Davis*, 20 Wis. 302; *Lewis v. Hartel*, 24 Wis. 504; *Grantier v. Rosecrance*, 27 Wis. 488; *German Mut., etc., F. Ins. Co. v. Decker*, 74 Wis. 556; *Murdock v. Hilmyer*, 45 Mo. App. 287; *Forbes v. Bringe*, 32 Neb. 757; *Lyles v. Haskell*, 35 S. Car. 391; *National Exchange Bank v. Stelling*, 31 S. Car. 360; *Doty v. Berea College* (Ky. 1891), 15 S. W. Rep. 1063; *Hog's Back, etc., Min. Co. v. New Basil, etc., Min. Co.*, 63 Cal. 121 (sufficiency of affidavit of service by mail); *Howard v. Galloway*, 60 Cal. 10; *Weil v. Bent*, 60 Cal. 603. So that an affidavit of service by one who was not an officer of the court is not sufficient which merely states that "A B, being first duly sworn on oath, says that on the 3d day of May, 1864, he served a copy of the within summons and complaint on C D, who is personally known to this affiant, by giving and leaving with him a copy thereof," etc. *Sayles v. Davis*, 20 Wis. 302. See also *Etna L. Ins. Co. v. McCormick*, 20 Wis. 265; *Romain v. Muscatine Co., Morr. (Iowa)* 357; *Coffee v. Gates*, 28 Ark. 43; *Reed v. Catlin*, 49 Wis. 686.

In *California* it is held that the affidavit must allege that the person serving the writ is over eighteen years of age, and if it fails to do so a judgment by default cannot be sustained. *Barney*

v. Vigoureaux, 75 Cal. 376; *Horton v. Gallardo*, 88 Cal. 581; *Maynard v. MacCrellish*, 57 Cal. 355; *Doerfler v. Schmidt*, 64 Cal. 265. But in another case it was held that such a mistake was a mere irregularity, and that a judgment in the case by default could not be attacked collaterally on the ground of it. *Peck v. Strauss*, 33 Cal. 678. A statement that person making service was "a white male citizen of the United States" is not equivalent to saying that he was over eighteen years old, and is therefore insufficient. *Lyons v. Cunningham*, 66 Cal. 42. See also *Williamson v. Cummings Rock Drill Co.*, 95 Cal. 652. It is sufficient to state the county in which service was made, as it will be presumed, nothing appearing to the contrary, that he resided in the county in which service was made. *Calderwood v. Brooks*, 28 Cal. 151. See also, in this general connection, *Dimick v. Campbell*, 31 Cal. 238; *Moulton v. De MaCarty*, 6 Robt. (N. Y.) 470; *Dellisser v. New York, etc., R. Co.*, 59 N. Y. Super. Ct. 233; *Robinson v. McManus*, 4 Lans. (N. Y.) 380; *Steinle v. Bell*, 12 Abb. Pr. N. S. (N. Y.) 172; *Pellier v. Gillespie*, 67 Cal. 582; *Gale v. Townsend*, 45 Minn. 357; *McCall v. Towers*, 1 Cranch (C. C.) 42; *Edmonds v. Buel*, 23 Conn. 242 (service of attachment by indifferent person need not be authenticated by affidavit of service); *Barnett v. Montgomery*, 6 Mon. (Ky.) 527 (affidavit of private person of delivery of subpoena, insufficient evidence of service).

Where a private individual certified upon oath, on the back of a copy of a bill in chancery, duly attested by the clerk, that he had given a true and attested copy thereof to the defendant, residing out of the State; and also made a like certificate upon the subpoena, it was considered sufficient evidence of proper service. *Stone v. Anderson*, 25 N. H. 221.

An affidavit of service is not conclusive upon the defendant. The supreme court has power on motion to inquire into the fact of alleged service of its own process. *Van Rensselaer v. Chadwick*, 7 How. Pr. (N. Y.) 297; *Wallis v. Lott*, 15 How. Pr. (N. Y.) 567.

A statute requiring the return of service of summons, when made by a special deputy, to be verified by oath is complied with if the return is verified by the affidavit of the person making the service. The matter may be reduced to the form of an affidavit,

1. **Requisites of Return.**—The return is the means by which the court is to be informed of the fact or legality of service; it must, therefore, affirmatively show everything necessary to constitute a valid service,¹ and must respond to the mandate of the writ.² Its contents vary according to the character of the service, whether actual personal service or constructive.

It should always follow the words prescribed in the statute, but a substantial compliance, it seems, is sufficient, and a refusal to give it effect on merely technical grounds, would be a denial of justice.³ A return merely that the writ had been "legally served" or "duly executed" is not sufficient; returning officers are ministerial, and are therefore not competent to judge of the legality of a service, or of any other similar act of their own.⁴

a. **IN CASE OF PERSONAL SERVICE.**—Where actual personal service is made, the return usually need state only the fact and

signed and sworn to by the person or officer making it. *Edwards v. McKay*, 73 Ill. 570. Nor in such a case is proof of service by a notary's seal sufficient. *Yolo Co. v. Knight*, 70 Cal. 431.

1. *Williams v. Downes*, 30 Tex. 51; *Ex parte Cross*, 7 Ark. 44; *Hakes v. Shupe*, 27 Iowa 465; *Rickards v. Ladd*, 6 Sawy. (U. S.) 42; *Hammond v. Olive*, 44 Miss. 543; *O'Leary v. Durant*, 70 Tex. 409; *Rankin v. Dulaney*, 43 Miss. 197; *Moore v. Coats*, 43 Miss. 225; *Botsford v. O'Conner*, 57 Ill. 72; *Johnson v. Aylesworth*, 3 Pittsb. (Pa.) 237; *Murfree on Sheriffs* (2d ed.), §§ 835, *et seq.* See also *Greenman v. Harvey*, 53 Ill. 386, as to the general requisites of return on summons in chancery; *People v. Fox*, 39 Cal. 621.

Briefly stated the rule is that a return must not depend upon extraneous facts to make it intelligible, but must be so when taken only in connection with the writ upon which it is indorsed. *Thompson v. Griffis*, 19 Tex. 115; *Harmon v. See*, 6 Iowa 171.

But that which is necessarily implied need not be expressed in the return. *Select v. Olmstead*, 1 Root (Conn.) 497.

A return which fails to show proper service cannot be cured by an affidavit showing a good service. *Gardner v. Small*, 17 N. J. L. 162.

Double Return.—If the officer makes two returns to a writ, the second one apparently intended to make the first one more specific, and, although the first one taken alone would be good, the two taken together do not show a good service; the service is bad. *Pillow v. Sentelle*, 39 Ark. 61. See also *Norton v. Meader*, 4 Sawy. (U. S.) 603.

2. *Shannon v. McMullin*, 25 Gratt. (Va.) 218. *Murfree on Sheriffs* (2d ed.), § 861.

3. *Collins v. Walling*, 6 La. Ann. 702; *Graves v. Drane*, 66 Tex. 658; *Presley v. Anderson*, 42 Miss. 274; *Clark v. Wilcox*, 31 Tex. 322.

In *Texas* it is usually required, however, that the officer in the service of process and in his return shall comply strictly with statutory requirements. *Roberts v. Stockslager*, 4 Tex. 307; *Graves v. Robinson*, 22 Tex. 130. It must therefore show that service was made by the sheriff. *Galveston, etc., R. Co. v. Wave*, 74 Tex. 47.

4. In *Perry v. Dover*, 12 Pick. (Mass.) 206, the court by Morton, J., said: "All returning officers are ministerial, and are bound to set forth in their returns all the acts done by them in order that the proper tribunal may judge of their sufficiency. They are not competent to judge of the legality of a notice or service, and a return that a precept has been legally served, or that the duty enjoined by a warrant had been duly performed, would most clearly be insufficient." See also *Davis v. Maynard*, 9 Mass. 242; *Wellington v. Gale*, 13 Mass. 483; *Harmon v. See*, 6 Iowa 171; *Charles v. Marney*, 1 Mo. 537; *Moore v. Miller*, 16 N. J. L. 233. Compare *Burrus v. Burrus*, 56 Miss. 92.

Therefore the service is wholly insufficient where the return states that it was made "conformable to the statute." The facts should be set forth. *Crisman v. Swisher*, 28 N. J. L. 149. Nor is an affidavit by the sheriff, that to the best of his belief he made service on defendant, any proof of service. *Pearson v. Pierce*, 40 Ohio St. 231.

time of service, and have the officer's name attached.¹ The usual return in such cases, unless the statute prescribes otherwise, is simply the word "executed" or "served," with the date and officer's name following.² If the return is correct in all other respects, it is immaterial that the defendant is not mentioned, either by name or otherwise.³ But where there are several

1. *Gilbreath v. Kuykendall*, 1 Ark. 50; *Orendorff v. Stanberry*, 20 Ill. 89; *Barbour v. Newkirk*, 83 Ky. 529; *Clemson v. Hamm*, 2 Ill. 176; *Legg v. Stillman*, 2 Cow. (N. Y.) 418; *Bartlett v. Winkler*, 15 Tex. 515; *Shaw v. Moser*, 3 Mich. 71; *Jones v. Relfe*, 3 Mo. 388; *Gilmore v. Lidden*, 23 Ga. 14.

Where the return is not dated, the presumption is that service was perfected within the time prescribed by law. *Reid v. Jordan*, 56 Ga. 282; *Cosby v. Bustard*, Litt. Sel. Cas. (Ky.) 137; *Fears v. Thompson*, 82 Ala. 294. And, generally speaking, the return of an officer should receive every reasonable construction, and where it is susceptible of more than one meaning the one most conformable to his legal duty should be adopted, upon the well-known principle "*ut res valeat magisquam pereat*," and "*omnia præsuntur esse rite ac solemniter acta*." *Murfree on Sheriffs*, § 846; *State v. Still*, 11 Mo. App. 283; *Davis v. Burt*, 7 Iowa 56; *Whittlesey v. Starr*, 8 Conn. 134; *Betts v. Boyd*, 31 Neb. 815; *Lodge v. Butler*, 42 N. J. L. 370; *Foster v. Berry*, 14 R. I. 601; *Kirby v. Gates*, 71 Iowa 100; *Brown v. Miner*, 21 Ill. App. 60.

Time of Service—Date of Return.—While it is usual to state the time of service it seems that an omission to do so is only an irregularity which is amendable, and which will not render the judgment liable to collateral attack. *Wilson v. Call*, 49 Iowa 463; *Rees v. Rees*, 7 Oregon 78; *Wilson v. King*, Morr. (Iowa) 106. And an amendment substituting the real for the apparent date of a writ may be allowed in the discretion of the court. *Gardiner v. Gardiner*, 71 Me. 266; *Snyder v. Schram*, 59 How. Pr. (N. Y.) 404.

If the return bears an earlier date than the process itself it is no evidence of service. *Keaton v. Moore*, 59 Ga. 553.

If a discrepancy occurs between the date of the return of an execution into court as made by the officer, and the date as made by the clerk upon filing,

the former must control. *Gilson v. Parkhurst*, 53 Vt. 384.

The *Wisconsin* statute requiring the date of service to be indorsed on the writ is held to be mandatory and the service is ineffectual if such indorsement is not made. *Wendel v. Durbin*, 26 Wis. 390.

Other Matters.—A return of a summons issued against Harrison Johnson, as follows: duly served "on the within named H. Johnson," is sufficient, notwithstanding there are other persons in the same town named H. Johnson. *Johnson v. Jones*, 2 Neb. 126.

Where process was required to be served by delivering a copy to the defendant, and by the return it appeared a copy of the summons was "left with" the defendant, the two forms of expression are equivalent. *Buck v. Buck*, 60 Ill. 105. See also *Hedges v. Mace*, 72 Ill. 472; *Keithley v. Borum*, 2 How. (Miss.) 683 ("Executed by copy" understood to mean delivery of copy to defendant personally).

2. 4 Minor's Inst. (2d ed.), p. 545; *Bridges v. Ridgley*, 2 Litt. (Ky.) 396; *Smith v. Bradley*, 6 Smed. & M. (Miss.) 485; *Com. v. Murray*, 2 Va. Cas. 504; *Thomas v. State*, 62 Miss. 184; *Strayhorn v. Blalock*, 92 N. Car. 292; *McDonald v. Carson*, 94 N. Car. 497; *Snelgrove v. Branch Bank*, 5 Ala. 295 ("Executed on S" sufficient).

The return "Executed" shows a legal service, but not necessarily a personal one. Therefore, in a case where personal service is required, such a return is insufficient. *Hermann v. Stricklin*, 60 Miss. 234. But if, besides the word "executed," there are words which indicate that the writ was not properly executed, the court must not consider it served. *Burrus v. Burrus*, 56 Miss. 93. Compare *Berlin Iron Bridge Co. v. Norton* (N. J. 1889), 17 Atl. Rep. 1079.

3. *Cardwell v. Sabichi*, 59 Cal. 490; *Robison v. Miller*, 57 Miss. 237.

A return "Served by reading," implies "to the defendant." *Holsinger v. Dunham*, 11 Ind. 346; *Chandler v.*

defendants, the return must clearly show upon which of them service has been made.¹

In some jurisdictions the character of the return is fixed by statute, and is required to contain a statement of the exact manner of service; in such cases a failure to observe the statutory requirement invalidates the service.²

Miller, 11 Ind. 382. But it is held in *Iowa* that a return on an original notice, "Served the within by reading" on a day named, is insufficient, as not showing to whom it was read. *Boker v. Chapline*, 12 Iowa 204; *Bain v. Gal-year*, 10 Iowa 585.

1. **Service Upon Several Defendants.**—*Tappan v. Bruen*, 5 Mass. 193; *Parker v. Danforth*, 16 Mass. 299; *Fulton v. State*, 14 Tex. App. 32; *Rape v. Heaton*, 9 Wis. 328; 76 Am. Dec. 269 (a return, "I have served this writ on defendant P and W by leaving a certified copy with his family in their residence"). Such a return cannot be dispensed with unless all the defendants appear. *Stults v. Outcalt*, 6 N. J. L. 130.

In an action against two, where there is a return of service on one only, which is silent as to the other, the legal conclusion is that there was no service on the latter. *Granberry v. Wellborn*, 4 Ala. 118; *Gamble v. Warner*, 16 Ohio 371; *Blinn v. Cheseman* (Minn. 1892), 51 N. W. Rep. 666.

A sheriff's return that he cannot find the defendants is equivalent to a return that he can find neither of them. *Hitchcock v. Hahn*, 60 Mich. 459.

Where a writ against several defendants is returned "Executed," the court will imply that it was executed on all the defendants. *Cantley v. Moody*, 7 Port. (Ala.) 443; and if the return is equivocal as to which of two defendants was served the justice may determine whether or not the service as to one was personal and sufficient. *Fleming v. Nunn*, 61 Miss. 603.

A legal service is sufficiently shown where the return showed that one of the defendants had been "Served," and that the others were "Not found," etc. *Colerick v. Hooper*, 3 Ind. 316; 56 Am. Dec. 505.

Where writs are issued in duplicate, running to different counties, the general return of "Executed" applies only to such of the defendants as reside within the county to which the writ

issued. *Bozman v. Brower*, 6 How. (Miss.) 43.

Where a return recites the service of the writ upon persons—naming three defendants—and fees are charged for service of three copies, it sufficiently appears that each of the defendants was served with a copy of the writ. *Martin v. Hargardine*, 46 Ill. 322.

In the case of *Thompson v. Griffis*, 19 Tex. 115, there were three citations against A, B and C, each directing the sheriff to summon all three defendants, each of the citations being indorsed with the date of issue and the name of the particular defendant on whom it was to be served, and the sheriff returned on the citation, indorsed for C, "Executed on — Nov. 11th, by delivering a true copy of writ and petition, 1854." It was held that it showed no service. And so where the statute required a citation to be served by delivering a copy to each defendant, a return of service of the citation on the "Within named defendants, in person, a true copy," was insufficient. *King v. Goodson*, 42 Tex. 152; *Schramm v. Gentry*, 64 Tex. 143; *Rutherford v. Davenport* (Tex. 1891), 16 S. W. Rep. 110.

2. *Faison v. Wolf*, 63 Miss. 24; *York v. Crawford*, 42 Miss. 508; *Continental Ins. Co. v. Milliken*, 64 Tex. 46; *Graves v. Robertson*, 22 Tex. 131; *Gilbough v. Keller*, 11 Phila. (Pa.) 364; *Charless v. Marney*, 1 Mo. 537; *Faison v. Wolfe*, 63 Miss. 24 (no presumption to support the service where return does not comply with statutory requirements).

Therefore, if service is required to be made by delivery of a certified copy, a return of service "by reading" is insufficient. *Robbins v. Clemmens*, 41 Ohio St. 285; *Thomas v. State*, 62 Miss. 184.

An example of a proper return under such statutes is this: "I executed the within by reading to the within-named A B at his residence in — county, on the — day of March, 18—." *Gatton v. Walker*, 9 Ark. 199; *Murfree on Sheriffs* (2d ed.), § 840.

b. IN CASE OF SUBSTITUTED OR CONSTRUCTIVE SERVICE.—The return in this case must show on its face all the circumstances which authorize this manner of service¹—*e. g.*, that the defendant was not found after diligent search,² etc.; and it must also show that all the requirements of the statute as to manner of service were fully complied with.³

1. The leading case upon this point is that of *Settlemer v. Sullivan*, 97 U. S. 444. A statute of *Oregon* provides that service in actions *in personam* may be made by the sheriff's delivering a copy of the notice to the defendant personally; or, if he cannot be found, to some white person of his family above the age of fourteen years, at his dwelling house or usual place of abode. In an action in which A was defendant, the sheriff's return showed that service was made by delivering a copy of the complaint and notice to the wife of the defendant, a white woman over fourteen years of age, at the defendant's usual place of abode, but contained no statement that A could not be found. Judgment was rendered against A, and there was a recital in the record "that the defendant, although duly served with the process, came not, but made default." Under these circumstances the court held: *First*, That the court by such service acquired no jurisdiction over the person of A, and that its judgment was therefore void. *Second*, That such substituted service, if ever sufficient for the purposes of jurisdiction, can only be made where the conditions upon which it is permissible are shown to exist. *Third*, That the inability of the sheriff to find A was not to be inferred, but must be affirmatively stated in his return. *Fourth*, That the recital in the record of the judgment was not evidence of due service, but must be read in connection with that part of the record which sets forth, as prescribed by statute, the proof of service. *Fifth*, That such proof must prevail over the recital, as the latter, in the absence of an averment to the contrary (the record being complete), can only be considered as referring to the form. *Settlemer v. Sullivan*, 97 U. S. 444. See also *Hammond v. Olive*, 44 Miss. 543; *Grant v. Harlow*, 11 Iowa 429; *Oakey v. Drummond*, 4 La. Ann. 363; *Corcoran v. Riddell*, 7 La. Ann. 268; *Chittenden v. Hobbs*, 9 Iowa 417; *Foster v. Simmons*, 40 Miss. 585; 4 Minor's Inst. (2d ed.) 533; *Cooper v. Roberts*, 16 N. J. L. 353; *Polhemus v.*

Perkins, 15 N. J. L. 435; *Derrickson v. White*, 32 N. J. L. 137; *Midkiff v. Lusher*, 27 W. Va. 438; *Miller v. Norfolk, etc., R. Co.*, 41 Fed. Rep. 431; *Caro v. Oregon, etc., R., etc., Co.*, 10 Oregon 510; *Mickey v. Stratten*, 5 Sawy. (U. S.) 475; *Brown v. William*, 39 Mich. 755; *Matteson v. Smith*, 37 Wis. 333; *Wheeler v. Wilkins*, 19 Mich. 78.

2. *Matteson v. Smith*, 37 Wis. 333; *Phillips v. Winne* (Supreme Ct.), 20 N. Y. Supp. 49. Where the statute allows service to be made upon the secretary of a company only in the absence of the president, or other chief officer, from the county, a return of service upon the secretary should set forth that the president or other chief officer was absent from the county and could not be found. *Palmetto Town Co. v. Rucker, McCahon* (U. S.) 146; *Galveston, etc., R. Co. v. Gage*, 63 Tex. 568. But it was added in the first case cited that such defect was not fatal, but might be amended. The rule is otherwise in *Arkansas* by statute. *Ex parte St. Louis, etc., R. Co.*, 40 Ark. 141; 16 Am. & Eng. R. Cas. 547. See also *infra*, this title, *Upon Corporations*; *Livar v. State*, 26 Tex. App. 115.

What diligence was used by the officer is not necessary to be stated. *Suerterlee v. Sir*, 25 Wis. 357.

3. *Piggott v. Snell*, 59 Ill. 106; *Hessler v. Wright*, 8 Ill. App. 229; *Fairfax v. Alexandria*, 28 Gratt. (Va.) 30; *Rees v. Rees*, 7 Oregon 78; *Settlemer v. Sullivan*, 97 U. S. 444; *Foster v. Simmons*, 40 Miss. 585; *Johnson v. Branch Bank*, 3 Ark. 522; *Barnett v. State*, 35 Ark. 501; *Scorpion Silver Min. Co. v. Marsam*, 10 Nev. 370; *Mathews v. Gordy*, 2 Houst. (Del.) 573; *infra*, this title, *The Several Returns*. See also *Eskridge v. Jones*, 1 Smed. & M. (Miss.) 595; *Mack v. Brown*, 73 Ill. 295; *Converse v. Warren*, 4 Iowa 158. Compare *Weldon v. Wood*, 9 R. I. 241.

A leading case in this connection is that of *Hammond v. Olive*, 44 Miss. 543. The court, by Simrall, J., said: "The

This procedure is a departure from the common law, and the statute must be strictly followed. Unless it appears from the record that the return was in these particulars duly made, a judgment by default is void.¹ The return must show, therefore, that a proper copy was left at the defendant's last and usual place of abode, that the person with whom the copy was left was of the requisite age and a member of the family of the defendant, or, if no such person could be found, that a copy of the writ was posted on a conspicuous part of the premises; the omission of any one of these particulars renders the return invalid.²

Where no service is made, a simple statement of the fact is sufficient—*e. g.*, "*Non est inventus*," "*Nihil est*," or "Not executed;"³ and when an officer returns that a defendant is not

return must show that every condition has been complied with. *First*. It must declare that the defendant could not be found. *Second*. That the copy was left with the wife or some free white person above sixteen years of age. *Third*. If there be no free white person willing to receive the same, then the copy must be left at some public place at the dwelling house. The statute regards the three modes of service, in the order named, as gradations. The second cannot be used if the first can be made, nor the last until both the others have failed." See also *Davis v. Patty*, 42 Miss. 509. What these statutory requirements are has already been set forth. See *supra*, this title, *Manner of Service*; *Murfree on Sheriffs* (2d ed.), § 850.

1. 4 *Minor's Inst.* (2d ed.) 533; 2 *Bl. Com.* 275; *Eskridge v. Jones*, 1 *Smed. & M. (Miss.)* 595. See also cases in note preceding; *Snyder v. Snyder*, 25 *Ind.* 399; *Gray v. Larrimore*, 4 *Sawyer (U. S.)* 638; 2 *Abb. (U. S.)* 542.

Everything may be inferred against the officer's return which its departure from the requirements of the statute will warrant. *Madison Co. Bank v. Suman*, 79 *Mo.* 527; *Blanton v. Jamison*, 3 *Mo.* 52; *Stewart v. Stringer*, 41 *Mo.* 400; 97 *Am. Dec.* 278; *Earle v. McVeigh*, 91 *U. S.* 508; *U. S. v. American Bell Teleph. Co.*, 29 *Fed. Rep.* 17.

The only safe course for an officer in doubt is to make a special return according to the facts. *Johnson v. Aylesworth*, 2 *Pittsb. (Pa.)* 237.

2. **Every Particular Must Be Stated.**—*Wilkinson v. Bayley*, 71 *Wis.* 131; *McConkey v. McCraney*, 71 *Wis.* 576; *Laney v. Garbee*, 105 *Mo.* 355; 24 *Am. St. Rep.* 391; *Laney v. Sweeney*, 105 *Mo.* 360; *Swift v. Meyers*, 37 *Fed. Rep.*

37; *Cole v. Hocha*, 21 *La. Ann.* 613; *Arnault v. St. Julien*, 21 *La. Ann.* 630; *Wheeler v. Wilkins*, 19 *Mich.* 78; *Mullins v. Sparks*, 43 *Miss.* 129; *Bustamente v. Bescher*, 43 *Miss.* 172; *Robison v. Miller*, 57 *Miss.* 237 (name of party with whom copy was left need not be stated); *Morehead v. Chaffe*, 52 *Miss.* 161 (same); *O'Hara v. Independence, Lumber, etc., Co.*, 42 *La. Ann.* 226.

3. *Sherer v. Easton Bank*, 33 *Pa. St.* 134; *Clarke v. Redman*, 5 *J. J. Marsh. (Ky.)* 31. Compare *Neyland v. State*, 13 *Tex. App.* 536; *Chase v. People*, 2 *Colo.* 528 (return on *scire facias*—"Not found"); *Chicago Dock, etc., Co. v. Kinzie*, 93 *Ill.* 415 (same).

It is said in *Sherer v. Easton Bank*, 33 *Pa. St.* 139, that the return "*Non est inventus*" is applicable only to a *capias*.

In *assumpsit* against A, B, C and D, the sheriff returned the writ served as to A and B, "Not found" as to C and D, but stated in his return that he did not go to the house of D by order of plaintiff's attorney. It was held that there was no legal return of "not found" as to D. *Lodge v. State Bank*, 6 *Blackf. (Ind.)* 557.

A return on an attachment for a witness in a criminal case that she "could not be found," is insufficient. The officer should state what inquiry and search he made, especially if in another parish. *State v. Boitreaux*, 31 *La. Ann.* 188.

The return must state something capable of being understood without the aid of evidence *aliunde*. It is said in one case that for this reason a return "*n. e. i.*," was of no effect whatever. *Parker v. Grayson*, 1 *Nott & M. (S. Car.)* 171.

Where a return of "Not found" is

found in his county, due diligence is presumed to have been used.¹ It has been said that "*Nihil est*" is the proper return upon the non-service of process, it being tantamount to an averment that the defendant has nothing in the bailiwick—no dwelling house, no family, no personal presence.²

c. WHERE SERVICE IS MADE ON CORPORATION.—In case of service upon a corporation the sheriff's return should show clearly upon what officer or agent service was made and the character of the office or agency;³ it is not essential that the full name of such officer or agent should be given.⁴ The time, place and manner of service must also be clearly stated;⁵ and if the return fails to show

made by the sheriff upon an original notice it will be construed as meaning not found within the county, and a service by copy left at defendant's residence will *prima facie* be good. *Macklot v. Hart*, 12 Iowa 428.

A sheriff cannot make a return of *non est inventus*, if the defendant is a known inhabitant of another State or county. *Kibbe v. Deering*, 1 Litt. (Ky.) 24. Nor will such a return made before return day authorize service by publication. *Palmer v. Cowdrey*, 2 Colo. 1.

In one case it is said that it is not sufficient excuse for not serving a summons merely to state that defendant is out of the county; the return should state that he could not be found in the county so as to be served with process. *Moore v. Miller*, 16 N. J. L. 233.

1. *Livar v. State*, 26 Tex. App. 115; *Neally v. Redman*, 5 Iowa 387. *Compare Matthews v. Miller*, 47 N. J. L. 413. And see *Dickison v. Dickison*, 124 Ill. 483; *Carlisle v. Cowan*, 85 Tenn. 165 (construction of § 3466 of Code of Tennessee).

2. *Sherer v. Easton Bank*, 33 Pa. St. 139; *Murfree on Sheriffs* (2d ed), § 841.

Where the sheriff knows the defendant is dead the return should be *mortuus est*, not *nihil habet*. An amendment, however, is permissible after execution, no rights having intervened. *Burr v. Dougherty*, 14 Phila. (Pa.) 6; *Warder v. Tainter*, 4 Watts (Pa.) 273.

3. Must State Name of Officer or Agent Served and Character of Agency.—*Union Pac. R. Co. v. Pillsbury*, 29 Kan. 652; *Dickinson v. Burlington, etc., R. Co.*, 43 Kan. 703; 44 Am. & Eng. R. Cas. 465; *Chicago Planing Mill Co. v. Merchants' Nat. Bank*, 86 Ill. 587; *Cairo, etc., R. Co. v. Holbrook*, 92 Ill. 297; *Jones v. Hartford Ins. Co.*, 88 N.

Car. 499; *Powder Co. v. Oakdale Coal, etc., Co.*, 14 Phila. (Pa.) 166; *O'Brien v. Shaw's Flat, etc., Canal Co.*, 10 Cal. 343; *Blodgett v. Schaffer*, 94 Mo. 652. *Compare Merriden v. Trussell*, 52 Miss. 711. See also *Boyle v. Whitney*, 8 Pa. Co. Ct. Rep. 501.

Therefore a return which omits the name of the agent with whom the copy was left and the statement that such person was an agent of the corporation, is bad. *Truax v. Sterling*, 74 Mich. 160; *Grand Taver Min., etc., Co. v. Schirmer*, 64 Ill. 106. *Compare Talbot v. Minneapolis, etc., R. Co.*, 82 Mich. 66.

In *Oxford Iron Co. v. Spradley*, 42 Ala. 24, a return showing service on "G. R., managing agent for defendant corporation" was held void.

Where the sheriff's return of service of process against a city was "Summoned Geo. P. Kane, Sheriff," "Service, of the within admitted, Albert Ritchie, City Solicitor," it was held that the defect in the return in failing to show what officer was served, was waived by the subsequent appearance of the defendants. *Dugan v. Mayor, etc., of Baltimore*, 70 Md. 1.

4. *Cincinnati, etc., R. Co. v. McDougall*, 108 Ind. 179. It is not essential that his name should be given at all where he is properly described, *e. g.*, as on the "general agent." *Goodwin v. Colorado Mortgage, etc., Co.*, 110 U. S. 1.

5. *Kinfeke v. Merchants' Tr. Co.*, 3 McCrary (U. S.) 547.

Where a natural person is also defendant, a return "served each of the defendants personally with a copy of the within summons" is invalid, in that it fails to state sufficiently the manner of service on the corporation. *Hayden v. Atlanta Sav. Bank*, 66 Ga. 150.

that service was made upon the identical agent provided by the statute¹ or at the place provided,² it is insufficient.

Where service is made upon a subordinate officer or agent the return must show that service upon the superior officers was not practicable.³

2. The Several Returns.—There is no exact language in which a return must invariably be worded; any expressions which will show that the statutory requirements have been complied with will suffice. This may best be shown by examples.⁴

1. Must Show Service Upon Agent Provided by Statute.—Thus where the statute provides for service of process upon the "nearest station or freight agent" of a railroad company, a return of service "on the nearest agent" is not sufficient. *Haley v. Hannibal*, etc., R. Co., 80 Mo. 112; *Norvell v. Porter*, 62 Mo. 309; *Dunn v. Missouri Pac. R. Co.*, 45 Mo. App. 29. So where the statute authorizes service on "a regular ticket or freight agent," the return is insufficient if it fails to state that the ticket agent served was a "regular" one. *Tallman v. Baltimore*, etc., R. Co., 45 Fed. Rep. 156.

A return upon a summons against a railroad company, that it was served by delivering a copy thereof, with the indorsements thereon duly certified, "to Mr. Fish, agent of the within railroad company," is considered not sufficient evidence of service, as it fails to show that he is of that class of agents on whom service may be made under the laws of *Kansas*, ch. 80. *Dickerson v. Burlington*, etc., R. Co., 43 Kan. 702; 44 Am. & Eng. R. Cas. 465.

In a suit against a bank, if the writ of summons commands the sheriff to summon the president, a return of service "on A, the within-named defendant," does not show such service upon the bank of which A is president, as to confer jurisdiction. *Blodgett v. Schaffer*, 94 Mo. 652; *Harrell v. Mexican Cattle Co.*, 73 Tex. 612.

A return showing service "on Charles C. Comstock as president of the Grand Rapids Chair Company, and who is the owner of such goods," is sufficient to show service on the company. *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104.

2. Place of Service.—*Kinfeke v. Merchants' Dispatch Transp. Co.*, 3 McCrary (U. S.) 547.

A return of service on an agent of a corporation "at its only office" in the county is equivalent to a return of

service at its "business" office. *Hill v. St. Louis Ore. etc., Co.*, 90 Mo. 103.

3. Hoen v. Atlantic, etc., R. Co., 64 Mo. 561; *Miller v. Norfolk, etc., R. Co.*, 41 Fed. Rep. 431; *supra*, this title, *Upon Domestic Corporations*, where numerous other cases are collected.

4. Sufficient Returns.—The following returns have been held sufficient in case of personal service: Under a statute requiring sheriff to make return that defendant could not be found within his county: "I hereby certify and return that after diligent search and inquiry I am unable to find the within-named defendant within my bailiwick, and cannot have his body as I am within commanded." *Lichfelt v. Kopp*, 38 Mich. 312. See also *Wood v. Thomas*, 38 Mich. 686; *Hammon v. Baker*, 39 Mich. 472. The return upon a citation, "Executed thirty-first March, 1859, by delivering to the defendant a true copy of this writ, together with the accompanying certified copy of petition." *Hill v. Grant*, 33 Tex. 132. *Barbour v. Newkirk*, 83 Ky. 529; *Graves v. Drane*, 66 Tex. 658. A return upon summons, "Executed personally, with original and copy, defendant claiming such," conforms to a statute requiring that return state exact manner of service. *Presley v. Anderson*, 42 Miss. 274; *Pendexter v. Cole* (N. H. 1890), 20 Atl. Rep. 331. So of a sheriff's indorsement upon summons "Executed on the within named J J M, this Oct. 12, 1870, by personal service, copy waived." *Milan v. Strickland*, 45 Miss. 721. See also *Smith v. Pattison*, 45 Miss. 619. So also of a sheriff's indorsement on the process, "Executed on, etc., by delivering in person to A H a certified copy," etc., and duly signed. *Clark v. Wilcox*, 31 Tex. 322. Also a return, "Executed by leaving with F, the defendant, a copy," etc., is sufficient, it being tantamount to saying "Executed by delivering to the defendant in person a copy." *Fitz-*

hugh v. Hall, 28 Tex. 558; *Sanders v. City Nat. Bank* (Tex. 1889), 12 S. W. Rep. 110. A return on a subpoena in chancery, directed to all defendants to the bill by name, "Executed on the parties, this Oct. 1, 1870, with copy." *Florence v. Paschal*, 50 Ala. 28. The words "Received in office, August 22, 1870," and "Executed August 22, 1870," followed by sheriff's name and title, and copied into the transcript immediately after the summons and complaint, are sufficient, after judgment by default, to show a regular service of the summons and complaint. *Lenoir v. Broadhead*, 50 Ala. 58. A return, "Served on defendant by reading and copy," is sufficient. *Wilson v. Hayes*, 18 Pa. St. 354; *Marlowe v. Kuhlbeck*, 2 Colo. 602. So of a return by sheriff that, on, etc., he served a summons on —, "who attempted to avoid service by concealing himself, and running from me at the time I read this process to him at the place I last saw him," is sufficient. *Ornedorff v. Stanberry*, 20 Ill. 89; *Story v. Ware*, 35 Miss. 399; 72 Am. Dec. 125. "Executed the within by reading the same to the within-named A, J, I, and M, and by delivering to each a true copy thereof on the 10th," etc. *Bozarth v. Largent*, 128 Ill. 98. "Personally served by reading in the hearing of the defendant and leaving a true copy with him." *Grosvenor v. Henry*, 27 Iowa 269. A statement by the officer that he served the defendant with a true copy of the summons is equivalent to saying that he delivered to him such a copy. *Hedges v. Mace*, 72 Ill. 472; *Turner v. Jenkins*, 79 Ill. 228. A return "Feb. 19, 1874, I have duly executed the within by reading the same to the within-named J," sufficiently states the date of service. *Marlow v. Kuhlbeck*, 2 Colo. 602. So a return, "Executed the 6th.—A.D., 1840," etc., on A B and C D, "the 28th day of July, 1840," shows with sufficient certainty that the service on A B was made the 6th of July, 1840. *Thompson v. State Bank*, 5 Ark. 245. A return, "Executed in person" and signed by the deputy sheriff in behalf of the sheriff, shows that the summons was actually served; and, if defective, can only be taken advantage of by plea in abatement. *Barksdale v. Neal*, 16 Gratt. (Va.) 314. Where the summons was against A B, Sr., and the return was "served on the within-named A B, Jr.," it was presumed that

the sheriff had done his duty and served the summons on A B, Sr. *Dawson v. State Bank*, 3 Ark. 505.

The following are instances of proper returns in case of constructive service: "Served the within-named," A B, etc., "by leaving a true copy thereof for each of them," being followed by another averment, "Served the within by reading the same to the within-named" C D, etc. *Brown v. Miner*, 21 Ill. App. 60. Under a statute requiring service by leaving a copy "at the usual place of abode of defendant, with some free white person, a member of his family, and informing such person of the contents thereof," a return of delivery of copy at defendant's "residence to A, a white person, . . . and a member of his family, and explaining the contents of the same," shows a good service, although defendant had been absent from the State for several years. *Du Val v. Johnson*, 39 Ark. 182. See also *Pigg v. Pigg*, 43 Ind. 117; *Phillips v. Evans*, 64 Mo. 17. Under similar statutes, where the officer uses the word "residence" in his return, it will be presumed to be synonymous with "usual place of abode," and that the daughter found there, by the officer, was a member of the family. *Smithson v. Briggs*, 33 Gratt. (Va.) 180; *Sexton v. Rock Island, etc., Lumber Co.* (Kan. 1892), 30 Pac. Rep. 164. A return showing service on A, by leaving a copy with B, who, in the officer's presence, is said to have delivered it to A, sufficiently shows a service on A. *Palmer v. Belcher*, 21 Neb. 58.

Insufficient Returns.—The following have been held to be insufficient returns in case of personal service: "Executed by leaving a copy at J. F. Reynolds." *Melvin v. Clark*, 45 Ala. 285. Where a *capias* can be served only by reading to the defendant or delivering him a copy, a return that defendant was arrested and gave bond for his appearance, does not show service. *Fulcher v. Lyon*, 4 Ark. 449. A return to chancery summons, "Served, by reading to, and leaving a copy with, the within-named J H, on this 8th day of May, 1872," is too indefinite and uncertain, it failing to show what the officer read, or of what he served a copy, and does not show that he served a true copy. *Hochlander v. Hochlander*, 73 Ill. 618. A return by special deputy that he served the writ by reading it to defendant, is insuffi-

cient under a statute requiring service by reading and delivering copy. *Noleman v. Weil*, 72 Ill. 502; *Cairo, etc., R. Co. v. Joiner*, 72 Ill. 520. A return that notice was served by reading "in presence and hearing of" defendant, is insufficient. The reading must be to the defendant. *Hynek v. Englest*, 11 Iowa 210. Compare *McPherson v. State Bank*, 4 Ark. 558. A return "by reading the same in his presence," is insufficient in not showing in whose presence it was read. *Spencer v. Medder*, 5 Mo. 458. A return on subpoena, "Executed on all in my bailiwick but R S." *Hackwith v. Damron*, 1 T. B. Mon. (Ky.) 235. A constable's return to an attachment that he had "personally attempted to serve it on defendant by reading the same and offering a copy to him at the house of A, but he ran away. I could not deliver a copy to him." *Holden v. Ranney*, 45 Mich. 399. Compare *Story v. Ware*, 35 Miss. 399; 72 Am. Dec. 125. Under a statute requiring officer to return the facts as to the execution of the writ, a return upon chancery summons in the words, "Executed Oct. 21, 1859." *Robertson v. Johnson*, 40 Miss. 500; *Merritt v. White*, 37 Miss. 438; *Naron v. Gwin*, 43 Miss. 346. So of a return, "Executed by delivering a true copy, July 25, 1868," because it fails to show upon whom service was made. *Woodliffe v. Connor*, 45 Miss. 552; *York v. Crawford*, 42 Miss. 508. Compare *Benson v. Holloway*, 59 Miss. 358. Under a statute requiring the delivery of copy, a return of service "by reading to him a true and certified copy," etc. *Newlove v. Woodward*, 9 Neb. 502; *Thomas v. State*, 62 Miss. 184; *Ross v. Ward*, 16 N. J. L. 23. Return on a writ against two debtors, stating 'service upon one of them and saying nothing as to the other. *Cook v. McDoel*, 3 Den. (N. Y.) 317. "Served summons and complaint on defendant at W by delivering to him a true copy thereof." *McMullin v. Mackey* (Supreme Ct.), 6 N. Y. Supp. 885 (under New York statute). But return must not only state that copies were delivered to defendant, they must have been left with him. *Syracuse Moulding Co. v. Squires*, 61 Hun (N. Y.) 48. A return, "Executed by serving the defendant with true copy," is insufficient under *Texas* statute as not showing manner of service, or that copy was delivered to defendant in person. *Graves v. Robertson*, 22 Tex. 130; *Willie v.*

Thomas, 22 Tex. 175; *Tullis v. Scott*, 38 Tex. 537. So a return of a subpoena, "Served by reading in hearing of" the witness, is insufficient under statute requiring return to show that service was "by being read to the witness". *Tooney v. State*, 5 Tex. App. 163. The return to each of several citations was as follows: "Came to hand on the 13th day of April, 1883; executed on the same day by delivering to the defendant . . . in person, by and through H. B. Andrews, the vice-president thereof, a true copy of this citation." It was fatally defective, as it indicated that Andrews and not the sheriff served the copies. *Galveston, etc., R. Co. v. Wave*, 74 Tex. 47. See also *King v. Goodson*, 42 Tex. 152, where return was considered insufficient in not showing clearly service of both the citation and copy of the petition. *Philadelphia v. Catheart*, 10 Phila. (Pa.) 103.

The following have been held insufficient returns in case of substituted or constructive service: A return that copy was left at defendant's place of residence, with "a" person over fifteen years of age, is insufficient, in not stating the person to be a member of defendant's family. *Dawson v. State Bank*, 3 Ark. 505; *Von Roy v. Blackman*, 2 Woods (U. S.) 98; *Mack v. Brown*, 73 Ill. 295; *Parks v. Weems*, 9 Ark. 439; *Ex parte Cross*, 7 Ark. 44. The substitution of the word "house" for "usual place of abode" is a fatal defect in a return. *Matthews v. Gordy*, 2 Houst. (Del.) 573. A return, served on "L P W by copy left with A W, a clerk in the store of said W, he being over the age of fourteen years, no copy of petition demanded." *Hendreys v. Wells*, 10 Iowa 587. A return on chancery summons stated that the officer served the writ on defendant by leaving a copy at his place of abode, with a person named, "a member of his family, and a white person, of the age of ten years and upward," is insufficient in omitting to state that the officer informed the person with whom he left the copy of the contents thereof, as required by statute. *Tompkins v. Wiltberger*, 56 Ill. 385; *Mack v. Brown*, 73 Ill. 295. A return "Served by leaving copy of this notice with Mrs. A T, the mother of J W T, at his usual place of abode, said J W T not being found in my county," is deficient in not showing that A T was a member of the family of J W T,

3. Return Days.—Every process is made returnable at a certain return day fixed by law for the return of all process issued since the preceding return day.¹ The day fixed upon is usually the first day of the next term of the court whose process is to be re-

or of the family where he had his residence. *Lyon v. Thompson*, 12 Iowa 183. A return, "Served the within notice by reading to and leaving a copy of the same with the mother of the within-named, she being a member of the family and over fourteen years of age (at her residence), the within-named defendants not being found," is insufficient in not showing that notice was left at the "usual place of residence" of the defendant, and in not giving the name of the person with whom copy was left. *Tavenor v. Reed*, 10 Iowa 416. An omission of the Christian name of such person, however, is not fatal. *Morehead v. Chaffee*, 52 Miss. 161; *Robinson v. Miller*, 57 Miss. 237. A return that defendant was cited by service "on Miss B. B. Simms, a white person about the age of fourteen, residing in defendant's house." *McCracken v. Simms*, 19 La. Ann. 33. Where the defendant is described as of D, but then commorant in B, and the officer returns a summons left at his last and usual place of abode known to him in B, there is a defect apparent on the record. *Ames v. Winsor*, 19 Pick. (Mass.) 247. A return of service "by leaving a copy at his residence on a table in the porch, he not being at home." *Tomlinson v. Hoyt*, 1 Smed. & M. (Miss.) 515; *Eskridge v. Jones*, 1 Smed. & M. (Miss.) 595. A return on chancery process, "Executed on H by leaving a true copy of the original at his residence, in the hands of his wife," is insufficient in not showing that the defendant could not be found. *Foster v. Simmons*, 40 Miss. 585. A return, "Executed by leaving a copy at defendant's house." *Fatheree v. Long*, 5 How. (Miss.) 661. A return upon a writ that it was served upon the wife of the defendant is insufficient in not stating that it was at his usual place of abode. *Smith v. Rollins*, 25 Mo. 408; *Vaughan v. Brown*, 9 Ark. 20; 47 Am. Dec. 730; *Piggott v. Snell*, 59 Ill. 106. A return of service by leaving, etc., "at the usual place of abode when in the city of Cape Girardeau, of the within-named," etc., "with a person of the family over the age of fifteen years," etc. *Brown v. Langlois*, 70 Mo.

226. See also *Allen v. Singer Mfg. Co.*, 72 Mo. 326. A return of an officer that he left a summons at the house of the defendant with his housekeeper, informing her of the contents. *Despreaux v. Barber*, 3 N. J. L. 1041. A return "served by reading the contents of the within to the families of the defendants at their place of abode." *Ballinger v. Sherron*, 14 N. J. L. 144. In *West Virginia* a return of service is fatally defective unless it shows that the person to whom the notice was delivered was found at the defendant's "usual place of abode" or received "information of its purport." *Vandiver v. Roberts*, 4 W. Va. 493; *Lewis v. Botkin*, 4 W. Va. 533. In *Wistar v. Philadelphia*, 86 Pa. St. 215, a return of *scire facias* on a municipal claim was held fatally defective in not showing that a copy was posted on a "conspicuous part of premises for two weeks before the return day."

In Case of Service on Partners.—In an action against two partners, an official return by the sheriff that he had served the defendants, J. B. & Co., in person with a true copy of the declaration was sufficient. *Peel v. Bryson*, 72 Ga. 331; *Murfree on Sheriffs* (2d ed.), § 876a. See also 2 *Bates, Law of Partnership*, §§ 1062, 85. A return on garnishment which merely states service on the firm of "N. & Bro." is insufficient, in that it fails to show who composed the firm. *Mitchell v. Greenwald*, 43 Miss. 167.

1. Where the return day is fixed by statute, no discretion is left to the district clerk or court, and if one be made returnable at any other time, there is no jurisdiction over the defendant. *Crowell v. Galloway*, 3 Neb. 215. Consult here *Patout v. Rawls*, 4 La. Ann. 485; *State v. Republican Val.*, etc., R. Co., 27 Neb. 852; *Craighead v. Martin*, 25 Minn. 41. If a writ is made returnable on a legal holiday, it may be properly returned on the first succeeding judicial day. *Ostertag v. Galbraith*, 23 Neb. 730. See also, in this connection, *People v. Kent*, 41 Mich. 722; *Hercules Iron Works v. Elgin*, etc., R. Co. (Ill. 1892), 30 N. E. Rep. 1050; *Lindsay v. Tansley*, 63 Hun (N. Y.) 635.

turned.¹ No process can be made returnable to such a day that a term of the court will intervene between the day of issue and the return day.²

1. This is a manner so exclusively regulated by statute in each State that it is impossible to state any settled rule that will apply to all cases. See, however, for the rule stated above, *Graves v. Cole*, 2 *Greene* (Iowa) 467; *Caskey v. Nitcher*, 8 *Ala.* 622; *Watson v. Miller*, 55 *Tex.* 289; *Briggs v. Sneghan*, 45 *Ind.* 14; *People v. Judge*, 38 *Mich.* 308; *Garner v. Johnson*, 22 *Ala.* 494; *Story v. Ware*, 35 *Miss.* 399; 72 *Am. Dec.* 125; *Territory v. Ashenfelter*, 4 *N. Mex.* 85; *Holliday v. Cooper*, 3 *Mo.* 286; *Starbird v. Brown*, 84 *Me.* 238.

Where, however, a writ was made returnable to the next term generally, instead of the first day of the term, as the statutes required, but was, nevertheless, executed before the term, and returned the first day, a motion to quash the writ and all the subsequent proceedings, made at the ensuing term, was overruled. *Hare v. Niblo*, 4 *Leigh* (Va.) 359.

After the time for the service of a writ for the return term has expired, and no service has been made, the return day may be changed to the next succeeding term. *Gardiner v. Gardiner*, 71 *Me.* 266.

In some States the return day is fixed by statute; in others it is stated in the process itself or in the memorandum to the clerk which asks for the process. 4 *Minor's Inst.* (2nd ed.), pp. 528, *et seq.*; *State v. Republican Val.*, etc., *R. Co.*, 27 *Neb.* 852.

A writ made returnable on the first day of the next term, to be holden, etc., without specifying the time, is valid when the time is fixed by law. *Rogers v. Miller*, 5 *Ill.* 333.

In *Virginia* and *West Virginia* all writs are required to be returnable within ninety days from their issuance; and this term "all writs" includes a *scire facias*. *Lavell v. McCurdy*, 77 *Va.* 763; 4 *Minor's Inst.* (2nd ed.) 545; *Gas Co. v. Wheeling*, 7 *W. Va.* 22.

By the reformed practice of *North Carolina*, the summons in all civil actions in the supreme court is returnable before the judge in term time; the summons in special proceedings is returnable before the clerk, in his office, at any time. *Tate v. Powe*, 64 *N. Car.*

644; *Woodley v. Gilliam*, 64 *N. Car.* 649.

2. No Term of Court Should Intervene Between Return Day and Day of Issuance.—*Kelly v. Gilman*, 29 *N. H.* 385; 61 *Am. Dec.* 648; *Briggs v. Sneghan*, 45 *Ind.* 14; *Shirley v. Hagar*, 3 *Blackf. (Ind.)* 225; *McAlpine v. Smith*, 68 *Me.* 423. This was the rule at common law for the reason that otherwise great injustice might have been done by keeping the defendant in prison an unnecessary length of time; and while the same reason does not now hold, the rule is continued with us from other and equally sufficient reasons. *Will v. Whitney*, 15 *Ind.* 194; *Parsons v. Loyd*, 3 *Wils.* 341; *Atkinson v. Taylor*, 2 *Wils.* 117; *Burk v. Barnard*, 4 *Johns. (N. Y.)* 309; *Bunn v. Thomas*, 2 *Johns. (N. Y.)* 190.

This rule applies in *Illinois*, provided the suit in which the process issues is commenced more than ten days before the first day of the term. If less than ten days are to intervene between the issuing of the summons and the beginning of the term of court it must be made returnable to the next term thereafter, thus allowing one term to intervene. But not more than one term can intervene; nor is even that permitted save under the proviso mentioned. *Hocklander v. Hocklander*, 73 *Ill.* 618; *Miller v. Handy*, 40 *Ill.* 448; *Elea v. Wait*, 28 *Ill.* 70; *Calhoun v. Webster*, 3 *Ill.* 221; *Mechanics' Sav. Inst. v. Givens*, 82 *Ill.* 157.

A similar doctrine prevails in *Mississippi*. See *Hurst v. Strong*, 1 *How. (Miss.)* 123.

In *New Hampshire* the doctrine is somewhat confused, the court there holding that a writ of mesne process commanding the arrest of the defendant, returnable after an intervening term, is void; but other writs, in such cases, are generally amendable. *Kelly v. Gilman*, 29 *N. H.* 385; 61 *Am. Dec.* 648.

In *Alabama* it has been uniformly held, however, that the evident intent is that the return day in the case mentioned above is the fourth Monday immediately after the date of the writ. *Lore v. McRae*, 12 *Ala.* 444; *Gibson v. Laughlin*, *Minor (Ala.)* 182; *Findley v. Ritchie*, 8 *Port. (Ala.)* 452.

If the time of return is fixed by law, a writ made returnable at any other time is irregular and may be quashed on motion.¹ So, also, if the return day be misstated,² or if the writ is made returnable to an impossible term of the court, or to a term unknown to the law.³ So where the day of the return of the writ is *dies non*.⁴

But in *Illinois* such writs are held void. *Miller v. Handy*, 40 Ill. 448; *Hildreth v. Hough*, 20 Ill. 331; *Culyer v. Phelps*, 130 Ill. 217. Compare *Murphy v. Williams*, 1 Ark. 376; *Phillip v. Lemoyne*, 4 Ark. 144; *Winston v. Miller*, 12 Smed. & M. (Miss.) 550.

A writ returnable on a certain day of a month subsequent to its issue, although without the word next or any express statement of the year of the return, is returnable in the month named of the current year. *Nash v. Mallory*, 17 Mich. 232; *Vinton v. Mead*, 17 Mich. 388.

1. *Sanders v. Rains*, 10 Mo. 770 (writ made returnable at an earlier day after its date than allowed by law); *Dyott v. Pennock*, 2 Miles (Pa.) 213; *Watson v. Miller*, 55 Tex. 289; *Thomas v. Womack*, 64 N. Car. 657; *Williams v. Rogers*, 5 Johns. (N. Y.) 163. Compare *Fisher v. Collins*, 25 Ark. 97 (writ may be amended so as to be made returnable at proper time).

This principle was sustained in *Rattan v. Stone*, 4 Ill. 540, and the court added that if, upon quashing the writ, the action was continued, with an order for an *alias* writ to issue, the *alias* might be considered as the commencement of the action, and the words "as you have been heretofore commanded" stricken out as surplusage.

And a writ made returnable at a wrong time may be abated, even though the law, which had been passed, making a change in the time of returning such writ may not have been published. *Thompson v. McHenry*, 18 Ark. 537. Compare *Fisher v. Collins*, 25 Ark. 97.

2. *Bell v. Austin*, 13 Pick. (Mass.) 90; *Craighead v. Martin*, 25 Minn. 41.

A writ which the clerk was directed to issue returnable to one date, but issued returnable to another is a nullity. *Bolling v. Anderson*, 4 Baxt. (Tenn.) 550.

This principle is not undoubted, however; thus, where original service was properly made, but the copy left with the defendant May 2, as the return day, while the original notice

named May 24, which was, in fact, the first day of the term, the service was held to be simply defective, and did not avoid a judgment rendered thereon for want of jurisdiction. *Irions v. Keystone Mfg. Co.*, 61 Iowa 406. Likewise a *capias* returnable "on the seventh day of October, A. D. 1879, that being the first day of the next succeeding term," was held fatally defective, although the first day of the term was the sixth day of October. *People v. Judge*, 41 Mich. 722. And in another case it was held that the court may permit an amendment of a summons which has been drawn up returnable at a time other than that fixed by law. *Fisher v. Collins*, 25 Ark. 97. Compare *Thomas v. Womack*, 64 N. Car. 657; *Waltson v. Bryan*, 64 N. Car. 764.

A writ purporting to bear date Oct. 23, 1863, returnable in July next, issued between June 20 and 25, 1863, is likely to delude the defendant by the confusion of dates, and should, therefore, be quashed. *Gorman v. Steed*, 1 W. Va. 1.

3. Such process is utterly void, and being void is not amendable. *Lowrey v. Richmond*, etc., R. Co., 83 Ga. 504; *Brown v. Simpson*, 3 Stew. (Ala.) 331; *Holliday v. Cooper*, 3 Mo. 286. See also *Darby v. McConnell*, 13 Ill. 352 (process may be returnable to a special term whether issued before or after such term was appointed).

A *capias* returnable in vacation is void, and will be quashed on motion made at the earliest opportunity, notwithstanding that, from excess of caution, defendant may have given bail to the sheriff, filed bail to the action, and pleaded to the declaration. *Leigh v. Alpaugh*, 24 N. J. L. 629.

But a summons will not, according to *Indiana* code, be set aside, merely because it was returnable in vacation. *Ross v. Glass*, 70 Ind. 391.

4. See SUNDAY. See also DAY, vol. 5, p. 85.

Thus, a subpoena made returnable on Sunday is irregular, and will not warrant the issuing of an attachment for disobedience thereof, as no court can be held on that day for any pur-

If a writ is made returnable on no day whatever and judgment is entered by default, such judgment is irregular for want of notice.¹

Process should properly be returned on the return day; if however, it has been served, there can be no objection to its being returned before the regular day, since no possible injury can occur from it.² But if the return is to be "Not found after diligent search," or "Not executed," or of similar character, showing a non-execution, it must not be made before the regular return day.³ In no case can a return be made after the return day.⁴

As to the exact hour of the day at which the writ must be returned, there is no settled rule. It seems that it may be returned at any reasonable hour, and if an hour is fixed by law, the return must be made accordingly.⁵ A legislative act changing the time of holding the court, without requiring writs already issued to be returned for correction, makes them returnable by force of law to the substituted terms of the court.⁶

pose. *Gould v. Spencer*, 5 Paige (N. Y.) 541.

An irregularity like this is generally avoided by having the writ returnable to "the next term of court," or to "the first Monday after a certain date," etc. If, however, the date is fixed by the calendar—*e. g.* the 31st of May, and such day happens to be *dies non*, it seems that the writ will not be void, but that the return day will be the first judicial day thereafter. *Ostertag v. Galbraith*, 23 Neb. 730; *Kinney v. Emery*, 37 N. J. Eq. 339. This rule is by no means certain, it being held in some cases that a writ returnable to a *dies non* is returnable to a time when it is impossible for a court to be held, and is therefore void and incapable of amendment. *Kenworthy v. Peppiat*, 4 B. & A. 288, and cases cited. See also *Bell v. Austin*, 13 Pick. (Mass.) 90; *Sanders v. Rains*, 10 Mo. 772.

1. *Bobb v. Graham*, 4 Mo. 222.

2. *Walker v. Birdwell*, 21 Tex. 92.

3. *Glover v. Rawson*, 3 Chand. (Wis.) 249; *Palmer v. Cowdrey*, 2 Colo. 1.

But if the sheriff makes a *non est inventus* return within a day or two after he receives it and long before the return day, the court is bound to receive it, and is justified in proceeding to judgment; and, if the defendant is injured thereby, his remedy is against the sheriff and not by writ of error. *Glover v. Rawson*, 3 Chand. (Wis.) 249. Compare *Palmer v. Cowdrey*, 2 Colo. 1.

In *Hitchcock v. Hahn*, 60 Mich. 459, a sheriff's return on attachment certified to a seizure on a certain day, and

that he was unable to find defendant. The writ was returned on the return day. It was held that the recital of inability to find defendant related to the return day, and that, therefore, the return was not premature.

4. Where the writ is not served until after the return day, though subsequently returned, the proceedings are irregular upon their face, and not to be cured by intendment, nor is a motion to dismiss the process for this irregularity a waiver thereof. *Blodgett v. Brattleboro*, 28 Vt. 695.

5. *Hour of Return*.—In *Rhode Island*, writs from a justice's court are required to state the hour of holding the court and of return of process. The universal practice, however, is to allow one hour after the expiration of the time specified. Thus an original writ, returnable at ten o'clock, must be returned not later than eleven to give the court jurisdiction over the defendant; and neither a previous agreement of defendant's counsel to waive the time, nor a custom to enter delayed writs and continue them, can give the court jurisdiction if the writ is not returned within the time stated. *Brown v. Carroll*, 16 R. I. 604. Compare *Dyer v. Smith*, 12 Conn. 384; *Blanchard v. Walker*, 4 Cush. (Mass.) 455.

A similar doctrine prevails in *Nebraska*, and unless it is specified that standard time is relied on it will be presumed that common time was intended to be meant. *Searles v. Averhoff*, 28 Neb. 668.

6. *Freeman v. Thompson*, 53 Mo. 183; *Woodward v. Peabody*, 39 N. H.

4. Where Returnable.—The nature of the word "return" indicates that a writ must be returned to the court from whence it issued.¹ Some authorities maintain, however, that the mistake of returning a writ to the wrong clerk's office is not so fatal as to invalidate proceedings based upon the return, it being considered that the statute designating the office is merely directory.²

5. Effect of Return—In General.—The general rule is that the sheriff's return is conclusive proof of service and of the other facts which it recites, and that it is beyond contradiction in a collateral proceeding.³

a. AS AGAINST THE OFFICER.—As against the officer himself⁴

189; *Thompson v. McHenry*, 18 Ark. 537.

Where a citation issued, returnable on a different date from that prescribed by law, in anticipation of the adoption of a new constitution, it was without authority of law, since the new judiciary system could only take effect after the ratification of the new constitution had been officially made known. *Watson v. Miller*, 55 Tex. 289.

1. *Wright v. Marvin*, 59 Vt. 457. In this case the return was made to the plaintiff's attorney. See also *Murfree on Sheriffs* (2d ed.), § 883; *Wills v. Whittier*, 45 Me. 544; *Cutler v. Rathbone*, 1 Hill (N. Y.) 204.

In *People v. Vermillion Co.*, 40 Ill. 125, an application for an alternative mandamus was made to the supreme court at Mount Vernon to be made returnable to the term to be held in Springfield. It was held by the court that such a writ could not be awarded in one grand division of the State and made returnable in another. In such a case the jurisdiction of the court is exclusive in each grand division.

Where a writ was made returnable at "a court to be held at," etc., and the circuit court had exclusive jurisdiction of such suit, it was held that the writ was returnable to the circuit court at that place. *Wharton v. Conger*, 9 Smed. & M. (Miss.) 510.

In an action of trespass on the freehold, before a justice of the peace, the writ must be made returnable in the town where one of the parties resides, if both parties are citizens of the State; and the writ will abate, if made returnable in the town where the land lies, if neither of the parties resides in that town. *June v. Conant*, 17 Vt. 656.

See also, in this connection, *Richardson v. Stevens*, 41 Vt. 120. If the justice has, before the return of process, been removed, a return made to

an officer designated by statute to take his place is a sufficient return. *Hampton v. Boylan*, 46 Hun (N. Y.) 151.

2. *Cutler v. Rathbone*, 1 Hill (N. Y.) 204; *Garlock v. Ontario Bank*, 1 Wend. (N. Y.) 288; *Lee v. Lake*, 13 Mich. 220. These cases, however, all depend upon the construction of a statute and can hardly be said to establish a universal rule.

3. For it becomes a part of the record. This is undoubtedly the rule in *England*, and is followed in almost every State of the Union. *Stewart v. Stewart*, 27 W. Va. 167, where the authorities are reviewed. See also *Murfree on Sheriffs* (2d ed.), § 868; *Barrows v. National Rubber Co.*, 13 R. I. 48; *Higgs v. Huson*, 8 Ga. 317; *Davant v. Carlton*, 57 Ga. 489; *State v. Kenniston*, 67 Me. 558; *Elder v. Cozart*, 59 Ga. 199; *Hunter v. Stoneburner*, 92 Ill. 75; *Leitch v. Colson*, 8 Ill. App. 458; *Ryan v. Lander*, 89 Ill. 554; *Gatlin v. Dibrell*, 74 Tex. 36; *Hunt v. Weiner*, 39 Ark. 70; *Chapline v. Robertson*, 44 Ark. 202; *Baker v. Jamison*, 73 Iowa 698; *Cully v. Shirk* (Ind. 1892), 30 N. E. Rep. 882; *Clark v. Shaw*, 79 Ind. 164; *Putnam v. Man*, 3 Wend. (N. Y.) 202; 20 Am. Dec. 686; *Allen v. Martin*, 10 Wend. (N. Y.) 300; 25 Am. Dec. 564; *Green v. Kindy*, 43 Mich. 279; *Stinson v. Snow*, 10 Me. 263; *Stewart v. Griswold*, 134 Mass. 391; *Elder v. Cozart*, 59 Ga. 199. Compare *Watson v. Watson*, 6 Conn. 334.

It is said in one case that a sheriff's return of service of the writ is conclusive, and if it is defective on its face, the defendant should rule the sheriff to amend, and cannot take the objection on the trial. *Zion Church v. St. Peter's Church*, 5 W. & S. (Pa.) 215.

4. This principle is well established. See *Blue v. Com.*, 2 J. J. Marsh. (Ky.) 26; *Murrell v. Smith*, 3 Dana (Ky.) 462;

and his legal representatives,¹ his return is conclusive, and he cannot be allowed to contradict it. He may, however, in some cases, obtain leave of the court to amend it,² and this is always the proper course. It is also *prima facie* evidence in his favor.³

b. AS AGAINST PARTIES.—The rule here is that, as against parties and privies in the action in which the process issued,⁴ the sheriff's official return, being a part of the record,⁵ is conclusive

Hustick v. Allen, 1 N. J. L. 168; Duncan v. Gerdine, 59 Miss. 550; Benjamin v. Hathaway, 3 Conn. 528; Stone v. Montgomery, 35 Miss. 83; Murfree on Sheriffs (2d ed.), § 858; Winnebago Co. v. Brones, 68 Iowa 682; Mendleson v. Paschen, 71 Wis. 591; Hensley v. Rose, 76 Ala. 373. Compare Decker v. Armstrong, 87 Mo. 316. This rule applies, of course, to all officers making returns. See cases just cited.

Where a constable has, without objection, given evidence in apparent contradiction to his return, he may be questioned further for the purpose of explaining such contradiction. State v. Caldwell, 115 Ind. 6. But a sheriff's entry in his writ book, accompanied by his personal recollection, will rebut the presumption from his return that the summons was personally served. Genobles v. West, 23 S. Car. 154. And his testimony in explanation of what was meant by his return is competent, and properly admitted when it does not contradict such return. Leonard v. O'Neal, 16 Lea (Tenn.) 158; Liston v. Central Iowa R. Co., 70 Iowa 714; 26 Am. & Eng. R. Cas. 593.

Entries made by the sheriff on separate slips of paper and attached to an execution, are part of the record—as much so as if indorsed on the execution—and hence admissible in evidence with the execution. Hammett v. Farmer, 26 S. Car. 566.

And it is also held that a sheriff may be called to prove that a recital in his return was made by mistake or inadvertence, but not to vary the return, in the absence of fraud or mistake. King v. Russell, 40 Tex. 124.

The return of an officer, where he himself is a party, is *prima facie* evidence only. Nichols v. Patton, 18 Me. 238; 36 Am. Dec. 713; Sias v. Badger, 6 N. H. 393.

Likewise in a *Missouri* case it is said, that in action by an execution debtor against a sheriff for the value of property exempt from execution, levied upon and sold by the sheriff,

the latter may contradict his return by showing that the property so levied upon and sold was that of the plaintiff and was levied upon by mistake. Decker v. Armstrong, 87 Mo. 316.

In Weidman v. Weitzel, 13 S. & R. (Pa.) 96, where the return was made two years after the proper time, it was held not conclusive.

1. State v. Penner, 27 Minn. 269; Clarke v. Gary, 11 Ala. 98.

A sheriff's administrator cannot insist that the sheriff's return was conclusive evidence of payment of the money due under the execution sale. Winnebago Co. v. Brones, 68 Iowa 682.

2. Henry v. Stone, 2 Rand. (Va.) 455; Murfree on Sheriffs (2d ed.), § 868; Walters v. Moore, 90 N. Car. 41.

3. Hensley v. Rose, 76 Ala. 373; Gyfford v. Woodgate, 11 East 297; Rex v. Elkins, 2 Burr. 2129. Compare Browning v. Hanford, 5 Den. (N. Y.) 586; Hessong v. Pressley, 86 Ind. 555; Stanton v. Hodges, 6 Vt. 64. But is not evidence in his favor to excuse a neglect of duty. Holderman v. Brasfield, Litt. Sel. Cas. (Ky.) 271.

4. Decker v. Armstrong, 87 Mo. 316; Sawyer v. Harmon, 136 Mass. 414; Baker v. Baker, 125 Mass. 7; Lowery v. Caldwell, 139 Mass. 88; Anderson v. Goff, 72 Cal. 65; Davis v. Baker, 72 Cal. 494; Wilson v. Hurst, Pet. (C. C.) 441; Bennethum v. Bowers, 133 Pa. St. 332; Stinson v. Snow, 10 Me. 263. Col. Ins. Co. v. Force, 8 How. Pr. (N. Y.) 353; Rowell v. Klein, 44 Ind. 290; 15 Am. Rep. 235; Phillips v. Evans, 64 Mo. 17; Fitzgerald v. Kimball, 86 Ill. 396. Compare Burton v. Schenck, 40 Minn. 52; Meyer v. Whitehead, 62 Miss. 387 (special statutory provision).

As to those not parties or privies the return is not conclusive. Bott v. Burnell, 11 Mass. 163; Lawrence v. Pond, 17 Mass. 433; Whitaker v. Sumner, 7 Pick. (Mass.) 551; 19 Am. Dec. 298; Diller v. Roberts, 13 S. & R. (Pa.) 60; 15 Am. Dec. 578; Straub v. Wooten, 45 Ark. 112.

5. Murfree on Sheriffs (2d ed.), § 868; Barrows v. National Rubber Co.,

evidence of the facts stated therein, and cannot be impeached in a collateral proceeding.¹ This is undoubtedly the rule in *England*,² and in most of the States.³ In some jurisdictions, however, it is considered as merely *prima facie* evidence, which may be rebutted.⁴

This rule applies to the return made by a sheriff or marshal on every kind of process which he is authorized to execute,⁵ and also

13 R. I. 48; *Swift v. Cobb*, 10 Vt. 282; *Bates v. Willard*, 10 Met. (Mass.) 62; *Sykes v. Keating*, 118 Mass. 517; *Huntress v. Tiney*, 39 Me. 237; *Messer v. Bailey*, 31 N. H. 9; *Compare Com. v. Russell*, 147 Mass. 545 (return on warrant).

1. *Nichols v. Nichols*, 96 Ind. 433; *Bond v. Wilson*, 8 Kan. 231; 12 Am. Rep. 466; *Rowell v. Klein*, 44 Ind. 290; *Green v. Kindy*, 43 Mich. 279.

The return of a writ "served" is not conclusive as to time and place of service, which may by affidavit be shown to be illegal. *Chapman v. Cumming*, 17 N. J. L. 11.

2. *Rex v. Elkins*, 2 Burr. 2127; *Barr v. Satchwell*, 2 Stra. 813; *Watson v. Watson*, 6 Conn. 334.

3. See cases just cited. See also *infra*, this title, *Effect of Return*.

4. *Butts v. Francis*, 4 Conn. 424; *Watson v. Watson*, 6 Conn. 334; *Crosby v. Farmer*, 39 Minn. 305; *Burton v. Schenck*, 40 Minn. 52; *Browning v. Hanford*, 5 Den. (N. Y.) 586; *Baker v. McDuffie*, 23 Wend. (N. Y.) 289; *Fitch v. Devlin*, 15 Barb. (N. Y.) 47; *Newell v. Whigham*, 102 N. Y. 20; *Godwin v. Monds*, 106 N. Car. 448; *Halcomb v. Stubblefield*, 76 Tex. 310. See also *Rowe v. Table Mountain Water Co.*, 10 Cal. 442; *Hammond v. Starr*, 79 Cal. 556; *McComb v. Council Bluffs Ins. Co.* (Iowa 1891), 48 N. W. Rep. 1038 (not conclusive as to date); *Baldwin v. Thibandeaux*, 14 N. Y. Supp. 788 (same); *Wendell v. Mugridge*, 19 N. H. 112; *Carr v. Commercial Bank*, 16 Wis. 50. *Compare Law v. Hall*, 2 Root (Conn.) 171; *Putnam v. Man*, 3 Wend. (N. Y.) 202; 20 Am. Dec. 686; *Allen v. Martin*, 10 Wend. (N. Y.) 300; 25 Am. Dec. 564.

In *Kentucky* it is only *prima facie* evidence before judgment. *Barbour v. Newkirk*, 83 Ky. 529. But after judgment it is conclusive. *Stewart v. Stewart*, 27 W. Va. 162; *Hobart v. Bennett*, 77 Me. 401.

Michigan Rule.—In *Michigan* the rule is stated to be that a return

showing regular service of declaration and rule to plead as the beginning of a suit, cannot be contradicted for the purpose of invalidating the proceedings founded thereon; but it may be contradicted to show excuse for default. *Zimmerman v. Merchants' Nat. Bank*, 1 Mich. N. P. 14.

5. **Rule Applies to Every Process.**—On attachment. *Morse v. Smith*, 47 N. H. 474; *Anderson v. Goff*, 72 Cal. 65; *Sams v. Armstrong*, 8 Mo. App. 573; *Wilder v. Holden*, 24 Pick. (Mass.) 8; *Wade on Attachments*, § 156. On execution. *Trigg v. Lewis*, 3 Litt. (Ky.) 129; *Stewart v. Stewart*, 27 W. Va. 167; *Crocker on Sheriffs*, 190 *et seq.* But it is said that a sheriff's return on an execution is not evidence in his favor of the fact of payment. *First v. Miller*, 4 Bibb. (Ky.) 311; *Cator v. Stokes*, 1 M. & S. 599. On replevin. *Green v. Kindy*, 43 Mich. 279; *Parker v. Simonds*, 8 Met. (Mass.) 205; *Stephens v. Frazier*, 2 B. Mon. (Ky.) 250; *Phillips v. Hyde*, 1 Dall. (U. S.) 439. On summons. *Genobles v. West*, 23 S. Car. 154, and other cases previously cited.

In a replevin suit, defendant had judgment for a return or, if that could not be had, for the value of the property. Execution issued and a levy was made, the sheriff stating in his published notice of sale that a return of the property replevied could not be had. It was held that this statement was equivalent to a return on the execution and could not be contradicted on the motion to recall the execution and to have the judgment declared satisfied. *Irvin v. Smith*, 66 Wis. 113.

Exception—Return on Chancery Process.—In *Lesterick v. Hamilton*, 9 Heisk. (Tenn.) 312, an exception to the general rule is made in case of process issuing out of chancery.

But as a general rule there is no distinction either in the effect or character of returns between process from chancery and that from other courts. *Crombie v. Little*, 47 Minn. 581.

to an amended return.¹ A return may only be impeached by a direct proceeding instituted for that purpose,² and there are many authorities which maintain that a return is conclusive upon the parties to a suit, and that the only remedy for a false or incorrect return lies in an action against the officer.³ But there seems to be no reason why a return may not be impeached by a direct proceeding just as any other portion of the record may be; that is, either by motion to set aside,⁴ or by application to the court

1. The amended return takes the place of the original one in every particular. *Rickards v. Ladd*, 6 Sawy. (U. S.) 40; *Hill v. Cunningham*, 25 Tex. 25.

2. Return May be Impeached Only in a Direct Proceeding.—*Harrison v. Hart*, 21 Ill. App. 348; *Devant v. Carlton*, 57 Ga. 489; *Flaniken v. Neal*, 67 Tex. 629; *Loughride v. Bowland*, 52 Miss. 546; *Phillips v. Evans*, 64 Mo. 17; *Brown v. Brown*, 10 Neb. 349; *Schneitman v. Noble*, 75 Iowa 120; 9 Am. St. Rep. 467; *Ketchum v. White*, 72 Iowa 193; *Levan v. Millholland*, 114 Pa. St. 49; *Michels v. Stork*, 52 Mich. 260; *Harris v. Lester*, 80 Ill. 307; *Hunter v. Stoneburner*, 92 Ill. 75; *Murfree on Sheriffs* (2d ed.), § 866a; *Mueller v. Bates*, 2 Disney (Ohio) 318. Compare *Holmes v. Buckner*, 67 Tex. 107; *Von Roy v. Blackman*, 3 Woods (U. S.) 98; *Johnson v. Gregory* (Wash. 1892), 29 Pac. Rep. 831; *Crane v. McCoy*, 1 Bond (U. S.) 429. As to the Georgia doctrine, see *O'Bryan v. Calhoun*, 68 Ga. 215.

Therefore, a suit in equity will not lie to set aside a judgment founded on a regular return of service, upon the allegation that the process was not, in truth, served. This is impeaching the return collaterally. *Johnson v. Jones*, 2 Neb. 126.

In order to contradict a sheriff's return that he had complied with the formalities of law as to seizure, etc., in a judicial sale, its errors must be specially set forth and shown. *Fortier v. Zimple*, 6 La. Ann. 54.

3. Action Against Officer for False Return.—*Garlock v. Ontario Bank*, 1 Wend. (N. Y.) 288; *Stinson v. Snow*, 10 Me. 263; *Jensen v. Crevier*, 33 Minn. 372; *Hawks v. Baldwin*, 1 Brayt. (Vt.) 85; *Nichols v. Nichols*, 96 Ind. 433; *Hallowell v. Page*, 24 Mo. 590; *Bouldin v. Page*, 24 Mo. 594; *Krug v. Davis*, 85 Ind. 309; *Richmond v. Whittlesey*, 2 Allen (Mass.) 230; *Ex parte St. Louis*, etc., R. Co., 40 Ark.

141; 16 Am. & Eng. R. Cas. 547; *Harriman v. Rockaway Beach Pier Co.*, 5 Fed. Rep. 461; *Segourney v. Ingraham*, 2 Wash. (U. S.) 336; *Delinger v. Higgins*, 26 Mo. 180; *Hume v. Conduitt*, 76 Ind. 598; *Trigg v. Louis*, 3 Litt. (Ky.) 129; *American Bank v. Doolittle*, 14 Pick. (Mass.) 126; *Whitaker v. Sumner*, 7 Pick. (Mass.) 552; 19 Am. Dec. 298. Compare *Goodall v. Stuart*, 2 Hen. & M. (Va.) 105; *Stone v. Richardson*, 76 Ga. 97.

The case of *Nichols v. Nichols*, 96 Ind. 433, is an extreme one; there the defendant, Geo. D. Nichols, instituted a proceeding to set aside a default for the reason that he was not served with process. The sheriff's return showed service upon Geo. D. Nichols, but the defendant claimed that the service was upon one Geo. D. Nicholas. He was not allowed to prove his claim, the court insisting that his only remedy lay in an action against the sheriff, since the officer's return imported absolute verity. But this case has been limited by a more recent one. *Nietert v. Trentman*, 104 Ind. 392. Compare *Gary v. State*, 11 Tex. App. 527; *Putnam v. Man*, 3 Wend. (N. Y.) 202; 20 Am. Dec. 686.

In an action against a sheriff for refusing to levy an execution, his return of a prior attachment is not conclusive, but may be contradicted. *Smith v. Burnham*, 58 N. H. 205.

In an action upon a constable's bond for breach of duty, his return on a writ is not conclusive. *Waymire v. State*, 80 Ind. 67; *Craven v. Higginbotham*, 83 Ala. 429 (parol evidence admitted).

4. *Grady v. Gosline*, 48 Ohio St. 665. In *Nietert v. Trentman*, 104 Ind. 390, the defendant was allowed to show, in a complaint to set aside the return, that he had not been served with process, although the return stated that he had. See also *Zimmerman v. Merchants' Nat. Bank*, 1 Mich. N. P. 14; *Godwin v. Monds*, 106 N. Car. 448.

direct,¹ or by plea in abatement verified by affidavit and interposed at the earliest opportunity,² or by original or cross-bill in equity.³ A party cannot, however, raise an objection to its sufficiency or truth for the first time in an appellate court.⁴

The evidence required to impeach or falsify a return must be sufficient to rebut the very strong presumption which the law allows in favor of the truth of the statement of its officer, and must, therefore, be very clear and decisive.⁵ It is not like an

So in *Loughridge v. Bowland*, 52 Miss. 548, it is said that a return on attachment, if irregular, may be set aside on motion. See also *Jensen v. Crevier*, 33 Minn. 372; *Crosby v. Farmer*, 39 Minn. 305, in which last case it is said that the return of an officer of the service of a summons is not conclusive on defendant, but may be impeached by affidavit, on motion or other direct proceedings in an action to set aside the judgment on default. See also *Burton v. Schenck*, 40 Minn. 52.

In *New York* a motion to vacate the return on an execution and to compel a true return affords the appropriate remedy when the execution has been satisfied and the sheriff returns it unsatisfied. *In re Dawson*, 20 Abb. N. Cas. (N. Y.) 188.

1. *Stewart v. Camden, etc., R. Co.*, 33 N. J. L. 115; *Gary v. State*, 11 Tex. App. 527. Compare *Primrose v. Browning*, 59 Ga. 69.

In *Crosby v. Farmer*, 39 Minn. 305, the court states that "the general tendency, especially in States having the code practice, is to allow the return to be impeached by affidavit on motion, or other direct proceeding to vacate." Citing *Bond v. Wilson*, 8 Kan. 228; 12 Am. Rep. 466; *Walker v. Lutz*, 14 Neb. 274; *Wendell v. Mugridge*, 19 N. H. 112; *Van Rensselaer v. Chadwick*, 7 How. Pr. (N. Y.) 297.

2. *Chicago, etc., Underground Co. v. Congsdon Brake, etc., Co.*, 111 Ill. 309; *Union Nat. Bank v. First Nat. Bank*, 90 Ill. 56; *Ryan v. Lander*, 89 Ill. 554; *Bowyer v. Knapp*, 15 W. Va. 291; *Murfrees on Sheriffs* (2d ed.), § 866a.

3. *Randall v. Collins*, 58 Tex. 231. In *O'Conner v. Wilson*, 57 Ill. 226, it is said that in a proper case equity will always relieve one against the effects of a false return when an action against an officer is inadequate and an amendment is not permissible. See also *Owens v. Ranstead*, 22 Ill. 161.

4. In *Cunningham v. Mitchell*, 4 Rand. (Va.) 189, the doctrine is thus stated: A sheriff's return may be contradicted by evidence *aliunde*, in which case the sheriff himself is a competent witness to prove its truth. After judgment by default, however, a party cannot object in an appellate court to the truth of the return. See also *Dasher v. Dasher*, 47 Ga. 320.

5. *Evidence to Impeach Return.*—*Abell v. Simon*, 49 Md. 318; *Wyland v. Frost*, 75 Iowa 209; *Randall v. Collins*, 58 Tex. 231; *Gatlin v. Dibrell*, 74 Tex. 36; *Hutton v. Campbell*, 10 Lea (Tenn.) 172; *Union Bank v. Barnes*, 10 Humph. (Tenn.) 245; *Freeman on Executions*, § 38; *Flannigan v. Alt-house*, 56 Iowa 513; *Jensen v. Crevier*, 33 Minn. 372; *Clark v. Shaw*, 79 Ind. 164; *Wilson v. Shipman* (Neb. 1892), 52 N. W. Rep. 576; *Hunt v. Weiner*, 39 Ark. 70; *Webber v. Webber*, 1 Metc. (Ky.) 18; *Anderson v. Sutton*, 2 Duv. (Ky.) 480; *Davis v. Johnson*, 3 Munf. (Va.) 81; *Bean v. Haffendorfer*, 84 Ky. 685.

An instruction in substance giving the same legal effect to the negative presumption arising from the failure of a sheriff's fee-book to show a charge for service of citation, as to the affirmative return on the citation itself, that it had been served, is error. *Randall v. Collins*, 58 Tex. 435.

In *Davant v. Carlton*, 53 Ga. 491, the defendant entered a motion to set aside a judgment on the ground that he had never been served with process, and had not appeared or acknowledged service. It appeared in evidence, on the trial of an issue formed in the matter, that there was a due return by the sheriff of personal service, and it was held error in the court to refuse to charge that under the law it required the strongest evidence to overcome the effect of the sheriff's entry, and to charge in lieu thereof that the sheriff's entry was *prima facie* evidence, but like other

ordinary issue of fact, to be determined by a mere preponderance of testimony.¹ Being the statement of a sworn officer who is disinterested, it seems that the testimony of more than one witness is required to prove it false,² and parol testimony can no more be admitted to falsify it than to impeach any other part of the record,³ though it may be admitted to explain a return,⁴ or to

presumptions it might be rebutted by proof. *Starkweather v. Morgan*, 15 Kan. 274.

And it is said that a plea contradicting an officer's return will not be received or tolerated without a verification on oath, and it is not erroneous to strike from the files a plea that is not so verified. *Ryan v. Lander*, 89 Ill. 554.

Consult here an able dissenting opinion delivered in the case of *Niert v. Trentman*, 104 Ind. 392.

1. *Randall v. Collins*, 58 Tex. 232. See also *Paul v. Malone*, 87 Ala. 544; *Wyland v. Frost*, 75 Iowa 209 (evidence held insufficient to establish falsity of return); *Murrer v. Security Co.*, (Ind. 1892), 30 N. E. Rep. 879.

2. The testimony of one witness alone would merely be one oath against another. *Driver v. Cobb*, 1 Tenn. Ch. 490; *Gatlin v. Dibreil*, 74 Tex. 36; *Sargeant v. Mead* (Supreme Ct.), 1 N. Y. Supp. 589; *Wygant v. Brown* (Supreme Ct.), 9 N. Y. Supp. 372.

The testimony of the defendant if unsupported is not sufficient, therefore, to establish the falsity of the return. *Sullivan v. Niehoff*, 27 Ill. App. 421; *Higley v. Pollock* (Neb. 1891), 27 Pac. Rep. 895; *U. S. v. Gayle*, 45 Fed. Rep. 107.

The rule applies, although the sheriff has no recollection of making the service. *Tatum v. Curtis*, 9 Baxt. (Tenn.) 360.

An affidavit, on a motion to set aside a default on the ground of a defect on the face of the citation, and an annexed citation showing such defect, and alleging to be the citation which was served, are insufficient to overthrow the return of the sheriff showing that no such defect existed. *Wood v. Galveston*, 76 Tex. 126.

3. **Parol Evidence to Contradict Return**—1 *Greenl. Ev.* (14th ed.), § 275; *Stratton v. Lyons*, 53 Vt. 130; *Smith v. Hornbeck*, 3 A. K. Marsh. (Ky.) 392; *Coughran v. Gutchens*, 18 Ill. 390; *Botsford v. O'Connor*, 57 Ill. 72. See also *PAROL EVIDENCE*, vol. 17, pp. 421, 453; *RECORD*.

In an action for a malicious attachment, the official return of the attachment is not conclusive, but may be contradicted by parol. *Mott v. Smith*, 2 Cranch (C. C.) 33.

It has been held, however, that in an action on a foreign judgment, the record return of an officer showing service of process, by which the court claimed to obtain jurisdiction, may be contradicted by parol evidence. *Webster v. Hunter*, 50 Iowa 215.

In a proceeding original or by cross-bill to set aside a judgment obtained upon default in favor of a party who fraudulently procured the record to show service, parol evidence contradicting the officer's return will be heard; but the evidence impeaching the verity of the return must be clear and satisfactory. Whether such evidence is admissible when the judgment plaintiff was innocent of conniving at or procuring the false return, *quære*. *Randall v. Collins*, 58 Tex. 231; *Flaniken v. Neal*, 67 Tex. 629.

In a proceeding by a surety to quash an execution upon the ground that a former execution had been levied on sufficient property of the principal to satisfy the judgment, it was allowed to introduce parol evidence on the part of the surety to contradict the officer's return on the execution thus levied: "Held up by order and consent of all parties." *Hutton v. Campbell*, 10 Lea (Tenn.) 170; *Shannon v. McMullin*, 25 Gratt. (Va.) 211. See also *Phillips v. Elwell*, 14 Ohio St. 244; 84 Am. Dec. 373.

4. *Johnson v. State*, 80 Ind. 220; *Bryant v. Buckner* (Tex. 1886), 2 S. W. Rep. 452; *Williams v. Cheesebrough*, 4 Conn. 356; *Silver Bow Min., etc., Co. v. Lowry*, 5 Mont. 618. *Compare* *Barnett v. Wolf*, 70 Ill. 76 (parol evidence inadmissible to assist return).

Parol evidence has been admitted to contradict an indorsement upon a warrant to the effect that the same had been served by a deputy sheriff rather than by a constable who had been murdered while making the arrest. *Com. v. Moran*, 107 Mass. 239.

and, if improper, set aside.¹ The rule applies only to the officer and to parties and privies, not to third parties;² it does not apply in case of the return of any officer other than the sheriff,³ or the marshal,⁴ or their deputies.

6. Amendment of Return.—Under proper circumstances, amendments to an officer's return are always allowable, the discretion vested in the courts being usually liberal in this regard.⁵ Before the return has been filed, the sheriff may amend it as he chooses, but after filing, amendments can only be made with leave of

the return is no evidence, and need not be traversed; and, though the sheriff be dead, the defendant may testify that he was not served. *Keaton v. Moore*, 59 Ga. 553.

1. *Knowles v. Logansport Gaslight, etc., Co.*, 19 Wall. (U. S.) 59; *Webster v. Hunter*, 50 Iowa 215; *Wright v. Mahaffey*, 76 Iowa 96; *Thompson v. Whitman*, 18 Wall. (U. S.) 457; *supra*, this title, *Upon Non-residents; Record*.

2. And such parties may introduce parol evidence to impeach the return. *Bates v. Fuller*, 8 Lea (Tenn.) 644; *Mitchell v. Lipe*, 8 Yerg. (Tenn.) 179; 29 Am. Dec. 116; *Loyd v. Anglul*, 7 Yerg. (Tenn.) 428; *Fife v. Bohlen*, 22 Fed. Rep. 878.

The case of *American Bank v. Doolittle*, 14 Pick. (Mass.) 123, is in point, holding that an officer's return in a trustee suit, which stated that the person named in the writ as trustee was not to be found, but made no mention of any service on the assignee as trustee, is not conclusive, and parol evidence is admissible, on the part of a plaintiff who was not party or privy to the trustee suit, to prove that the trustee writ had been properly served.

Where the sheriff is a party it is *prima facie* evidence only. *Nichols v. Patten*, 18 Me. 238; 36 Am. Dec. 713; *Bruce v. Holden*, 21 Pick. (Mass.) 187.

3. The reason seems to be that a sheriff is the officer of a court of record and his return is, therefore, made a part of the record; while the same is not true of inferior officers. Thus, the constable's return on an execution is only *prima facie* evidence of a levy. *Joyner v. Miller*, 55 Miss. 208; *Harvey v. Rickett*, 15 Johns. (N. Y.) 87. Compare *Baker v. Jamison*, 73 Iowa 698.

A return of service to a warrant by a police officer is no part of the record, and an error in the date does not affect the jurisdiction of the court, and

is not ground for arrest of judgment. *Com. v. Russell*, 147 Mass. 545. A return of service by a private person is not conclusive. *Detroit Free Press Co. v. Bagg*, 78 Mich. 50.

There is no legal objection to proof that a constable's return bears a wrong date. *Welch v. Butler*, 24 Ga. 445.

Where the defendant appeared at the return day and moved to dismiss, offering proof that he had not been served with process, it was error to reject the evidence on the ground that the constable's return, showing personal service, was conclusive. *Wheeler, etc., Co. v. McLaughlin*, 54 Hun (N. Y.) 639; *State v. Caldwell* (Ind. 1888), 17 N. E. Rep. 185. See also *Fitch v. Devlin*, 15 Barb. (N. Y.) 47.

4. *Wilson v. Hurst*, Pet. (C. C.) 441; *U. S. v. Lotridge*, 1 McLean (U. S.) 246.

A marshal's return is equally conclusive with that of the sheriff. *Sindall v. Thacker*, 56 Ga. 51.

5. *Murfree on Sheriffs* (2d ed.), §§ 875-8; *Jeffries v. Rudloff*, 73 Iowa 60; *Berry v. Griffith*, 2 Har. & G. (Md.) 337; 18 Am. Dec. 309; 4 *Minor's Inst.* (2d ed.) 839. See also *Walters v. Moore*, 90 N. Car. 41; *Turner v. Holden*, 109 N. Car. 182; *Main v. Lynch*, 54 Md. 658; *Lee v. Neilson*, 14 U. C. Q. B. 106; *Primrose v. Browning*, 59 Ga. 69; *Elder v. Frevert*, 18 Nev. 278; *Commercial Union Assoc. Co. v. Everhart*, 88 Va. 952; *Kidd v. Dougherty*, 59 Mich. 240; *Tilton v. Cofield*, 93 U. S. 163.

Consult here *Dobynes v. U. S.*, 3 Cranch (U. S.) 241, from which it seems there should be something in the record by which to amend the return.

Courts are, however, extremely cautious in permitting amendments where the title to property is to be affected thereby. *Hobart v. Bennett*, 77 Me. 401.

court.¹ The allowance of amendments is a matter of judicial discretion.²

a. WHEN ALLOWABLE.—There is scarcely any limitation as to the time during which amendments are allowed; in some cases, many years after judgment was rendered,³ and even though the

1. *Wilcox v. Moudy*, 89 Ind. 232; *Morrill v. Fitzgerald*, 36 Tex. 275; *Berry v. Griffith*, 2 Har. & G. (Md.) 337; 18 Am. Dec. 309; in which latter case it is said that it is the right and duty of a sheriff to correct his return, so as to make it conform to the truth of the fact, whatever that may be, and give it legal effect and operation.

2. *Murfree on Sheriffs* (2d ed.), § 878a; *Howard v. Priestly*, 58 Miss. 21; *Jeffries v. Rudloff*, 73 Iowa 60; *Sawyer v. Harmon*, 136 Mass. 414.

In *O'Conner v. Wilson*, 57 Ill. 226, it is stated that the true rule of practice is, that the court should grant leave to a sheriff to amend his return to process as a matter of course, and without notice to the party to be affected by it, only during the term at which the cause is determined.

3. **Return Amended Years After Being Made.**—Mere lapse of time, where the rights of third persons are not injuriously affected, will not bar an amendment. *Gilman v. Stetson*, 16 Me. 124, in which case twenty years was held to be not too long. *Scruggs v. Scruggs*, 46 Mo. 271; *McClure v. Wells*, 46 Mo. 311; *Jarboe v. Hall*, 37 Md. 345; *Slicer v. Bank of Pittsburg*, 16 How. (U. S.) 571; *Peck v. Whitaker*, 103 Pa. St. 297; *Kirkwood v. Reedy*, 10 Kan. 453; *Hackett v. Lathrop*, 36 Kan. 661; *Mills v. Howland* (N. Dak. 1891), 49 N. W. Rep. 413; *National Ins. Co. v. Chamber of Commerce*, 69 Ill. 22; *Toledo, etc., R. Co. v. Butler*, 53 Ill. 323; *Jeffries v. Rudloff*, 73 Iowa 60. In this last case it was allowed, although fifteen months had elapsed since judgment rendered in the attachment case, and an action was pending against the officer, based on the return. In the case of *O'Brien v. Gaslin*, 20 Neb. 347, it was allowed eight years after judgment. In *Shenandoah Val. R. Co. v. Ashby*, 86 Va. 232, although thirteen years had elapsed since judgment by default, an amendment was allowed so as to show that the county in which service was had on the defendant corporation was the county in which it resided, and the judgment was validated by such amendment.

A sheriff has been allowed to amend his return even after the lapse of sixteen years, a proper case being shown, and rights of third parties not having intervened. *Spellmyer v. Gaff*, 112 Ill. 29; 13 Ill. App. 294.

But where a declaration was filed and process issued against a corporation, and a regular return made by the sheriff that the defendant was not to be found, and that the president of the corporation was dead; the plaintiff was not entitled, after the lapse of five terms of the court, without having taken any further action, or showing sufficient legal reason for the delay, to amend the process so as to make it returnable to the then ensuing term. *Branch v. Mechanics' Bank*, 20 Ga. 413.

Courts are very slow to allow such amendments, however. Thus, in *Thatcher v. Miller*, 13 Mass. 271, it was held that a return by a deputy sheriff cannot be amended by him after a period of six years from the date of the return. The court, by Parker, C. J., said: "More than six years have elapsed since the return was made, and the deputy sheriff now offers to insert an essential fact, the omission of which may render him liable to an action for damages. It would be unsafe to expose officers to such a temptation. For an officer to undertake, six years after a defective return, to know with certainty the performance of a particular duty, when he is daily and hourly performing similar duties upon different persons, is more than can be expected of men, however strong their memories." Likewise, in *Coughran v. Gutcheus*, 18 Ill. 390, on an application to amend a record four years after judgment, it was said that the motion was out of time, particularly where there was nothing to amend by in the record. Also in *O'Conner v. Wilson*, 57 Ill. 226, it was considered that an application to amend, made twelve years after the date of the return, was made too late, and reason seems rather to uphold the doctrine of these cases. 1 *Wade on Attachment*, § 151; *Dorsey v. Peirce*, 5 How. (Miss.) 173; *Hughes v. Lapice*,

officer's term had expired,¹ and even after the hearing of a motion to reverse the judgment for a deficiency in the return,² or pending proceedings against the officer for a false return;³ an amendment has also been allowed after a default and sale under the judgment.⁴ Indeed, the return on an attachment has been amended, although subsequently to the attachment the defendant had made a voluntary assignment for the benefit of creditors.⁵ But it seems that after an appeal has been taken and the judgment superseded, the return is beyond amendment.⁶

b. TO WHAT EXTENT.—Within certain limits,⁷ any return may be amended so as to make it conform to the facts; for example, where the date of service or return is omitted, or is incorrectly stated,⁸ or where the officer serving the process has failed to attach

5 Smed. & M. (Miss.) 451; in which two cases it was held that, after the term at which judgment was rendered, it was too late for an amendment to a return on mesne process. See also Williams v. Oppelt, 1 Smed. & M. (Miss.) 559; Branch v. Mechanics' Bank, 50 Ga. 413; Perdue v. Davis, 31 Tex. 488.

1. Diggins v. Cook, 71 Ind. 579; Avery v. Bowman, 39 N. H. 393; Lake, Petitioner, 15 R. I. 628; Palmer v. Thayer, 28 Conn. 237; Newton v. Prather, 1 Duv. (Ky.) 100; Jeffries v. Rudloff, 73 Iowa 60; Adams v. Robinson, 1 Pick. (Mass.) 461; Beutell v. Oliver (Ga. 1892), 15 S. E. Rep. 307; Keen v. Briggs, 46 Me. 467. Compare Armstrong v. Easton, 1 B. Mon. (Ky.) 66; Jessup v. Gragg, 12 Ga. 261; Cole v. Dugger, 41 Miss. 557.

After sheriff's death. A return made by a sheriff cannot, after his death, be amended so as to affect his representatives, unless they have due notice to appear. Jefferson Co. Sav. Bank v. McDermott (Ala. 1891), 10 So. Rep. 154.

2. Capehart v. Cunningham, 12 W. Va. 750.

3. Murfree on Sheriffs (2d ed.), § 879a; Jeffries v. Rudloff 73 Iowa 60; People v. Ames, 35 N. Y. 482; 91 Am. Dec. 64; Trotter v. Parker, 38 Miss. 473; Hodges v. Laird, 10 Ala. 678; Niolin v. Hanmer, 22 Ala. 578; Gorham v. Hood, 27 Ga. 299. See also Wordsworth v. Miller, 4 Gratt. (Va.) 99.

In Thomas v. Browder, 33 Tex. 783, it was held that the fact that an amendment was made by the sheriff, after a motion made to amerce him, only affects the credibility of the return, not its competency. This doctrine is op-

posed by two cases in Tennessee, which maintain that a sheriff cannot amend his return so as to avoid a motion pending against him, neither can his deputy. Mullins v. Johnson, 3 Humph. (Tenn.) 396; Howard v. Union Bank, 7 Humph. (Tenn.) 26. Similarly in Virginia. Carr v. Mead, 77 Va. 142. So also in Pennsylvania. McElrath v. Knitting, 5 Pa. St. 336; Peck v. Whitaker, 103 Pa. St. 297. The rule of the text seems rather harsh, and the exceptions appear more consonant with reason; but it must be remembered, as a general principle in amendments, that the rights of no third party shall be unduly prejudiced thereby. See *infra*, this title, *Limitations*; Glidden v. Philbrick, 56 Me. 222.

4. Allison v. Thomas, 72 Cal. 562.

5. Pond v. Campbell, 56 Vt. 674.

6. The defendant being no longer in the trial court. Jenkins v. Crofton (Ky. 1888), 9 S. W. Rep. 406. But in Colorado an amendment was allowed in the district court after the record had been removed into the supreme court by a writ of error. Anderson v. Sloan, 1 Colo. 484; Lowland v. Sears, 1 Colo. 433; citing Moore v. Purple, 8 Ill. 149; People v. Needles, 3 Ill. 361; Morris v. Trustees, etc., 15 Ill. 269.

7. See *infra*, this title, *Limitations*.

8. *Amendment of Dates.*—Kidd v. Dougherty, 59 Mich. 240; Fisher v. Collins, 25 Ark. 97. Especially where there is a memorandum of the officer's by which to amend. Haven v. Snow, 14 Pick. (Mass.) 28; Williams v. Weaver, 101 N. Car. 1; Ware v. Bucksport, etc., R. Co., 69 Me. 97. Compare Thomas v. Womack, 64 N. Car. 657; Walston v. Bryan, 64 N. Car. 764. Where, on a writ dated and issued Nov. 4, 1833, the officer, by mis-

his signature,¹ or a mistake has been made in the name of a party,² or for other similar error.³

c. HOW EFFECTED.—Amendment is usually to be made by the sheriff,⁴ yet, inasmuch as the return can only be amended according to the facts,⁵ the amendment should be made by the officer who served the writ and who is acquainted with the facts;⁶ though in such case, it may be made by the sheriff himself from a memorandum made by the deputy at the time he served the writ, and which clearly states the facts omitted in the return.⁷ Where the sheriff is incompetent from interest to make service of a writ, he is also incompetent to amend, and the duty in such case devolves upon his deputy.⁸

It is said that the consent of the sheriff or officer is not necessary to an amendment, and that the court may compel him to

take, returned an attachment as made Nov. 4, 1834, but the action was entered in 1833, and judgment rendered in June, 1834, he was allowed to substitute 1833 for 1834, so as to defeat an intermediate purchaser. *Johnson v. Day*, 17 Pick. (Mass.) 106. Likewise, where a justice certified that he issued and delivered a summons to a constable on the 23d day of January, and the constable in his return certified that he served it on the "3d" day of January, on affidavits that the constable inadvertently omitted the figure "2," it was held that the mistake was not fatal to the judgment; the justice could amend the return, before or after judgment, and the appellate court could also allow it to be made. *Snyder v. Schram*, 59 How. Pr. (N. Y.) 404. The rule applies to mistakes as well as to omissions. *Chase v. Williams*, 71 Me. 106; *Bessey v. Vose*, 73 Me. 217.

1. *Wilkins v. Tourtellott*, 28 Kan. 825; *Kirkwood v. Reedy*, 10 Kan. 453.

2. *Frost v. Paine*, 12 Me. 111; *Cleveland v. Pollard*, 37 Ala. 556; *Ala. Sel. Cas.* 481; *McKane v. Adams* (Supreme Ct.), 1 N. Y. Supp. 580; *Phillips v. Evans*, 64 Mo. 17.

3. **Other Instances.**—Thus, the granting of permission to an officer to amend his return so as to show what actually occurred in relation to the execution of the writ, is within the discretion of the court, provided no intervening rights have accrued. *Howard v. Priestly*, 58 Miss. 21. See, in this connection, *Smith v. Clinton Bridge Co.*, 13 Ill. App. 572.

A sheriff may amend his return by inserting the words, "and by reading

this summons to him." *Golden Paper Co. v. Clark*, 3 Colo. 321. Also by stating that he left a copy of the order with the occupant, or posted the same. *Wilkins v. Tourtellott*, 28 Kan. 825.

A sheriff's return, insufficient in showing service by copy, etc., without averring that the defendant was not found, after motion by the defendant to set aside, may, on plaintiff's motion, be amended so as to show due service. *Northrup v. Shephard*, 23 Wis. 513; *Allison v. Thomas*, 72 Cal. 562.

The recital, in a sheriff's return, served upon a "member of the family," etc., of defendant, instead of upon a "person, a member of the family," etc., or its insertion of the initial letter of a middle name, when he has none, are immaterial and may be amended. *Phillips v. Evans*, 64 Mo. 17.

4. *O'Conner v. Wilson*, 57 Ill. 226; *Smith v. Gaines*, 93 U. S. 343; *Washington Mill Co. v. Kinnear*, 1 Wash. Ter. 116; 1 *Wade on Attachment*, § 151; *Cole v. Dugger*, 41 Miss. 557. In this last case the court draws the conclusion that therefore a sheriff whose term has expired, being not an officer, and not speaking on oath, cannot amend his return.

After a return has been filed, it can be amended only by leave of the court upon good cause being shown. *Edwards v. Tipton*, 77 N. Car. 22.

5. *Lake, Petitioner*, 15 R. I. 628; *Williams v. Weaver*, 101 N. Car. 1.

6. *O'Conner v. Wilson*, 57 Ill. 226.

7. *O'Conner v. Wilson*, 57 Ill. 226.

8. *O'Conner v. Wilson*, 57 Ill. 226; *supra*, this title, *By Whom Service is Made*.

perfect his return,¹ but this may well be doubted. It is certain, however, that he cannot be compelled to amend a return regular on its face,² nor may the court dictate what the return should be.³ It can only require that it be appropriate in form and sufficient in law.⁴

d. EFFECT OF AMENDMENT.—After an amendment has been made, the amended return relates back and takes the place of,⁵ and operates from the time of, the original return.⁶ Therefore, if the sheriff's amended return is false, he is liable to an action by the party injured.⁷

e. LIMITATIONS AS TO AMENDMENT.—Although the allowance of amendments is purely a matter of judicial discretion, which is to be exercised under rules of law,⁸ the rights of third parties are not to be prejudiced by its exercise;⁹ and wherever it is proposed to affect such rights, notice must be given to those whose interests are to be affected.¹⁰ A new and material fact cannot be inserted

1. Murfree on Sheriffs (2d ed.), § 878a. Mr. Murfree is contradicted by several authorities. *Wilcox v. Moudy*, 89 Ind. 232, where it is distinctly stated that the court has no such power; and this case is supported elsewhere. *Bacon's Abr.*, Execution; 4 *Minor's Insts.* (2d ed.) 840. The reason, as stated in this last authority, is a strong one, "a return being the sworn statement by the officer," how can he be compelled to make a return of facts other than what he believes correct?

In the case of *Stetson v. Freeman*, 35 Kan. 523, however, motion to amend a return was allowed, although the sheriff opposed the motion.

2. *Washington Mill Co. v. Kinnear*, 1 Wash. Ter. 116; *Sample v. Coulson*, 9 W. & S. (Pa.) 62.

3. *Vastine v. Fury*, 2 S. & R. (Pa.) 426; *Maris v. Schermerhorn*, 3 Whart. (Pa.) 13.

4. Murfree on Sheriffs (2d ed.), § 878a; *Dixon v. White Sewing Mach. Co.*, 128 Pa. St. 397. See also *Ex parte Worley*, 19 Fed. Rep. 586.

5. *Capeheart v. Cunningham*, 12 W. Va. 750; *Lake, Petitioner*, 15 R. I. 628; *Hill v. Cunningham*, 25 Tex. 25; *People v. Ames*, 35 N. Y. 482; 91 Am. Dec. 64; *Rickards v. Ladd*, 6 Sawy. (U. S.) 40; *Freeman on Ex.* (2d ed.) 358.

6. *Lake, Petitioner*, 15 R. I. 628.

7. Murfree on Sheriffs (2d ed.), §§ 880, 880a; *Daniels v. Hamilton*, 52 Ala. 105; *Smith v. Leavitts*, 10 Ala. 92; *Hodges v. Laird*, 10 Ala. 678.

8. Murfree on Sheriffs (2d ed.), § 878. In *Moler v. Marks*, 39 La. Ann.

575, it is said that a return on a citation cannot be amended or corrected after judgment so as to cure nullities resulting from a defective citation. See also *DISCRETION*, vol. 5, p. 681.

9. *Briggs v. Hodgdon*, 78 Me. 514; *Chase v. Williams*, 71 Me. 190, where it is further said that a plaintiff's attorney, who becomes the purchaser, cannot deny the validity of the attachment and levy that he was called upon to make; nor can subsequent purchasers from him, the record disclosing his relation to the matter. See also *Murfree on Sheriffs* (2d ed.), § 878a; *Main v. Lynch*, 54 Md. 658; *Cole v. Dugger*, 41 Miss. 557; *Peaks v. Gifford*, 78 Me. 362. Thus it is stated in *Glidden v. Philbrick*, 56 Me. 222, that no amendment of an officer's return should be permitted, when such amendment would destroy or lessen the rights of third persons acquired *bona fide* and without notice by the record or otherwise. But if the return contains sufficient to indicate that all the requirements of the statute have been complied with, an amendment may be made, notwithstanding any intervening interest of a subsequent purchaser or creditor.

10. *Thriffts v. Frity*, 101 Ill. 457; *Coopwood v. Morgan*, 34 Miss. 368; *Williams v. Doe*, 1 Smed. & M. (Miss.) 559; *Shufeldt v. Barlass* (Neb. 1892), 51 N. W. Rep. 134; *Freeman on Ex.* (2d ed.), § 358; *Jeffries v. Rudloff*, 73 Iowa 60; *Blodgett v. Schaffer*, 94 Mo. 652; *Mendelson v. Paschen*, 71 Wis. 591.

The sheriff may amend his return of service upon the defendant by leave of

by amendment without proof of its truth,¹ and when an amendment is allowed it must show the whole truth.²

The court from which a cause has been removed by a change of venue has no jurisdiction to permit the sheriff to amend his return on the original process.³ Nor can a court amend a return upon process issued from another tribunal in a suit which has been finally disposed of there.⁴

X. PROCESS IN THE FEDERAL COURTS—1. Form and Character.—
Process in the United States circuit and district courts usually

the court after the term at which judgment or decree is rendered, upon notice to the party to be affected by it; and, if the record shows that such other party is present in court at the time of granting such leave, this will dispense with the necessity of a notice. *National Ins. Co. v. Chamber of Commerce*, 69 Ill. 22.

The officer's return of an attachment of real estate or of a levy upon it cannot be amended to affect the title of an intervening purchaser for full value, unless there is sufficient appearing by the return to give third parties notice that all the requirements of law have probably been complied with. *Bessey v. Vose*, 73 Me. 217.

It has been held in *Kansas* that notice is unnecessary where the application is made at the return term of the writ, prior to the confirmation of an execution sale. *Stetson v. Freeman*, 35 Kan. 523. Also where defendant could not be found, but his attorney appeared in order to object to the jurisdiction, an amendment without notice was allowed. *Kidd v. Dougherty*, 59 Mich. 240. See also *Bushey v. Rath*, 45 Mich. 181.

Where property is to be affected by amendments, courts are extremely cautious in allowing them. *Hobart v. Bennett*, 77 Me. 401.

1. *Bayley*, Petitioner, 132 Mass. 457, where it is held that a court of record has no authority to allow an amendment to a return of an execution issued by it, by inserting a new and material fact without proof of the truth of that fact; and that the truth of an amendment that the officer, "having made diligent search for" the debtor, "but not finding him in my precinct could make no personal service upon him," is not sustained by proof that the officer, upon hearing, at the debtor's residence, that he was probably not in, left for him a written notice of the time and place of sale under the execution, and made no further inquiry or search.

So also a sheriff's return on execution cannot be amended by incorporating in it subsequent facts with which the sheriff had no connection, such as the payment of the purchase-money by the purchaser, at the sale, to the plaintiff in the writ, after the return day. *Bibb v. Collins*, 51 Ala. 450; *Carr v. Mead*, 77 Va. 142.

2. In *Woolcott v. Ely*, 2 Allen (Mass.) 338, it was held that it was not competent for a court to allow one amendment to a return necessary to make the levy valid, where there was another error in the return which, if corrected, would show that the levy was invalid. The court, by Hoar, J., said: "But we do not think it within the proper limits of judicial discretion to allow an officer to amend a former defect in his return when facts are untruly stated in another part of the return, and when, if the whole return were amended so as to conform to the truth, the amendment would be ineffectual and useless. If any amendment is allowed it must show the whole truth." See also *Hovey v. Wait*, 17 Pick. (Mass.) 196; *Pratt v. Wheeler*, 6 Gray (Mass.) 520.

Other instances may be cited. Thus, it is held that an amendment by a sheriff of his return to an attachment, made upon his own application and without notice, by which he vacated the levy of an attachment on lands, and substituted a return of *nulla bona*, was an abuse of the court's powers and discretion, and should be set aside. *Griffiths v. Short*, 14 Neb. 259; *Murfree on Sheriffs* (2d ed.), § 878.

A sheriff's return cannot be so amended as to cause a reversal of judgment. *Chicago Planing Mill Co. v. Merchants' Nat. Bank*, 97 Ill. 294.

3. **Power of Court to Amend After Change of Venue.**—*State v. Rayburn*, 31 Mo. App. 385; *Tallman v. Baltimore, etc., R. Co.*, 45 Fed. Rep. 156 (removal from State to Federal court).

4. *Ledford v. Weber*, 7 Ill. App. 87.

conforms in form and character to that used in the courts of the State wherein such circuit or district courts sit. This was made the rule to govern such process by act of Congress, 1789, and also by later statutes.¹

2. Service and Return.—Service and return of process in the Federal courts is always made by the marshal, who is the ministerial officer of such courts, he occupying the same position relatively as does the sheriff in State courts.² The rule as to the time, manner, and place of service, and the character of the return, are the same as those which apply in case of process issuing from State courts.³

1. The process act of Congress of 1789, adopted for the courts of the United States, in each State respectively, the forms of writs and other process, and the forms and modes of proceeding in suits at common law, as they existed at that time in the supreme courts of the States, but did not adopt, prospectively, such alterations as the State might afterwards make. *Lane v. Townsend*, 1 Ware (U. S.) 286.

Such parts only of the laws of a State as are applicable to the courts of the United States are adopted by the process act of Congress. *Gwin v. Breedlove*, 2 How. (U. S.) 29.

Actions for penalties brought in the Federal courts of *New York* in the name of the United States correspond with those brought by the State of *New York* in the name of the people. Congress, therefore, having adopted the "forms and modes of proceedings" of the several States, the summons in such an action must be indorsed with a reference to the statute giving the penalty, as is required by the *New York* Code; otherwise it is defective, and not amendable. *U. S. v. Rose*, 14 Fed. Rep. 681.

Where the circuit court of the United States, by a rule, adopts the process pointed out by a State law, there must be no essential variance between them; such a variance is a new rule, unknown to any act of Congress or the State law professedly adopted. *McCracken v. Hayward*, 2 How. (U. S.) 608.

The act of Congress of May 19, 1828, to regulate process, adopted for the Federal courts the laws then in force in the State of *Indiana*, governing executions issued by the supreme court of that State. *Simpson v. Niles*, 1 Ind. 196.

2. *Sindall v. Thacker*, 56 Ga. 51; **SHERIFFS.**

Service of process by one who, by memorandum, indorsed on the same by the marshal, was deputized to execute it, has been held sufficient. *The E. W. Gorgas*, 10 Ben. (U. S.) 460.

It is held that the United States statutes conferring on marshals similar powers to those exercised by sheriffs are laws conferring powers only, and not restricting those which the marshals already had. *The E. W. Gorgas*, 10 Ben. (U. S.) 460.

A summons directed to the marshal must be served by that officer or his deputy, and cannot be served by a private person. *Schwabacker v. Reilly*, 2 Dill. (U. S.) 127.

While a witness's subpoena, issued by the supreme court of the District of Columbia, may run out of the District, it must be served by a marshal, or, under his order, by a deputy; it cannot be served by any one else, although such service might be valid under the law of the State where made. *In re Spencer*, 4 McArthur (D. C.) 433.

A warrant issued by order of the Senate of the United States, for the arrest of a witness for contempt in refusing to appear before a committee of the Senate, and addressed only to the Sergeant-at-Arms of the Senate, cannot be served by deputy in *Massachusetts*. *Sanborn v. Carleton*, 15 Gray (Mass.) 399.

3. See *supra*, this title, *Manner of Service; Return*; **SHERIFFS**; *Parker v. Dacres*, 1 Wash. 190.

As to substituted service, consult *Hyslop v. Hoppock*, 5 Ben. (U. S.) 533; *Harris v. Hardeman*, 14 How. (U. S.) 334.

While the State law as to what should constitute a sufficient service was in a condition of uncertainty, the adoption by the Federal court of a rule for the purpose of securing uniformity, will be controlling where it is estab-

The circuit and district courts of the United States cannot, either in suits or at common law or equity, send their process into another district, except where specially authorized to do so by act of Congress.¹

lished by the practice and procedure of the court and is well understood by the marshal and his deputies. *Lowry v. Story*, 31 Fed. Rep. 769. And see *Hat-Sweat Mfg. Co. v. Davis Sewing Mach. Co.*, 31 Fed. Rep. 294.

1. The district or circuit court of one district has no authority to send its process into any other district, to compel the appearance of a person not residing or found within the jurisdiction of the court from which the process issued, or for any alleged contempt of court. *Ex parte Graham*, 4 Wash. (U. S.) 211. See also *In re Spencer*, 4 McArthur (D. C.) 433.

The act of Congress of 1859 (11 Stat. at L. 272)—prescribing the mode of procedure where there are several defendants residing in different districts of the same State—construed and applied. *Babbitt v. Burgess*, 2 Dill. (U. S.) 169.

The 11th section of the Judiciary Act (1 Bright. Dig. 127) provides that, "no civil suit shall be brought before either of these (*i. e.*, circuit or district) courts against any inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ;" and that "no person shall be arrested in one district for trial in another in any civil action before a circuit or district court." 4 Minor's Insts. (2d ed.), p. 273; *Desty's Fed. Proc.* 116, 118.

"And, although this act relates in terms to original process, it is well understood that no process whatever, issued from the circuit or district courts, can be legally executed without the limits of the judicial district in which it is issued, unless Congress expressly authorizes it to be done. This authority Congress has conferred in reference to executions. But this provision does not *per se* avoid any jurisdiction which these courts would otherwise possess. It is a personal privilege of the defendant to be sued only within his district. He may waive it by omitting to avail himself of the objection by plea. An appearance by the defendant and answering generally, without objection, has

always been deemed a waiver. (1 Abb. Pr. (U. S.) 248; *Pollard v. Dwight*, 4 Cranch (U. S.) 421; *Logan v. Patrick*, 5 Cranch (U. S.) 288; *Gracie v. Palmer*, 8 Wheat. (U. S.) 699; *Levy v. Fitzpatrick*, 15 Pet. (U. S.) 167.) And so also, an appearance alone, and an omission to plead, or otherwise to insist upon this privilege until a subsequent term, has been held to be a waiver of it. (*Flanders v. Aetna Ins. Co.*, 3 Mason (U. S.) 158; *Harrison v. Rowan*, Pet. (C. C.) 489.)" 4 Minor's Inst. (2d ed.), p. 274; 1 Bright. Dig. 268; *Rev. Sts. U. S.*, §§ 985, 986; 2 Abb. U. S. Pr. 160; *Desty's Fed. Proc.* 207.

In all cases of a local nature at law or in equity, where the land, etc., lies partly in one district and partly in another in the same State, the plaintiff may sue in either district, and process may be sent to the other. 11 U. S. Sts. 272; 1 Abb. U. S. Pr. 78, 79; 2 Bright. Dig. 15, 16; *Rev. Sts. U. S.*, §§ 740-742; *Desty's Fed. Proc.* 117, 118.

"A subsequent statute relaxes the restriction still further, providing, in substance, that in suits not local (for in the United States courts the distinction of local and transitory actions is still retained), if there be two or more defendants residing in different districts in the same State, the plaintiff may sue in either district, and may issue a duplicate writ to the other, and carry on the suit at once against all the parties, so far as they reside in the same State. And in suits of a local nature, if defendant lives in a different district in the same State from that in which the local cause of action exists, and where the suit is brought, process may be sent to his district. And in all cases of a local nature, at law or in equity, where the land, etc., lies partly in one district and partly in another in the same State, plaintiff may sue in either district, and send the process to the other. It is further to be observed that provision is made in one case for summoning a defendant constructively, although not resident in the district where the suit is brought, by what in the practice of the State courts is known as an order of publication through the newspapers." 4 Minor's Inst. (2d ed.), p. 276.

Definition.

SERVIENT—SESSION.

Definition.

SERVIENT.—See SERVITUDE.

SERVILE.—See note 1.

SERVITUDE (see also EASEMENTS, vol. 6, p. 139), in its original and popular sense, signifies the duty of service, or, rather, the condition of one who is liable to the performance of services. The word, however, in its legal sense is applied figuratively to things. When the freedom of ownership in land is fettered or restricted by reason of some person other than the owner thereof, having some right therein, the land is said to serve such person; the restricted condition of the ownership, or the right which forms the subject-matter of the restriction, is termed a servitude; and the land so burdened with another's right is termed a servient tenement, while the land belonging to the person enjoying the right is called the dominant tenement. The word "servitude" may be said to have both a positive and a negative signification; in the former sense denoting the restrictive right belonging to the entitled party; in the latter, the restrictive duty entailed upon the proprietor or possessor of the servient land.²

SESSION.—(See also ADJOURN, vol. 1, p. 192; TERM).—The time during which a legislative body, a court or other assembly sits for the transaction of business; as a session of Congress, which commences on the day appointed by the Constitution and ends when Congress finally adjourns before the commencement of the next session; the session of a court which commences at the day appointed by law and ends when the court finally rises.³

1. **Servile Labor**—Service of a writ has been held to be "servile labor," within the *Connecticut* Sunday law. The court, by Brainard, J., adverted to the contention of counsel that a distinction should be taken between "servile labor" and "secular business," and denied the existence of such distinction, saying: "There is, indeed, a difference in expression, but I think not in principle. The service of a writ is labor, and generally servile. A sheriff may race his horse after a fugitive debtor, and find the exercise servile enough; and, I think, common sense would say it was also secular." *Gladwin v. Lewis*, 6 Conn. 49; 16 Am. Dec. 33. See generally SUNDAY.

2. Brown's L. Dict.

Easement and Servitude Distinguished.—"A privilege or right attached to one tenement or parcel of land, to enjoy some benefit in or over another tenement or parcel, is called an easement of the dominant tenement to which it belongs, and a servitude upon the servient tenement, or that in

which it exists." *Fetters v. Humphreys*, 18 N. J. Eq. 262.

3. *People v. Auditor*, 64 Ill. 86, *quoting* Bouv. L. Dict.

The term "session" when applied to courts, means the whole term, and in legal construction the whole term is construed but as one day, and that day is always referred to the first day or commencement of the term. *Dew v. Judges*, 3 Hen. & M. (Va.) 1; 3 Am. Dec. 639.

But in *Com. v. Gove*, 151 Mass. 392, where a statute provided that a commissioner might admit to bail when the "court is not in session," it was held that the words "when the court is not in session" meant "when it is not in actual session," and that the time, between sittings of a court, during a temporary adjournment, was not part of the "session." See also *In re Gannon*, 69 Cal. 541; *People v. Fancher*, 50 N. Y. 288.

These cases illustrate the double meaning of the word as pointed out by Mr. Abbott, who thus defines the term: "A sitting; sometimes used for the

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time during which any body of persons or tribunal is organized, competent for transaction of its business; in other connections, the time during which it is convened and actually engaged in business. To illustrate this double use of the term, it is common to speak of the first or the second session of a Congress, meaning the whole time from the first Monday in December to the adjournment, on the fourth of March or later; and equally common to say, in the holidays' recess, that Congress is not in session." And so, in *People v. Fancher*, 50 N. Y. 294, it is said: "The word 'session' may mean the actual sitting of a court or legislature, or the time during which a court or legislature meets for the transaction of business, and the connection in which it is used must determine its meaning as used." See also *Farwell Co. v. Mathis*, 48 Fed. Rep. 363.

1. Set Aside.—An *Illinois* statute provides that "where an indictment,

information or suit is quashed, or the proceedings on the same are 'set aside' or reversed on writ of error," the time during which the same was pending shall not be computed as part of the time of the limitation prescribed for the offense. In *Swalley v. People*, 116 Ill. 250, the court by Sheldon, J., said: "To 'set aside' is very broad in scope—to defeat the effect or operation of; and we think it may well be held to embrace here every other mode of defeat of the proceedings on an indictment, than quashing it and reversal on error." And upon a similar *Missouri* statute, the court by Wagner, J., said: "There is no particular magic about the words 'set aside,' they simply mean to annul, to make void. A *nolle prosequi* has no more effect." *State v. Primm*, 61 Mo. 171.

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I. SET-OFF—1. Definition.—A set-off is a counter-demand, generally, of a liquidated debt, growing out of an independent transaction, for which an action might be maintained by the defendant against the plaintiff, exhibited by the defendant to counterbalance the plaintiff's recovery, either in part or in whole, and, as the case may be, to recover a judgment in his own favor for the balance.¹

2. Nature, Origin, and General Principles of Set-off—a. AS A DEFENSE. — Set-off, in the proper sense of the word, is wholly of statutory origin. In the proper sense of a cross-

1. See 2 Chit. Contr. (11th Am. ed.) 1266; Mitchell v. McLean, 7 Fla. 329; Avery v. Brown, 31 Conn. 398; Trabue v. Harris, 1 Metc. (Ky.) 598; Cook v. Mills, 5 Allen (Mass.) 37; Parker v. Hartt, 32 N. J. Eq. 225.

Set-off has been described as "a mode of defense whereby the defendant acknowledges the justice of the plaintiff's demand on the one hand, but on the other sets up a demand of his own to counterbalance it, either in whole or in part." Tomlin's L. Dict. See Babb. on Set-off, p. 17; Ord v. Ruspini, 2 Esp. 569.

See also Mr. Parsons' distinction between set-off and reduction, *infra*, this title, *Recoupment*.

A set-off is a counter-demand which a defendant holds against a plaintiff, arising out of a transaction extrinsic of the plaintiff's cause of action. Raymond v. State, 54 Miss. 562; 28 Am. Rep. 382.

A set-off means a "cross-claim, for which an action might be maintained against the plaintiff, and is very different from a mere right to a deduction from, or reduction of, his demand, on account of some matters connected therewith." See the authorities cited, 2 Saunders on Pleading and Evidence (Am. ed. 1829) 314; Annan v. Houck, 4 Gill (Md.) 331; 45 Am. Dec. 133.

In *New York*, counterclaims under

the Code of 1852, embrace both set-offs and recoupments, as previously understood. Pattison v. Richards, 22 Barb. (N. Y.) 146. In Boston Silk, etc., Mills v. Eull, 37 How. Pr. (N. Y.) 299, 301, the superior court, by Freedman, J., said: "A set-off is a money demand by the defendant against the plaintiff, and refers to a debt or demand independent of and unconnected with the plaintiff's cause of action. It may exceed the plaintiff's claim or fall short of it."

Discount.—In the law of *South Carolina* the term "discount" appears to be synonymous with "set-off." See Haynes v. Prothro, 10 Rich. (S. Car.) 318; Sumter v. Welsh, 1 Brev. (S. Car.) 539.

Compensation of the Civil Law.—The law of set-off is somewhat similar to the compensation of the civil law. Domat, pt. 1, b. 4, tit. 2, § 1; 1 Ersk. Inst., b. 3, tit. 4, § 5. Pothier, *Traité des Obligations*, pt. 3, ch. 4. The likeness is such that the civil-law doctrines can sometimes be applied to the law of set-off. This similarity has been thought, by an eminent writer, to exist, not because set-off is borrowed from the civil-law doctrine of compensation, but because both rest on similar principles of common sense and common justice. 2 Pars. Conts.

demand, a set-off was, at common law, recoverable only by a separate action.¹

While a defendant, upon common-law principles, is in general entitled to retain, or claim by way of reduction, all payments made by him, and all just demands and allowances accruing to him, in respect of the same transaction or account, which forms the ground of action, this species of defense is, in this respect, clearly distinguishable not only from set-off, but also from recoupment.² Set-off and recoupment do not attack the claim of the plaintiff, but, on the contrary, admit the plaintiff's cause of action, and urge a counter-demand, so that the sum awarded to one party may counterbalance that awarded to the other, in whole or in part.³ For this reason it has been said that they are not true

1. *Rogers v. Maw*, 15 M. & W. 446; *U. S. v. Eckford*, 6 Wall. (U. S.) 488; *White v. Governor*, 18 Ala. 767; *M'Lean v. M'Lean*, 1 Conn. 397; *Gunn v. Scovil*, 1 Conn. 399, note; *Starkey v. Peters*, 18 Conn. 187; *Meriwether v. Brid*, 9 Ga. 594; *Call v. Chapman*, 25 Me. 128; *Chandler v. Drew*, 6 N. H. 469; 26 Am. Dec. 704; *Hart v. Davis*, 21 Tex. 411.

Disconnected and independent claims cannot, except by agreement or by virtue of the statute of set-off, be applied to the extinguishment of each other. A having advanced \$500 to B took a receipt from B in these words: "Received of A \$500—\$300 of which I am to give him credit for, and for which sum he is to pay himself out of money which he may collect for me; the other \$200 is left with me for safekeeping, which I am to hand to him when called for." In an action of account, brought by B against A for claims which B had put into A's hands for collection, held that A's claim for the \$200 mentioned in the receipt had no connection with the claim in suit; that the receipt showed no agreement to apply such claim of A in extinguishment of so much of his indebtedness to B, but the contrary; and that, as the case was not claimed to be within the statute of set-off, A could not insist upon such application. *Starkey v. Peters*, 18 Conn. 181.

2. 1 Chit. Pl. 495; 2 Chit. Contr. 1266; Pom. Rem., §§ 731-733.

Where the plaintiff was sued on a *quantum meruit* for work and labor, it was held that the defendant might (without pleading a set-off) give in evidence that he provided the plaintiff's men, who did the work, with their beer, as it might be that the plaintiff de-

served to be paid the less, because his men had their beer provided for them by the defendant. *Grainger v. Raybould*, 9 C. & P. 229; 38 E. C. L. 94.

Likewise it has been held that, in assumpsit for the value of services, the defendant, with a view to the reduction of damages, may, under the general issue, without notice or plea of set-off, offer evidence that during the time of the rendition of the services he had supported and maintained the plaintiff and his family. *Brooke v. Carroll*, 13 Md. 379.

See DISCOUNT, vol. 5, p. 681, note 1.

3. **Effect of Set-Off on the Jurisdiction of Court.**—The characteristic of set-off referred to in the text has been considered by the courts in determining the effect of urging this defense upon the jurisdiction of the court where its jurisdiction is regulated by the amount in controversy. Setting off an independent debt does not deny the plaintiff's right to recover the amount claimed. It was accordingly held, where, in an action to recover a larger debt than forty shillings the plaintiff's demand was opposed by a set-off which, if allowed, would reduce plaintiff's recovery to less than that sum, that the action was nevertheless not within the provisions of the local act confining debts for less than forty shillings to an inferior jurisdiction, but that it might be brought in a superior court. *Pitts v. Carpenter*, 1 Wils. 19; 2 Str. 1191; *Heaward v. Hopkins*, Dougl. 448; *M'Collum v. Carr*, 1 B. & P. 223. See *Cooper v. Coats*, 1 Dall. (U. S.) 308; *Brailey v. Miller*, 2 Dall. (U. S.) 74; *Van Antwerp v. Ingersoll*, 2 Cai. (N. Y.) 107.

defenses.¹ But the defense referred to does not admit that the demand sued upon is just; on the contrary, it attacks the plaintiff's claim itself, and urges matter to defeat, or at least reduce, the plaintiff's demand, on account of some matter connected therewith. The defense of payment obviously belongs to this species.² So also, in an action of debt for work performed or goods furnished, the defendant may, in general, independently of the statutes of set-off, by way of reducing the sum claimed by the plaintiff, prove that the work was not done,³ or that none or only part of the goods were furnished.⁴ And in an action for work

1. See *Wills v. Browning*, 96 Ind. 149; *Bowen v. Hale*, 4 Iowa 430; *Freeman v. Fleming*, 5 Iowa 460; *Lewis v. Denton*, 13 Iowa 441; *Reed v. Darlington*, 19 Iowa 349; *Ward v. Fellers*, 3 Mich. 281; *Chandler v. Drew*, 6 N. H. 469; 26 Am. Dec. 704; *Timmons v. Dunn*, 4 Ohio St. 680. See *Jones v. Moore*, 42 Mo. 413.

The effect of a plea of set-off, without a denial of the plaintiff's claim, is to admit the facts alleged by the plaintiff, and leave the defendant to proof of his set-off. *Gregory v. Trainor*, 4 E. D. Smith (N. Y.) 58.

2. *Broughton v. McIntosh*, 1 Ala. 103. In *Buce v. Henagan*, 1 McMull. (S. Car.) 28, where the word "discount" is evidently employed in the sense of "set-off," the court by Earle, J., said: "Discount and payment are not convertible terms. Discount may admit the existence of the plaintiff's demand; payment implies that it has been extinguished. If the plaintiff had applied the money received by him, as a payment of the demand sued on, it would have been at the option of the defendant to repudiate it or not. He might still have recovered it by action, and hence disputed the account. It is enough for the purpose of this motion, to say, that if the defendant's demand against the plaintiff was a proper subject of discount at all, it cannot, under the general issue, be considered as payment; and the defendant cannot be permitted without notice, to avail himself of a separate cause of action, which the plaintiff cannot be prepared to resist." See *Jeffs v. Wood*, 2 P. Wms. 128; *Gilliat v. Lynch*, 2 Leigh (Va.) 504.

So where a tenant has been compelled by a superior landlord, or other incumbrancer having a title paramount to that of his immediate landlord, to pay sums due for ground rent, or other like charges, the courts have given to the tenant the benefit of a set-off as to

payments of this description, by holding them to be, in fact, payments of the rent itself, or part of it (*Graham v. Allsopp*, 3 Exch. 186, 198; *Sapsford v. Fletcher*, 4 T. R. 511, 512; *Taylor v. Zamira*, 6 Taunt. 624; *Andrew v. Hancock*, 1 B. & B. 37; 5 E. C. L. 10; *Spragg v. Hammond*, 2 B. & B. 59; 6 E. C. L. 37; *Laycock v. Tuffnell*, 2 Chit. 531 a), and to be properly admissible in evidence, under the plea *riens en arriere*. *Jones v. Morris*, 3 Exch. 742.

3. When a person was employed to do certain work for a specified sum (40*l.*), and part of the work was afterwards done by the employer, who paid 2*l.* 13*s.* 4*d.* to workmen employed by him to complete the contract, the value of the latter work was not a matter for set-off, but for deduction from the agreed sum which the plaintiff was to receive, on the ground that the work was not done. *Turner v. Diaper*, 2 M. & G. 241; 40 E. C. L. 351. See *Edwards v. Todd*, 2 Ill. 462.

4. *Weakland v. Hoffman*, 50 Pa. St. 513; 88 Am. Dec. 560. So, where the plaintiff contracted to do certain work for the defendant, and to find the materials for it for a fixed sum, and the defendant supplied a portion of the materials, which the plaintiff accepted and used up in the work, it was held, in an action by the plaintiff for work done, that the defendant was entitled to deduct the value of the materials supplied by him, without pleading a set-off. *Newton v. Forster*, 12 M. & W. 772.

In an action to foreclose a mortgage, allegations in the answer that the consideration for the mortgage was plaintiff's agreement to advance to defendants the amount for which the mortgage was given, \$1,000, in cash, but that only \$850 had ever been advanced, were held to show a partial failure of consideration, but not a set-off or counterclaim. *Lash v. McCormick*, 17 Minn. 403.

and labor done or for goods sold, though the contract was at a certain price, the defendant may prove, under the general issue, in reduction of the claim, that the work was improperly done,¹ or that the goods were not of the quality warranted.² Likewise, in an action for money had and received, the defendant may show, without the aid of the statutes of set-off, that he is entitled to retain certain allowances out of the very sum demanded, this not being in the nature of a cross-demand; but being a charge, which makes

1. *Basten v. Butler*, 7 East 479; *Farnsworth v. Garrard*, 1 Campb. 38; *Kist v. Atkinson*, 2 Campb. 63; *Duncan v. Blundell*, 3 Stark. 6; *Cousins v. Padon*, 2 C. M. & R. 547; *Field v. Ringo*, 7 Ark. 435; *Leech v. Baldwin*, 5 Watts (Pa.) 466; *Heck v. Shener*, 4 S. & R. (Pa.) 249; 8 Am. Dec. 700; *Nickle v. Baldwin*, 4 W. & S. (Pa.) 290; *Shoup v. Shoup*, 15 Pa. St. 361; *Wright v. Cumpsty*, 41 Pa. St. 102; *Hunt v. Gilmore*, 59 Pa. St. 450; *Glennon v. Lebanon Mfg. Co.*, 140 Pa. St. 594.

In *Moffet v. Sackett*, 18 N. Y. 522, which was an action for the price of certain gas fixtures and for the value of work and labor performed in placing the fixtures in defendant's house, alleged to be worth \$197.25, the defendant set up that by reason of the defective fitting, his indebtedness should be reduced \$15. It was held that this deduction could be made notwithstanding there was no counterclaim in the answer. The court by Strong, J., said: "If a plaintiff charges in his complaint for a general indebtedness for goods, and work and labor bestowed upon them, and proves that there were specified prices, and it appears from his evidence, or the evidence of the other party, that there were defects in the goods or work, it follows that there was never an indebtedness to the extent claimed, and the amount allowed to him should be limited accordingly. It requires no counterclaim to reduce the amount."

2. 1 Chit. Pl. 506; *Fisher v. Samuda* 1 Campb. 190; *Germaine v. Burton*, 3 Stark. 32; *Hitchcock v. Hunt*, 28 Conn. 343; *Steigleman v. Jeffries*, 1 S. & R. (Pa.) 477; 7 Am. Dec. 626; *Light v. Stoeber*, 12 S. & R. (Pa.) 431; *Price v. Lewis*, 17 Pa. St. 51; 55 Am. Dec. 536.

Where, in an action for the price of seed sold, and which was warranted to be good, new, growing seed, it appeared that soon after the sale the buyer was told that it did not correspond with the warranty, it was held to be an answer to the action upon the general issue

that the seed was wholly unproductive and worthless. *Poulton v. Lattimore*, 9 B. & C. 259; 4 M. & R. 408; 17 E. C. L. 373.

The distinction between set-off and a mere right to a reduction of the plaintiff's demand or claim to defeat it on account of some matter connected therewith, was discussed and applied in *Crookshank v. Mallory*, 2 Greene (Iowa) 257, a case of assumpsit upon a building contract. Therein the court, by Greene, J., said: "Where a mechanic sues for his labor, and a defense is made by setting up damages for defective work, such damages can only be used as a defense against the plaintiff's claim, and not as a ground of action in the nature of set-off by which the defendant may recover over against him. The statute provides that a defendant may set off 'any demand' he may have against the plaintiff. Rev. Stat., p. 318. The defendants in this case set up no demand against that of the plaintiff, but sought rather to destroy his claim by showing that the work was not properly done. A set-off must be predicated upon an independent demand, which a defendant has against the plaintiff. But in this case, the defendants attempted to set off a claim which resulted from and depended upon the demand of the plaintiff. Had the defendants recovered a verdict, it would not have been the result of their demand against the plaintiff, but it would have been by the avoidance or destruction of the plaintiff's demand against them. If the plaintiff had no demand, the defendants had nothing against which they could place their set-off; and if the plaintiff's demand was legal, then the defendant's claim would necessarily fail, because it depended upon the fact that it was not a legal demand."

In *Pennsylvania*, in an action for services as a housekeeper, and for goods sold and delivered, it was held that the defendant could, under a plea

the sum of money received to the plaintiff's use so much less.¹ When the nature of these defenses is rightly understood, that is, understood to be defenses which simply attack the cause of action, and show that by virtue thereof the plaintiff ought not to recover at all, or only part of his demands, in contradistinction to those defenses which admit the plaintiff's cause of action, but set up claims due the defendant, so that the sums awarded to each party may counterbalance one another, which is the nature of set-off and recoupment, and that set-off, although resembling recoupment in being confined to actions upon contract, differs also from that defense in that it must be for a sum certain, and may arise upon a different contract from the one in suit, while recoupment is for damages, often unliquidated, resulting from the breach of the very contract sued upon, it will be observed that set-off is wholly distinct from those defenses which might be urged at common law, and that it can find no authorization except by statute law. Nor should set-off be confounded with the defense that there was an agreement by which the plaintiff should accept certain coun-

of *non-assumpsit*, give evidence that while the plaintiff was acting as housekeeper, she, without his knowledge, gave away articles belonging to him, although such matter was not proper subject of set-off. The court by Tilghman, C. J., said: "By the plea of *non-assumpsit* the defendant puts the plaintiff on proving his whole case, and entitles him to give in evidence anything which shows that at the time the action was commenced the plaintiff had no right to recover. . . . So whatever be the nature of the services for which the plaintiff demands compensation, I may show that those services were ill-performed, for by such evidence I do no more than meet plaintiff on his own allegation; I prove that he did badly what he ought to have done well.

"The principle being settled, we have only to apply it to the present case. Plaintiff claimed compensation for services as a housekeeper. It is the duty of the housekeeper to care for the household goods. The defendant offered to prove that the plaintiff did not take care of his goods, and to show the particular manner in which she violated her trust, viz., that she sent sundry articles to her daughter's house, and suffered her to make use of them. How is neglect of duty to be shown but by showing the particular acts of negligence or misfeasance?" *Heck v. Shener*, 4 S. & R. (Pa.) 249; 8 Am. Dec. 700.

1. In *Dinwiddie v. Bailey*, 6 Ves.

142, where the plaintiff had employed the defendant, who was a ship-broker, as his agent in suing for and recovering a sum of money for damages done to the plaintiff's ship, and the defendant had recovered £2,000, and paid that sum, less £40, which he retained for his labor and services, over to the plaintiff, and the sum retained was proved to be a reasonable charge—it was held that the defendant might deduct the value of his labor and services, in this manner, without pleading or giving notice of set-off; Lord Mansfield, saying: "The plaintiff can recover no more than he is in conscience and equity entitled to, which can be no more than what remains after deducting all just allowances which the defendant has a right to retain out of the very sum demanded. This is not in the nature of a cross-demand or mutual debt. It is a charge which makes the money received for the plaintiff's use so much less." *Dale v. Sollat*, 4 Burr. 2133. See *Dobson v. Lockhart*, 5 T. R. 135; *Sturdy v. Armand*, 3 T. R. 599; *James v. Kynnier*, 5 Ves. 108.

See ACCOUNT STATED, vol. 1, p. 122, n. 5. Where services have been performed in payment of the demand sued, under a contract between the parties, it is not necessary for the defendant to file an account for such services, by way of set-off, pursuant to the provisions of the statute, in order to entitle him to give evidence of the

ter-demands in satisfaction of his claims.¹ Evidence of such an agreement may be given under the general plea of payment.² Where demands, originally cross, and not arising out of the same transaction, have, by subsequent express agreement, been stipulated to be deducted, or set off against each other, only the balance is the debt and sum recoverable, without any special plea of set-off.³ But, in order that matter of set-off, or of recoupment, may be proved, under a plea of payment, it is indispensable that an express agreement that such matter shall constitute payment, or such a state of facts from which such assent is clearly inferable, be first proven.⁴ When this is proved, the right to urge such matter as a defense to the claim of the plaintiff is secured to the defendant independently of the statutes of set-off, if, of

same in defense of the action. *Wilby v. Harris*, 13 Mass. 496.

1. Although set-off is not permitted in an action on an insurance policy after a partial loss under the statute of set-off (see *infra*, this title, note *In Actions on Insurance Policies*, p. 242), yet where there is an express agreement between the parties in the policy that the amount of the premium due shall be deducted out of any loss that may be claimed, the contract of the parties must govern. *Livermore v. Newburyport M. Ins. Co.*, 2 Mass. 232; *Dodge v. Union M. Ins. Co.*, 17 Mass. 471. And, under agreement, the insurers may set off not only their premium against the loss upon the same policy, but also against losses arising on different policies. *Cleveland v. Clap*, 5 Mass. 201. Under a clause in a policy of insurance that the "loss shall be paid," "the amount of the premium note" "being first deducted," the insured, when sued upon the note, can set off a loss under the policy (*Columbian Ins. Co. v. Bean*, 113 Mass. 541; see *Osgood v. De Groot*, 36 N. Y. 348), although the amount of such loss being unliquidated, cannot be set off under the statute. See *infra*, this title, p. 251. *Massachusetts Gen. Stats. ch. 130, §§ 3, 16.*

A counterclaim which might be set off is not admissible under the plea of discount, without an agreement to discount it. *Glazier v. McCallister*, 5 Harr. (Del.) 41.

The vendor gave a deed with a warranty of title, and a covenant that the land was free from incumbrances, except an outstanding lease, which had two years and seven months to run. The vendee gave, in part payment, his note, with an agreement that so much

should be deducted from the amount of it as he should be compelled to pay to obtain possession of the house at the expiration of the lease. Before the expiration of the lease, the tenant pulled down the house. *Held*, on demurrer to the answer, in an action by the vendor on the note, that the vendee could not deduct the value of the house under the agreement. *Ogilvie v. Lightstone*, 1 Daly (N. Y.) 129.

2. *Sullivan v. Sullivan*, 20 S. Car. 509.

So if a landlord directs a tenant who is overseer of the poor, to pay on the landlord's account rates irregularly assessed on him, and promises that the levies shall eat out the rents, the tenant may set them off, or prove them as payment, in an action for use and occupation. *Roper v. Bumford*, 3 Taunt. 76.

See PAYMENT, vol. 18, p. 167, n. 3.

3. 1 Chit. Pl. 595.

Where a set-off was admitted by consent, although the claim could not be legally set-off, the court refused to reverse the judgment for that cause. *McKinney v. Robinson*, 2 N. J. L. 262.

If a set-off, which cannot legally be made, is pleaded and not objected to, and a jury pass upon it, the consent of parties thus to be implied will take away the error. *King v. Fuller*, 3 Cai. (N. Y.) 152.

4. *Gafford v. Proskauer*, 59 Ala. 267; *Green v. Storm*, 3 Sandf. Ch. (N. Y.) 305.

So in order that matter of set-off, or of recoupment, may be proved under a plea of payment in *assumpsit*, it is indispensable that an agreement that such matter shall constitute payment be first proven. *Hill v. Austin*, 19 Ark. 230; *Quinn v. Sewell*, 50 Ark. 380. See PAYMENT, vol. 18, p. 254, n. 2.

course, the agreement is founded upon a sufficient consideration.¹ It is probably upon the theory that there exists an agreement of this kind,² that, where the nature of the transaction necessarily constitutes an account, consisting of receipts and payments, debts, and credits, the balance only will, at both law and equity, be considered to be the debt.³ But the right to set-off is entirely dif-

1. *Eaves v. Henderson*, 17 Wend. (N. Y.) 190; *Livermore v. Newburyport M. Ins. Co.*, 2 Mass. 232.

In an action to recover money for dyeing goods, it was held that the defendant might, at common law, prove as a defense that there was a custom in the trade that the amount of damage done to goods whilst being dyed might be deducted from the price of the dyeing. *Banford v. Harris*, 1 Stark. 343.

So where mutual debts are contracted in a foreign country, and by the law of that country the defendant would be entitled in an action against him, to set off his debt against the plaintiff's, it appears that irrespective of the English law of set-off, this may be pleaded as a defense to an action brought by the plaintiff in England to recover the debt in question. *MacFarlane v. Norris*, 2 B. & S. 782; 110 E. C. L. 782; 31 L. J. Q. B. 245.

Whatever an agent is entitled to deduct from the demands of his principal for advances or disbursements which he makes, may be given in evidence in an action brought against him without pleading or giving notice of set-off. The balance only is the debt due, and upon the principal's bankruptcy the balance only can be claimed by the assignees. *Dale v. Sollet*, 4 Burr. 2133; *Dinwiddie v. Bailey*, 6 Ves. 142.

In an action by a servant against his master for wages, the latter cannot, in general, set off or deduct the value of goods lost or damaged by the negligence of the former, unless it can be proved to be part of the original agreement between them that the servant should pay out of his wages for all his master's goods lost through his negligence, in which case the value of the goods lost may, under the general issue, be deducted from the amount of the wages. *LeLoir v. Bristow*, 4 Campb. 134; *Cleworth v. Pickford*, 7 M. & W. 320.

2. See *Hughes v. M'Connis*, 3 Bibb. (Ky.) 254.

3. See *Green v. Farmer*, 4 Burr. 2221; *Curson v. African Co.*, 1 Vern. 121; *Downam v. Matthews*, Proc. Ch.

580; *Hawkins v. Freeman*, 2 Abr. Eq. Cas. 10, pl. 10; Vin. Abr. 560, pl. 26; *Peters v. Soame*, 2 Vern. 428; *Jeffs v. Wood*, 2 P. Wms. 128; *M'Lean v. M'Lean*, 1 Conn. 397; *Wolcott v. Sullivan*, 1 Edw. Ch. (N. Y.) 399; *Holcombe's Intr. Eq. Jur.* 285.

In *Downam v. Matthews*, Proc. Ch. 580, where there were mutual dealings on each side, and independent debts, the Lord Chancellor held that a set-off ought to be allowed, because the mode of dealing furnished a strong presumption of an agreement to this purpose, and that without such liberty of retaining against each other, the parties would not have continued on their dealings. In the case of *Hawkins v. Freeman*, 2 Eq. Abridg. 10, pl. 10; 8 Vin. Abr., the decision was precisely to the same effect. And in *Lanesborough v. Jones*, 1 P. Wms. 326, Lord Cowper said that "it was natural justice and equity that in all cases of mutual credit only the balance should be paid."

Upon these and other English decisions Judge Story deduced the general rule, that courts of equity will set off distinct debts, where there has been a mutual credit (*i. e.*, a credit founded on a knowledge of, and trust to, the existing debts), upon the principles of natural justice, to avoid circuity of suits, following the doctrine of compensation of the civil law to a limited extent. *Greene v. Darling*, 5 Mason (U. S.) 201. And in *Gordon v. Lewis*, 2 Sumn. (U. S.) 628, the same judge said: "To justify a court of equity in allowing a set-off, there must be some original and intervening equity between the parties beyond the mere fact of mutual debts. There must be a mutual credit, founded on a subsisting debt on the other side, or an express or implied agreement for a set-off of mutual debts." See *Simmons v. Williams*, 27 Ala. 507; *Jordan v. Jordan*, 12 Ga. 77.

Equity Jurisdiction as to Set-Offs.—Independently of statute, "the mere existence of distinct debts, without mutual credits, or some supervening equity,

has never been supposed to give the right of set-off in a court of equity any more than at law. But the general principle has always prevailed, both at law and in equity, that where there were connected accounts of debt and credit, the balance of the accounts constituted the amounts due, and was the sum only recoverable." *Holcombe's Intr. Eq. Jur.* 285. This is probably founded on the existence of an agreement between the parties that one debt shall be discounted from the other. And many of the cases, which would otherwise appear to be founded on other grounds, can be reconciled with this view when it is remembered that there need not be an express agreement to this effect. It is sufficient that there has been a mutual credit given by each upon the footing of the debt of the other, so that a just presumption arises that one is understood by the parties to go in liquidation or set-off of the other. See *Raleigh v. Raleigh*, 35 Ill. 512. It would seem that courts of equity in giving effect to such agreements do no more than should be done in an action at law; for the granting of such reduction is not properly referable to any power to permit a set-off. The agreement between the parties is in effect that one debt shall be in payment of the other; so that the defense is not in the nature of a set-off, but rather attacks the plaintiff's cause of action. In *Rawson v. Samuel*, 1 Cr. & Ph. 161, Lord Cottenham says: "We speak familiarly of equitable set-off, as distinguished from set-off at law, but it will be found that this equitable set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand." Courts of equity will not enforce a set-off not allowed by law unless the party seeking it can show some equitable ground for being protected against his adversary's demand. *Simmons v. Williams*, 27 Ala. 507; *Beall v. Squires*, 3 T. B. Mon. (Ky.) 372. The mere existence of cross-demands is not sufficient. *Rawson v. Samuel*, 1 Cr. & Ph. 161; *Dodd v. Lydall*, 1 Hare 337; *Whyte v. O'Brien*, 1 S. & S. 551; *Greene v. Darling*, 5 Mason (U. S.) 201; *Gordon v. Lewis*, 2 Sumn. (U. S.) 628; *Bowen v. Bowen*, 20 Conn. 127; *Spurr v. Snyder*, 35 Conn. 172; *Downs v. Jackson*, 33 Ill. 465; 85 Am. Dec. 289; *Davis v. Milburn*, 3 Iowa 163; *Tribble v. Taul*, 7 T. B. Mon. (Ky.) 455; *Moody v. Mc-*

Dowell, 2 A. K. Marsh. (Ky.) 212; *Markham v. Todd*, 2 J. J. Marsh. (Ky.) 364; *Talbot v. Warfield*, 3 J. J. Marsh. (Ky.) 86; *Smith v. Washington Gas-light Co.*, 31 Md. 12; 100 Am. Dec. 49; *Lockwood v. Beckwith*, 6 Mich. 168; 72 Am. Dec. 69; *Schermerhorn v. Anderson*, 2 Barb. (N. Y.) 584; *Cummings v. Morris*, 25 N. Y. 634; *Riddick v. Moore*, 65 N. Car. 382. See *Derby v. Gage*, 39 Ill. 27. And there is no equity to retain a sum due because cross-demands to a larger amount are about falling due. *Jeffries v. Agra, etc., Bank*, L. R., 2 Eq. 674; *Smith's Case*, L. R., 1 Ch. 538. Where A recovered a judgment against C, and was at the same time surety for B upon an arbitration bond, for submitting differences between B and C to arbitration, C obtained an award against B and then filed a bill to have the amount of the judgment credited on the award—it was held that, as A's liability to C was only contingent and might never arise, he should not be restrained from collecting his judgment, unless it was alleged that he was insolvent or about to leave the State. *Hinrichsen v. Reinback*, 27 Ill. 295.

But, where the parties have mutual demands against each other, and an equitable right of set-off exists because the debt due to the party claiming the set-off is so situated that it is impossible for him to obtain satisfaction of such debt by an ordinary suit at law, or in equity to recover the same, a court of equity, upon a bill filed, will compel an equitable set-off of one debt against the other. So, where there are mutual demands between the parties which cannot be set off under the statute, but which a court of equity may compensate or apply in satisfaction of each other without interfering with the equitable rights of any person, the fact that one of the parties is insolvent has frequently been held a sufficient ground for the exercise of equitable jurisdiction. *Tuscumbia, etc., R. Co. v. Rhodes*, 8 Ala. 206; *Wray v. Furniss*, 27 Ala. 471; *Bettison v. Jennings*, 8 Ark. 287; *Hobbs v. Duff*, 23 Cal. 576; *Pond v. Smith*, 4 Conn. 302; *Goodwin v. Keney*, 49 Conn. 563; *Hall v. Kimball*, 77 Ill. 161; *Doane v. Walker*, 101 Ill. 628; *Keightley v. Walls*, 27 Ind. 384; *Rowzee v. Gregg*, Litt. Sel. Cas. (Ky.) 487; *Collins v. Farquhar*, 4 Litt. (Ky.) 153; *Payne v. Loudon*, 1 Bibb (Ky.) 518; *Markham v. Todd*, 2 J. J. Marsh. (Ky.) 364; *Kentucky Flour*

Co. v. Merchants' Nat. Bank (Ky. 1890), 13 S. W. Rep. 910; *Marshall v. Cooper*, 43 Md. 46; *Field v. Oliver*, 43 Mo. 200; *Lindsay v. Jackson*, 2 Paige (N. Y.) 581; *Gay v. Gay*, 10 Paige (N. Y.) 376; *Smith v. Felton*, 43 N. Y. 419; *Davidson v. Alfaro*, 80 N. Y. 660; *Brazelton v. Brooks*, 2 Head (Tenn.) 194; *Fields v. Carney*, 4 Baxt. (Tenn.) 137; *Hamilton v. Van Hook*, 26 Tex. 302. See also *Thrall v. Omaha Hotel Co.*, 5 Neb. 295; 25 Am. Rep. 488; *Pignolet v. Geer*, 19 Abb. Pr. (N. Y.) 264; *Keep v. Lord*, 2 Duer (N. Y.) 78; *Bradley v. Angel*, 3 N. Y. 475; *DEBTOR AND CREDITOR*, vol. 5, p. 201, n. 11. In *Simson v. Hart*, 14 Johns. (N. Y.) 63, Spencer, J., asserts that insolvency furnishes a strong and substantial ground of equity, as a meditated fraud. Where the plaintiffs' creditors, by representing that the makers of a certain note were perfectly solvent, procured the plaintiffs' indorsement on the note, and the makers of the note were at the time insolvent, as were the creditors, who, about two weeks thereafter, made an assignment for benefit of creditors, with preferences to the exclusion of plaintiffs, who were forced to pay the note, it was held that the representations were fraudulent, giving the plaintiffs a right of action against the creditors in the nature of assumpsit, and that an action was maintainable to compel the application of the sum paid on the note by the plaintiffs to the extinguishment of a sum due from them to the defendant, as assignee. *Rothschild v. Mack*, 115 N. Y. 1.

A court of equity has also been influenced to set off one demand against another by the fact that the situation of the parties against whom the demand is allowed is such that, unless it were allowed, it could probably never be enforced against them because of their removal and being withdrawn from the State, leaving nothing there out of which satisfaction could be had. *Quick v. Lemon*, 105 Ill. 578; *Edminson v. Baxter*, 4 Hayw. (Tenn.) 11; 9 Am. Dec. 751; *Robbins v. Holley*, 1 T. B. Mon. (Ky.) 194; *Forbes v. Cooper*, 88 Ky. 285. But see *M'Kinney v. Bellows*, 3 Blackf. (Ind.) 31.

But where a complainant filed a bill to restrain execution on a judgment at law recovered against him by a corporation incorporated by Congress and established in the District of Columbia, and praying that so much of the complainant's claim might be set off as

necessary to extinguish said judgment, the court held that the complainant's contention that the non-residence of the defendant and the non-subjection of it to the jurisdiction of the courts of the State constitute a special equity, or an equitable ground for being protected against a judgment threatened to be executed, was not well founded, it not being pretended that the defendant was insolvent, nor that redress for any wrong that the complainant had suffered might not have been made in the courts of the United States exercising jurisdiction over the District of Columbia, the court by Alvey, J., said: "The mere fact that the appellee is located and doing business in the city of Washington, does not give a court of equity here jurisdiction to restrain the judgment against the appellant and to enforce a set-off," citing *Beall v. Brown*, 7 Md. 393; *Smith v. Washington Gas Light Co.*, 31 Md. 12; 100 Am. Dec. 49.

And in *Murray v. Toland*, 3 Johns. Ch. (N. Y.) 569, it was insisted that the set-off should be allowed because the complainant might have difficulty in obtaining satisfaction of his demand of a party who resided in Spain, if the latter were permitted to recover judgment and withdraw the fund in question. But Chancellor Kent, in answer to the application said: "Such a principle would check all suits at law, and extend the doctrine of set-off to every possible case, if it so happened that the plaintiff at law was not within the jurisdiction of the court. The inconvenience of following a party to his place of residence abroad does not appear to me to be of itself a sufficient ground for departing from the settled doctrines of the court. The court cannot be governed by the mere question of comparative convenience. What would be proper, if the party resided in a country where there was no regular law or justice, or where he was absolutely inaccessible, is not a point before me. A resident at Cadiz is surely not such a case; nor is Spain, with all her infirmity, to be put out of the pale of civilized nations."

As to the peculiar equities which will justify the interposition of a court of equity to secure the subtraction of such cross-demands, Mr. Story says: "It has been already suggested that courts of equity will extend the doctrine of set-off and claims in the nature of set-off beyond the law in all cases where peculiar equities intervene be-

tween the parties. These are so very various as to admit of no comprehensive enumeration. Some cases, however, illustrative of the doctrine, may readily be put. Thus if an agent having a title to an estate should allow his principal to expend money upon the estate without any notice of that title, he will not be permitted after a recovery at law in ejectment to maintain an action at law against the principal for mesne profits; but courts of equity will require that to the extent of the improvements there shall be a set-off or compensation allowed to the principal against the mesne profits. *Cawdor v. Lewis*, 1 Y. & C. 433. See *Money Penny v. Britow*, 2 R. & M. 117. So if an agent in his own name should procure a policy of insurance to be underwritten for his principal, he will be personally liable for the premium of insurance to the underwriters; and if he has also in his own name procured another policy to be underwritten for the same principal, and a loss occurs under the latter policy on which he sues the underwriters, they may in equity, if not at law, set off the premiums due on the first policy against such loss. *Leeds v. Marine Ins. Co.*, 6 Wheat. (U. S.) 565; 2 Story Eq. Jur., § 1437 a.

But according to some of the authorities, it is required, in addition to these aforementioned equities, that there should be a mutual credit. Thus, it has been held that, where there is no mutual credit, insolvency alone is insufficient, even in a case of positive indebtedness, to authorize an equitable offset. *Hale v. Holmes*, 8 Mich. 37; *Kinney v. Tabor*, 62 Mich. 517. In *Lockwood v. Beckwith*, 6 Mich. 168; 72 Am. Dec. 69, it was considered that, where nothing more than a cross-demand was shown, it not appearing that there was a mutual credit between the parties, the mere fact of the insolvency of the party against whom the set-off is claimed, does not of itself raise an equity of set-off, although it is a circumstance, which, in connection with the fact of the existence of a mutual credit, will justify such set-off. So in *U. S. Bung Mfg. Co. v. Armstrong*, 34 Fed. Rep. 94, it was said that in order to create the right to an equitable set-off there must exist a mutual credit between the parties founded at the time upon the existence of some debt, due by the crediting party to the other. The court by Jackson, J., said: "Mutual credit means something different from mutual debts.

Mutual credit, such as will give rise to an equitable set-off, applies only to that class of cases where there has been mutual trust and understanding that an existing debt should be discharged by a credit given upon the ground of such debt."

Where there were mutual demands so connected that one might fairly be presumed to have been founded on the other, it was considered that the insolvency of one party rendered the interposition of the court necessary for the protection of the other. *Littlefield v. Albany Co. Bank*, 97 N. Y. 581.

The rights of the parties become fixed at the moment and by the act of insolvency; insolvency will not be a ground for allowing set-off where the claim was bought after the insolvency for the purpose of set-off. *Robbins v. Holley*, 1 T. B. Mon. (Ky.) 191; *Condon v. Shehan*, 46 Miss. 710; *Reppy v. Reppy*, 46 Mo. 571; *Hegerman v. Hyslop*, Anth. (N. Y.) 197; *Venango Nat. Bank v. Taylor*, 56 Pa. St. 14. But it has been frequently said that, as to the right of set-off in equity the fact that the debt owing to the insolvent is not due when he makes an assignment, is entirely immaterial. *Rothschild v. Mack*, 115 N. Y. 1; *Richards v. La Tourette*, 119 N. Y. 54; *Kentucky Flour Co. v. Merchants' Nat. Bank* (Ky. 1890), 13 S. W. Rep. 910. But the claims which may be set off under this equitable jurisdiction have, in some cases, been expressly limited to debts which are due at the time when it is sought to enforce the set-off. See *Jeffries v. Agra Bank*, L. R., 2 Eq. 674; *Smith's Case*, L. R., 1 Ch. 538. Where the complainants, being indebted to the defendant's testator in the sum of between \$3,000 and \$4,000 to recover which the defendant, as executor, had brought an action at law, filed their bill to restrain the action at law and to compel a set-off of certain notes given to them by the testator, but which were not yet due, it was held that the bill could not be sustained even though the estate of the testator was insolvent. *Bradley v. Angel*, 3 N. Y. 475; *Spaulding v. Backus*, 122 Mass. 553; 23 Am. Rep. 391; *Keep v. Lord*, 2 Duer (N. Y.) 78; *Chance v. Isaacs*, 2 Edw. Ch. (N. Y.) 356; *affirmed*, 5 Paige (N. Y.) 595. It was said that by allowing a set-off in this case, the executors would have been deprived of a legal right, secured to their testator by contract, and the complainants would have ob-

tained payment of their debt before it became due, and to the prejudice of the other creditors of the decedent.

But, upon bill filed, it does not appear that the fact that the defendant's demand against the complainant is not yet due and payable, forms any valid objection to the claim of the latter to have it applied in payment of their debt which is due from the defendants. *Rothschild v. Mack*, 115 N. Y. 1; *Richards v. La Tourette*, 119 N. Y. 54. Thus, it has been held that A, having a demand against B, which is due, and B one against A, not due, A may in equity compel a set-off if B is insolvent, notwithstanding. *Lindsay v. Jackson*, 2 Paige (N. Y.) 581, and cases cited. In deciding this case the court, by Walworth, Ch., said: "... as the debt of the defendants is due, and if they paid it immediately, according to their agreement, the complainants might, without any injustice to the other party, waive the time of credit which was for their own benefit, and pay the notes immediately with the money thus received; the defendants have no cause to complain of such a mode of compensating one debt by another." Commenting upon this decision, the court, in *Bradley v. Angel*, 3 N. Y. 475, by Gardiner, J., said: "Where a debt is due from an insolvent debtor, the right of the creditor to payment is absolute. Natural equity and law unite in binding the debtor to a fulfillment of his obligation. If the latter holds a demand against his creditor not due, he has no right to retain it, as an investment. The law by sequestration and sale would compel him at once to apply the proceeds in discharge of the debt due from him. Equity by compelling a set-off, under such circumstances, with the consent of the person entitled to the credit, and where third persons are not injured, follows the law. It creates no new obligation, and deprives the insolvent of no right or privilege which he could justly exercise."

So it was held that a plaintiff, holding a payable demand against the defendants, could set it off against a note which the insolvent defendant held against him, although such latter note was not yet due. *Keightley v. Walls*, 27 Ind. 384; *Snyders' Sons Co. v. Armstrong*, 37 Fed. Rep. 18.

An equitable set-off existing against a bank when it stops payment is allowable whether the debt is then payable

or becomes due afterwards. *In re Middle Dist. Bank*, 9 Cow. (N. Y.) 413, note.

Where the complainant, having paid the defendant, as receiver of the Fidelity National Bank, a certain promissory note, of which it was the maker, afterwards filed its bill in equity to have a set-off of the sum so paid against debts which it owed to the insolvent bank, it was held that the voluntary payment of the note with the full knowledge of all the facts operated as an abandonment of all right to set off cross-demands or independent debts, and the bill disclosing such facts presented no case for equitable relief by way of equitable set-off. *U. S. Bung Mfg. Co. v. Armstrong*, 34 Fed. Rep. 94. But, upon the failure of a national bank, a depositor in the amount of \$2,900 was indebted to it on eleven notes to the amount of \$5,000, and the receiver agreed with the complainant that this sum should go as a set-off on the indebtedness, but that the depositor should pay the notes first coming due, and the deposit should be applied on the last maturing notes. After paying the first two notes, it was found, both to the surprise of the petitioner and that of the receiver, that the others were in the hands of third parties. The depositor was compelled to pay them, and filed his bill to authorize the receiver to refund the money paid under a mutual mistake. It was held that the deposit should properly be set off against the claim of the bank, and the depositor should, therefore, recover the sum paid by him. *Snyders' Sons Co. v. Armstrong*, 37 Fed. Rep. 18.

Since this equitable jurisdiction to allow set-offs in the case of insolvency, etc., and the statutory provisions for set-off in the various insolvency and bankruptcy statutes, arose from the same need, it may be that the decisions under the statutes may sometimes serve to throw light upon the equitable principle, and *vice versa*. In *Snyders' Sons Co. v. Armstrong*, 37 Fed. Rep. 18, the court by Hammond, J., said: "This principle arises out of the fact of insolvency, *ipso facto*, and finds its highest development in all of our insolvency and bankruptcy statutes, particularly the late bankruptcy act of the United States, where the very best judicial and legislative thought upon this subject finds expression in its provisions and the decisions concerning the subject of set-off. . . ." See *infra*, this title,

ferent from a right to an account, where the demands are not of a distinct and independent character, but are connected in such a way that the whole series forms one transaction.¹

b. COMMON LAW AND STATUTES. — At common law a defendant who was sued by his creditor could not set up a debt due him by the plaintiff, by way of counterbalancing the plaintiff's recovery, although the amount of such debt was the greater. The defendant would be driven to separate action to recover his own claim. This not only tended to multiplicity of suits, but, if the plaintiff happened to be in circumstances of insolvency, often resulted in positive injustice. Even if the plaintiff had become bankrupt, so that his assignees had become entitled to what was owing from the defendant, the law allowed the assignees to recover the whole amount of the defendant's indebtedness, leaving the defendant to go in under the bankruptcy and prove against the bankrupt's estate, and recover a dividend only.² The temporary bankrupt act of 4 and 5 Anne, ch. 17, effected a mitigation of this evil by allowing a set-off in cases of mutual credits and mutual debts between the bankrupt and any person. This enactment was followed by similar ones, which were designed for the same purpose.³ But these acts only partially remedied the

What May be the Subject of Set-off, Under the Bankruptcy Acts.

1. The essential difference between the right of account and set-off has been stated as follows: "It (the right of account) is not a right to amalgamate independent cross-demands, for the purpose of enabling one action or suit to suffice, but it assumes that the several demands have no independent existence, but have been so connected by the original contract or course of dealing, that the only thing which either party can claim is the ultimate balance. The only right, therefore, is that of taking the account. An account of this kind is not confined to mere receipts and payments of money, although it ordinarily occurs in that form. But it is applicable to any dealings which have been treated as equivalent to receipts and payments. An account, for instance, will lie in respect of reciprocal deliveries of goods, provided that in the course of dealing between the parties such deliveries have been treated as items in an account, and not as creating mere cross-demands; or it will lie in respect of a claim for work done and partially paid for by advances from time to time, so that a balance only of the price is ultimately due." *Adams Eq. pp. 423, 424. See Ranger v. Great West. R. Co., 5 H. L. Cas. 91.*

2. *Ex parte Prescottt*, 1 Atk. 230.

3. The statute of Anne was followed by a similar one in the temporary act of 5 Geo. I., ch. 11; then with improvements by 5 Geo. II., ch. 30, § 28. By the 28th section of the latter statute it was enacted "that where it shall appear to the said commissioners, or the major part of them, that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the said commissioners, or the major part of them, or the assignees of such bankrupt's estate, shall state the accounts between them, and one debt may be set against another; and what shall appear to be due on either side, on the balance of such account, and on setting such debts against one another, and no more, shall be claimed on either side respectively." None of these acts, however, went further than to allow a set-off upon the accounts existing at the time of the bankruptcy. But the statute of 46 Geo. III., ch. 135, § 3, went further and extended the right of set-off to cases where credit was given within two months of the date of the commission, provided the person giving it had not notice of a prior act of bankruptcy, or that the bankrupt was insolvent, or had stopped payment. Afterwards in the statute of 6 Geo. IV., ch. 16, § 50, the

evil of not allowing set-offs; in all cases, except where the plaintiff was bankrupt, the defendant was still compelled to bring a separate action to recover any sum which might be due him from the plaintiff upon an independent transaction. To remedy the evil of multiplicity of suits,¹ it was enacted in 2 Geo. II., ch. 22, § 13, that a defendant might establish a debt against a plaintiff without resorting to a separate action.² And these provisions were subsequently made perpetual and extended by 8 Geo. II., ch. 24, §§ 4 and 5.³ While it seems that these statutes of Geo. II. did not become a part of the law of the United States,⁴ they have been substantially reenacted in the different States,⁵ though usually without the restriction as to penalties.⁶

provisions of this statute relating to set-off were reenacted in 12 and 13 Vict., ch. 106, § 171. And this enactment continued to govern this branch of the law until the passing of the Bankrupt Act (32 and 33 Vict., ch. 71) in 1869. See *Gibson v. Bell*, 1 Bing. N. Cas. 753; 27 E. C. L. 562; *Rose v. Hart*, 2 Sm. L. C. (8th ed.) 330; *Tuscumbia, etc., R. Co. v. Rhodes*, 8 Ala. 206.

1. To avoid multiplicity of suits is generally understood to have been the object of these enactments. See *Isberg v. Bowden*, 8 Exch. 852; 22 Eng. L. & Eq. 551; *Wallis v. Bastard*, 4 De G., M. & G. 251; 31 Eng. L. & Eq. 175; *Cook v. Mills*, 5 Allen (Mass.) 37; *Raymon v. Green*, 12 Neb. 219; 41 Am. Rep. 763.

2. The terms of this statute were as follows: "Where there are mutual debts between the plaintiff and defendant, or, if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other."

3. The statute of 8 Geo. II., ch. 24, § 5, enacts, "that, by virtue of the said clause in the said first-recited act contained (2 Geo. II., ch. 22, § 13), and thereby made perpetual, mutual debts may be set against each other, either by being pleaded in bar, or given in evidence on the general issue, in the manner therein mentioned, notwithstanding that such debts are deemed in law to be of a different nature; unless in cases where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty, and, in all cases where either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same, hath accrued, or shall accrue, by reason of

any such penalty, the debt intended to be set off shall be pleaded in bar, in which plea shall be shown how much is truly and justly due on either side; and, in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid." *Lee v. Lester*, 7 M. G. & S. 1011.

4. *Baltimore Ins. Co. v. McFadon*, 4 Harr. & J. (Md.) 31; *Stowers v. Barnard*, 15 Pick. (Mass.) 221.

5. See *Dunn v. White*, 1 Ala. 645; *Henry v. Butler*, 32 Conn. 140; *Chandler v. Drew*, 6 N. H. 469; 26 Am. Dec. 704; *Drew v. Towle*, 27 N. H. 427; 59 Am. Dec. 380; *Gordon v. Bowne*, 2 Johns. (N. Y.) 150; *Holbrook v. Am. Ins. Co.*, 6 Paige (N. Y.) 220.

6. 2 Whart. Contr., § 1012.

Statutes of Set-Off.—The following compilation is illustrative of the legislation on this subject.

In *Rhode Island*, the language of the statute is as follows: "If any defendant shall have a demand on the plaintiff for any sum liquidated, or for one which may be ascertained by calculation, and which is founded on a judgment, or upon an account, or upon any contract, whether express or implied, and whether with or without seal, and which existed at the time of the commencement of the action, and then belonging to the defendant in his own right, and for which he might maintain a suit in his own name, he may set off the same in an action founded upon any demand which could itself be set off." *Rhode Island Pub. Sts.* 1882, ch. 580, § 14.

The statute of *Delaware* is, that "mutual debts between parties to an action due at the time of action brought,

in the same right, and being for a sum liquidated, or which can be ascertained by calculation, may be the subject of set-off in such action." *Delaware Laws*, 1874, p. 649, § 21.

In *New Hampshire*, the first provincial statute of 1765 followed the terms of the 8 Geo. II., Prov. Stat. 1771, 195. A change of phrase was made in the revision of 1791, Stat. 1815, 172. "If there are mutual debts or demands between the plaintiff and the defendant at the time of the commencement of the plaintiff's action, one debt or demand may be set off against the other." *New Hampshire Pub. Stat.* 1891, p. 619, § 7.

Massachusetts.—The existing statutory provisions for set-off in *Massachusetts* will be found to be of representative importance: "No demand shall be set off unless it is founded upon a judgment or upon a contract, but the contract may be either express or implied, and with or without a seal. No demand shall be set off unless it is for the price of real or personal estate sold, for money paid, for money had and received, or for services done, or unless it is for a sum that is liquidated, or that may be ascertained by calculation. No demand shall be set off unless it existed at the time of the commencement of the suit, and then belonged to the defendant, nor unless it is due to him in his own right, except as is hereinafter provided.

"A demand assigned to the defendant with notice to the plaintiff of such assignment before the commencement of the action, may be set off in like manner as if it had been originally payable to the defendant. If the demand set off is founded on a bond or other contract having a penalty, no more shall be set off than the sum equitably due. The set-off shall be allowed in all actions founded on demands which could themselves be the subject of set-off according to law, and in no others.

"If there are several plaintiffs, the demand set off shall be due from all of them jointly; and if there are several defendants, the demand set off shall be due to all of them jointly, except as is provided in the following section:

"When the person with whom a contract is made has a dormant partner, and a suit is brought on such contract by or against the partners jointly, a demand due to or from the person with whom the contract was made may be set off in like manner as if such dor-

mant partner had not been joined in the suit.

"If the demand on which the action is brought has been assigned, and the defendant had notice of the assignment, he shall not set off a demand that he acquired against the original creditor after such notice. When an action is brought by one person in trust or for the use or benefit of another, the defendant may set off a demand against the person for whose use or benefit the action is brought, in like manner as if that person was the plaintiff in the suit.

"In an action by an executor or administrator, a demand against his testator or intestate, which at the time of his death belonged to the defendant, may be set off in the same manner as if the action had been brought by the deceased. In actions against executors, administrators, trustees and others sued in their representative character, the defendants may set off demands belonging to their testators or intestates or those whom they represent, in the same manner as the persons represented would have been entitled to set off the same in an action against themselves. In suits brought by or against executors, administrators, or trustees in their representative character, no demand shall be set off that is due to or from such executors, administrators or trustees in their own right.

"After a declaration in set-off is filed, the plaintiff shall not be allowed to discontinue his action, unless by consent of the defendant." *Mass. Pub. Stat.* 1882, chap. 168, p. 982.

Under the foregoing statute, in A's action against an administrator, it was held that a claim for money which a written instrument signed by A recited that A had "received in trust" from the intestate, "the same to be accounted for" to the intestate, could be set off, whether the instrument imported a trust or a debt merely. *Gannon v. Ruffin*, 151 Mass. 204.

In a case under the *Massachusetts Betterment Act*, special benefits must be separately assessed, and cannot be set off against damages. *Benton v. Brookline*, 151 Mass. 250.

Unliquidated damages for breach of an agreement to pay a mortgage on realty cannot be set off. *Rice v. Sanders*, 152 Mass. 108.

In A's action for B's breach of an agreement to pay a mortgage on one estate conveyed by A to B, B cannot set off damages for A's breach of an

agreement to pay a mortgage on another estate mortgaged by A to B. (Three judges dissenting.) *Rice v. Sanders*, 152 Mass. 108.

As to when unsecured claims of a life-insurance company may be set off against proceeds of the policy, see *Boden v. Mass. M. L. Ins. Co.*, 153 Mass. 544.

In A's action for goods sold to B, B cannot set off damages for A's breach of a prior agreement to constitute B selling agent of a similar line of goods, and to give B the privilege of purchasing at net prices, less commission. *Knitted Mattress Co. v. Griggs*, 154 Mass. 5.

New York.—It seems that the doctrine of set-off was introduced into the colony of *New York* as early as September 4, 1714. The earliest statutes of set-off in *New York* were modeled upon the *English* statute of 2 Geo. II, ch. 22, § 13; the similarity between those acts was such that *English* decisions were relied upon for the interpretation of the early statutes of the State. *Gordon v. Bowne*, 2 Johns. (N. Y.) 150; *U. S. v. Eckford*, 6 Wall. (U. S.) 484. This statute regulating and defining set-off was the first innovation upon the common law, and it was deemed to remain in force, notwithstanding the enactment of the code of procedure, except so far as the latter was inconsistent with it. *Comm's Rep.* 1850.

The *New York Revised Statutes* provided that the demand to be set off must arise upon judgment, or upon contract express or implied: "It must be a demand for real estate sold, or for personal property sold, or for money paid, or for services done; or if it be not such a demand, the amount must be liquidated or be capable of being ascertained by calculation." 3 *New York Rev. Stats.* (5th ed.), pp. 634, 635. Compare the present provisions, *Birds-eye's New York Rev. Stat.* 1890, p. 2236.

In *Virginia*, the legislation on the subject of set-off began at a very early date. See 5 *Rob. Prac.*, ch. 87, § 3, where the earliest enactments are set out.

In 4 Anne (1705) the general assembly of *Virginia* enacted as follows: "That where any suit shall be commenced and prosecuted within this colony for any debt due by judgment, bond, bill, or otherwise, the defendant shall have liberty upon the trial thereof to make all the discount he can against such debt, and upon proof thereof the

same shall be allowed in court." 3 *Hen. Stat.* 378; 4 *Hen. Stat.* 275; 6 *Hen. Stat.* 87. This was accidentally omitted by the revisers of 1792, but re-enacted by act of Dec. 29, 1806. 1 *R. C.* 819, p. 487, ch. 127. It was considered "as equally extensive with the *English* statute of set-off, to say the least." *Lewis v. Long*, 3 *Munf. (Va.)* 157. Compare the present provisions, see *Virginia Code*, 1887, ch. 160, §§ 3298, *et seq.*

The statute of *West Virginia* (*West Virginia Code*, 1891, ch. 126, § 4) provides that "in a suit for any debt the defendant may, at the trial, prove and have allowed against such debt any payment or set-off, which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise." It seems that the statute of set-off in that State, or in its parent State, has been substantially the same at least as far back as 1705. See *Wartman v. Yost*, 22 *Gratt. (Va.)* 607; *Baltimore, etc., R. Co. v. Jameson*, 13 *W. Va.* 833; 31 *Am. Rep.* 779.

The *Pennsylvania* act of 1705 (*Defalcation Act*) was passed before the *British* statute of 2 Geo. II., and is more comprehensive. Its provisions are: "If two or more dealing together be indebted to each other upon bonds, bills, bargains, promises, accounts or the like, and one of them commence an action in any court of this province, if the defendant cannot gainsay the deed, bargain or assumption upon which he is sued, it shall be lawful for such defendant to plead payment of all or any part of the debt or sum demanded, and give any bond, bill, receipt, account or bargain in evidence." 1 *Bright. Purd. Dig.* 603. This statute has been construed to include cases not permitted to be set off under the *English* statutes. *Boyd v. Thompson*, 2 *Yeates (Pa.)* 217; *Steigleman v. Jeffries*, 1 *S. & R. (Pa.)* 477; 7 *Am. Dec.* 626; *Gogel v. Jacoby*, 5 *S. & R. (Pa.)* 121; 9 *Am. Dec.* 339; *Shaw v. Badger*, 12 *S. & R. (Pa.)* 275; *Bayne v. Gaylord*, 3 *Watts (Pa.)* 301; *Nickle v. Baldwin*, 4 *W. & S. (Pa.)* 290; *Phillips v. Lawrence*, 6 *W. & S. (Pa.)* 150; *Carman v. Franklin Ins. Co.*, 6 *W. & S. (Pa.)* 155; *Hunt v. Gilmore*, 59 *Pa. St.* 450.

Compare the present provisions for "defalcation," *B. P. Pennsylvania Dig.* 1885, p. 603.

In *Maryland* the set-off was first authorized by the Act of 1785, ch. 46.

This act provides as follows: "That in case any suit shall be brought on any judgment, or any bond or other writing sealed by the party, and the defendant shall have any demand or claim against the plaintiff, upon judgment, bond, or other instrument under seal, or upon note, agreement, assumpsit, or account proved, as by this act is allowed the defendant, or otherwise according to law, shall be at liberty to file his account in bar, or plead discount of the plaintiff's claim, and judgment shall be given for the plaintiff for the sum only which remains due after just discount made; provided the sum which shall remain due, after such discount, be sufficient to support a judgment in the court where the cause may be tried, according to its established jurisdiction; and in all cases of suits upon simple contracts the defendant may file an account in bar, or plead discount of any claim he may have against the plaintiff, proved as aforesaid, or otherwise proved according to law, which may be of an equal or superior nature to the plaintiff's claim, and judgment shall be given as aforesaid."

This has been given a wider construction than the *English* statutes, in that set-off has been permitted in actions to recover unliquidated claims. *Dyer v. Dorsey*, 1 Gill & J. (Md.) 442. Thus, set-off was allowed in an action on a policy of insurance. *Baltimore Ins. Co. v. M'Fadon*, 4 Har. & J. (Md.) 41.

Except a slight change made in 1876, this statute may be found in *Maryland* Pub. Gen. Laws, 1888, p. 1095, § 12.

Section 2 of the *South Carolina* discount act, passed in 1759, and made perpetual by the act of 1783, provided as follows: "That in all actions whatever, brought for the recovery of any debt, by any plaintiff, either in his own right or in the right of his wife, or as executor or administrator of any person deceased, it shall and may be lawful for the defendant, if he have any accmpt, reckoning, demand, cause, matter or thing against the plaintiff, to give the same in evidence, by way of discount, regard being always had to the cause of action, so that accmpts, reckonings, demands causes, matters or things relating to the defendant in his own right, shall only be given in evidence by way of discount to actions brought against such defendant in his own right; and so if

such defendant is sued in the right of his wife, or as executor or administrator of any person deceased, and the same shall be noted, and judgment be entered for the balance only; and if the plaintiff be found indebted to the defendant, judgment shall be entered for the defendant, with costs of suits, and execution go against the plaintiff."

This provision has been enlarged into those for counterclaim. See *South Carolina* Code, 1882, § 171; also *infra*, this title, *Counterclaim*.

In *Missouri*: "If any two or more persons are mutually indebted in any manner whatsoever, and one of them commence an action against the other, one debt may be set off against the other, although such debts are of different nature." *Missouri* Rev. Stats. 1879, § 3867. Compare the present provisions, *Missouri* Rev. Stat. 1889, § 8160.

In *Vermont*: "In suits for the payment or recovery of money, offset shall be allowed agreeably to the equitable rights of the parties." *Rev. Laws*, 1880, § 715.

In *Tennessee* the statute provides that the defendant may plead by way of set-off "any equities between the defendant and the original party under whom the plaintiff claims, which by law have attached to the demand in the plaintiff's hands, and for which the defendant would be entitled to a recovery against such original party." *Tennessee* Code of 1884, § 3628, pl. 4.

In some of the States where statutes have been enacted which substantially allow the same defense which may be made under the provisions for counterclaim under the codes of reformed procedure, the terms "set off" and counterclaim have both been preserved. Thus, in *Ohio* and some other States, the term set-off is applied to the class of matter which may be set off under that part of the statute which in effect provides that, in an action on contract, any other cause of action on contract, existing at the commencement of the action, etc., may be offset, and the term "counterclaim" is employed to designate the class of cases which come within the provision which extends to a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

"A set-off can only be pleaded in an action founded on contract, and must be a case of action arising upon contract

AS A CROSS-ACTION.—Set-off is in the nature of a cross-action; it does not affect the plaintiff's right to recover on his cause of action.¹ Because of its nature, the same principles must, in general, apply to the maintenance of a set-off that would govern were an independent action brought thereon.²

A defendant cannot file the same claim in set-off to two separate actions.³ Using a demand in set-off bars a subsequent action thereon.⁴ But, although there is a close analogy between setting off a demand and bringing an independent action thereon, it has

or ascertained by the decision of a court." *Ohio Rev. St.* 1890, § 6075. "The counterclaim must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action." *Ohio Rev. St.* 1890, § 5072. See like provisions in 2 *Kansas Gen. St.* 1889, §§ 4178, 4181; *Nebraska Consol. Stat.* 1891, § 4641. Somewhat similar ones in *Indiana Rev. St.* 1888, §§ 348, 350.

As to *Iowa*, see *Miller's Iowa Rev. Code*, 1888, § 2659, or *McClain's Iowa Annot. Code*, 1888, § 3865. See also *infra*, this title, *Counterclaim*.

As to *Georgia*, see *Georgia Code*, 1882, §§ 2900, *et seq.* Formerly the proposed set-off must have been a money demand for which *indebitatus assumpsit*, or some other action, *ex contractu*, would lie. *Crenshaw v. Jackson*, 6 Ga. 509; 50 Am. Dec. 361.

1. *Lewis v. Denton*, 13 Iowa 441.

Nor does a defendant, by filing an account by way of set-off or cross-demand, commencing within six years, thereby waive the Statute of Limitations as to so much of plaintiff's account as is of more than six years' standing. *Hibler v. Johnston*, 3 Harr. (N. J.) 266.

2. *Mitchell v. McLean*, 7 Fla. 329; *Freeland v. Man*, 1 Smed. & M. (Miss.) 531; *Chase v. Strain*, 15 N. H. 535; *Prentiss v. Sprague*, 1 Hilt. (N. Y.) 428; *Barnes v. Shelton*, Harp. (S. Car.) 33; 23 Am. Dec. 642.

It was, therefore, held that a set-off may be proved by the defendant's uncontradicted affidavit under a statute (*Mansf. Dig. Arkansas*, § 2915) which enacts that "in suits upon accounts, the affidavit of the plaintiff . . . that such account is just and correct, shall be sufficient to establish the same, unless the defendant shall, under oath,

deny the correctness of the account." *Herr Dry Goods Co. v. Shaffer*, 51 Ark. 368.

A set-off was held to be within the meaning of 2 *Indiana Revised Statutes* 41, § 78, requiring that when any pleading is founded on a written instrument or an account, the original, or a copy thereof, must be filed with the pleading. *Fugit v. Ewing*, 9 Ind. 345.

3. *Chase v. Strain*, 15 N. H. 535.

4. *King v. Fuller*, 3 Cal. (N. Y.) 152.

See *RES JUDICATA*, vol. 20, p. 167.

An account in set-off, already pleaded in one case, may be proved by the defendant; but the plaintiff may reply by proof (where there is no special pleading) showing the fact of such former use of the account. *Merchants' Bank v. Rawls*, 21 Ga. 289.

Where a party in the defense of a suit sets up matter on the trial of the cause which is not properly available as a defense, as, where he insists upon matter as set-off which is not available as such, and testimony is produced in support of such defense, and submitted to, and passed upon, by the jury, such matter cannot again be brought up in a suit by such defendant, and, if it be, the former suit and trial may be pleaded in bar of a recovery. *Wilder v. Case*, 16 Wend. (N. Y.) 583.

Where a verdict was given against the plea of set-off, and the defendant afterwards brought an action for such cause of action, it was held that he was estopped from suing for the same demand, and a plea stating such former action and the second action was for the recovery of the identical claim specified in the set-off, was not answered by a replication that no evidence was offered to substitute the plea of set-off. *Eastmure v. Laws*, 5 Bing. N. Cas. 444; 7 Dowl. 431; 35 E. C. L. 170.

To admit a suit for a matter once

been said that statutes which speak only of an action are to be construed rigidly, and are not to be extended to set-off.¹ The fact that set-off is in the nature of a cross-action does not deprive the plaintiff's counsel of his right to the closing argument.²

d. APPLICATION OF SET-OFF—BALANCES.—Set-off not being a defense, but admitting the truth and validity of the plaintiff's claim, the result is that, if only a set-off is pleaded, the plaintiff's demand will be taken as true, and, the set-off having been proved, whichever demand is the smaller deducted from the other, and judgment rendered for the balance; but if the defendant should fail to establish his claim, the judgment must be for the amount claimed by the plaintiff in his pleading.³ This where

offered to be proved as a set-off and rejected, there must be clear proof that it was withdrawn by the party. *Muirhead v. Kirkpatrick*, 2 Pa. St. 425.

It was held that a defendant is not precluded from claiming a set-off on the trial of a cause in court, by reason of his having used it in another suit by the same plaintiff, before arbitrators, from whose award the plaintiff appealed in. *Bitzer v. Killinger*, 46 Pa. St. 44.

A bill of particulars by a defendant in one suit, claiming a payment made on a certain day, as a set-off in that suit, is not evidence against the same defendant in another suit, in which he insists upon such payment as a bar to a recovery. *Starkweather v. Kittle*, 17 Wend. (N. Y.) 20.

1. *Taylor v. Mayor, etc.*, of N. Y., 82 N. Y. 10.

The provision of the *New York Code*, that no action on a judgment rendered by a justice of the peace shall be brought in the same county within five years after its rendition, does not prevent parties thereto, and especially an assignee thereof, from using such judgment as a defense, set-off or counterclaim. *Clark v. Story*, 29 Barb. (N. Y.) 295.

So notwithstanding the provision of the Code, that "no action shall be brought upon a judgment rendered in any court of this State, except a court of justice of the peace, between the same parties, without leave of the court for good cause shown, on notice to the adverse party," it was held in an action upon contract, for goods sold and delivered that the defendant may, without obtaining leave of court, set up in his answer, by way of set-off, or counterclaim, a judgment recovered by him against the plaintiff before the suit

brought by the latter was commenced. *Wells v. Henshaw*, 3 Bosw. (N. Y.) 625.

Although by reason of the charter of a city no suit can be maintained upon a claim against it, until after presentation to, and demand of payment from, an officer thereof, it was yet held that the claim may be set-off in a suit against its owner by the city. *Taylor v. Mayor, etc.*, of N. Y., 82 N. Y. 10.

Notwithstanding the statute in *Virginia* (1 *Virginia Rev. Code* 1819, p. 320, ch. 85, § 23), prohibiting an action for clerk's fees until a return by the sheriff or sergeant, such fees were allowed as a set-off in *Craig v. Lobb*, 12 Leigh (Va.) 630, the court citing *Martin v. Winder*, 1 Dougl. 198, note, and *Bulman v. Birket*, 1 Esp. 449.

Under a statute providing that no attorney shall commence or maintain an action for the recovery of any fees, charges, or disbursement for business done by him until the expiration of one month after the delivery of a bill therefor, it has nevertheless been held that an attorney may set off his bill although it was not delivered a month before the commencement of the action; but it ought, if possible, to be delivered time enough to be taxed, and at least should be delivered sufficiently early to prevent the plaintiff from being taken by surprise at the trial. *Brown v. Tibbits*, 11 C. B. N. S. 855; 103 E. C. L. 855; 31 L. J. C. P. 206; 103 E. C. L. 855; *Martin v. Winder*, Dougl. 199, note; *Bulman v. Birkett*, 1 Esp. 449; *Montag*, 36. See *Harrison v. Turner*, 10 Q. B. 482; 59 E. C. L. 481; and see per Parke, B., *Lester v. Lazarus*, 2 C. M. & R. 669.

2. *Toppan v. Jenness*, 21 N. H. 232.

3. For an application of the rule that a mere plea of set-off is an acknowl-

only set-off is pleaded. But, in accordance with the well-settled practice that the defendant may plead one matter of defense to part of the plaintiff's demand, and, in the same plea, another matter of defense to the residue of the demand, it is admissible for the defendant to oppose a defense, as of payment, performance, etc., to a part of the plaintiff's claim and plead a set-off as to the remainder.¹ While set-off may be pleaded to a single count,² it is not necessary to plead it expressly to any particular count.³ Where a debtor has a set-off equally applicable to two demands against him, it is not for him to elect which demand he will satisfy by his set-off; but the court will direct the application according to the equities between the parties.⁴ Set-off will be applied on a secured rather than an unsecured claim.⁵

As has been substantially stated in the paragraph next above, if the defendant files and sustains his set-off, and the result is not only that he owes the plaintiff nothing, but that the plaintiff owes him a balance when the mutual and opposing claims are adjusted, the generally prevailing rule is that the defendant may have judgment and execution against the plaintiff, in that action, for the balance or surplus due him.⁶

c. PLAINTIFF'S RIGHT OF ACTION—NONSUIT.—It is not necessary, according to some authorities, to entitle the defendant to judgment for the amount of a cross-demand, that there

edgment of the justice of the plaintiff's demand, and, if not sustained, entitles him to a judgment, see *Raymond v. Kerker*, 81 Ill. 381.

It was provided by statute that "when no balance is found due to either party, no costs are recoverable." *Maine Rev. Stat.*, ch. 82, par. 60. Upon a set-off and counter set-off in an action on an account annexed, an instruction that if the jury should find as much due the defendant as there was due the plaintiff the verdict should be for the defendant, was held to be in contravention of this statute—the proper verdict would be, "nothing due either party." *Morgan v. Heffer*, 68 Me. 131.

Interest.—It has been said that justice demands that the claim of the debtor, not bearing interest, should be set off against that of the creditor, drawing interest, as of the time it became due and owing. *Meriwether v. Bird*, 9 Ga. 594.

Where an auditor found that the plaintiff was indebted to the defendant at the time the suit was brought to a certain amount, which was then a proper subject of set-off against any demand of the plaintiff in the action, and the court, in making the set-off,

brought the interest on the plaintiff's claim down to the time of the judgment, and set off the amount of the defendant's claim as found without interest, it was held that the court erred, and that the defendant's claim should have been applied to the plaintiff's as of the time when the suit was brought. *Tucker v. Jewett*, 32 Conn. 563.

1. *Roebuck v. Tennis*, 5 T. B. Mon. (Ky.) 82; *Taylor v. Weister*, 1 Litt. (Ky.) 355.

2. *Gibson v. Bell*, 1 Bing. (N. Cas.) 751; 27 E. C. L. 562.

3. *Noel v. Davis*, 4 M. & W. 136.

4. *Tallmadge v. Fishkill Iron Co.*, 4 Barb. (N. Y.) 382, the court by *Harris, J.*, citing *Collins v. Allen*, 12 Wend. (N. Y.) 356; 27 Am. Dec. 130; *U. S. v. Prentice*, 6 McLean (U. S.) 65.

5. *Putnam v. Russell*, 17 Vt. 54; 42 Am. Dec. 478.

6. 2 Pars. Contr. 745; *Avery v. Brown*, 31 Conn. 398; *Hay v. Short*, 49 Mo. 139; *Good v. Good*, 9 Watts (Pa.) 567; *Sumter v. Welsh*, 1 Brev. (S. Car.) 539; *Cowsar v. Wade*, 2 Brev. (S. Car.) 291. See *Hart v. Missouri State Mut. F. Ins. Co.*, 21 Mo. 91.

But in *England* this cannot be done;

should be something proved and allowed to the plaintiff.¹ Other authorities are to the effect that there can be no set-off where the plaintiff has no cause of action.²

The more commonly accepted rule is that the filing of a plea of set-off in nowise impairs the plaintiff's right to a discontinuance or nonsuit.³ But it has been held that after filing a plea of set-off, the plaintiff has no longer a right to take a nonsuit without the consent of the plaintiff.⁴ In yet other States the plaintiff

the defendant must bring his action for the surplus. *Hennell v. Fairland*, 3 Esp. 104.

1. *Moore v. Wright*, 4 Ill. App. 443; *Greenleaf v. Low*, 4 Den. (N. Y.) 168.

2. *Claridge v. Klett*, 15 Pa. St. 255.

It has been held that no judgment can be rendered against a plaintiff upon a demand against him by way of set-off if he become nonsuit; *Sewall v. Tarbox*, 30 Me. 27; or if he discontinued his action by leave of court. *Cummings v. Pruden*, 11 Mass. 206.

In *Tennessee*, by the act of 1815, ch. 58, the defendant could only recover, by means of a set-off, the balance, if any, in his favor, and could not recover at all if no claim of the plaintiff was proved against him. *Edington v. Pickle*, 1 Sneed (Tenn.) 122. Likewise under section 2 of the act of 1852, the right of set-off was considered incidental to and dependent upon the fact of the plaintiff's having established a right of recovery against the defendant; this failing, the right of set-off could not exist. *Brazelton v. Nashville R. Co.*, 3 Head (Tenn.) 570. So, under the *Tennessee Code*, § 2922, which authorizes a judgment upon a set-off only for its "excess" over the plaintiff's demand, there can be no judgment in favor of the defendant in a case where the plaintiff establishes no demand whatever against the defendant. *East Tennessee, etc., R. Co. v. Galbraith*, 1 Heisk. (Tenn.) 482; *Baker v. Grigsby*, 7 Heisk. (Tenn.) 627.

3. *Fowler v. Lawson*, 15 Ark. 148; *Buffington v. Quackenboss*, 5 Fla. 196; *McCann v. Boyers*, 8 B. Mon. (Ky.) 285; *Sewall v. Tarbox*, 30 Me. 27; *Cummings v. Pruden*, 11 Miss. 206; *Wooster v. Burr*, 2 Wend. (N. Y.) 295; *McCredy v. Fey*, 7 Watts (Pa.) 496; *Usher v. Sibley*, 2 Brev. (S. Car.) 32; *Bremham v. Brown*, 1 Bailey (S. Car.) 262.

See *NONSUIT*, vol. 16, pp. 727, *et seq.*

In *Illinois*, it is, after a plea of set-off

has been filed, within the discretion of the court whether to grant a motion by the plaintiff to dismiss the suit. *Butler v. Randall*, 25 Ill. App. 586.

In *Maine*, the statute touches on the matter; it provides that the time of the limitation of a debt or contract, filed by way of set-off, "shall be computed as if an action had been commenced therefor at the time when the plaintiff's action was commenced, unless the defendant is deprived of the benefit of the set-off by the non-suit or other act of the plaintiff; and where he is thus defeated of a judgment on the merits of such debt or contract, he may commence an action thereon within the time limited." *Maine Rev. Stat.* (ed. 1857), p. 512.

4. *Thomas v. Hill*, 3 Tex. 270. See *NONSUIT*, vol. 16, p. 727, *et seq.*; *DISCONTINUANCE*, vol. 5, p. 676, n. 2.

The case of *Riley v. Carter*, 3 Humph. (Tenn.) 230, is in terms to this effect. But in *Fowler v. Lawson*, 15 Ark. 148, the court by Scott, J., comments upon this case as follows: "That case, however, originated before a justice of the peace, who not only found, upon the trial, a balance due the defendant, but rendered a judgment for it in his favor, which was appealed from the circuit court, where the plaintiff was refused leave to take a nonsuit, and that refusal was affirmed by the Supreme Court of Tennessee."

It was held that, after an account ordered by the court under *Tennessee Code*, § 2924, as to set-off in an action at law, the plaintiff cannot dismiss his suit without the defendants' consent. *Galbraith v. East Tennessee, etc., R. Co.*, 11 Heisk. (Tenn.) 169.

In assumpsit on account it was held that, after the defendant had filed an account in set-off, and the auditor had reported, the plaintiff could not then discontinue without the defendant's consent. *Dyer v. Morris*, 68 Me. 472; citing *Maine Rev. Stat.*, ch. 82, § 59.

may dismiss his action but cannot thereby interfere with the defendant's cross-action or set-off.¹

f. FAILURE TO USE.—In the absence of evidence of any mutual and open accounts, a set-off may be withdrawn.²

The distinction between set-off and a defense in the technical sense is well illustrated in the rule that a set-off may be used or not, at pleasure.³ If a defendant in an action has a defense thereto, he must, in general, defend and protect his rights; for, if he omit to do so, he cannot afterwards, as plaintiff, sue for such rights.⁴ But, unless there are provisions in the statutes which expressly provide differently, a defendant may use or not use his claim in set-off when an opportunity is presented,⁵ without im-

1. *Georgia Code*, § 2907.

Where defendant pleads a set-off, plaintiff cannot, by refusing to proceed with the case, defeat defendant's right to recover under his set-off; and the rule is the same, although defendant may have discontinued a pending action against plaintiff in order to interpose his claim by way of set-off to plaintiff's claim. *Simon v. Myers*, 68 Ga. 74.

In *Nebraska*, if the plaintiff dismisses his action after the filing of set-off, the clerk should, before dismissal, docket the set-off, with claimant as plaintiff and the adverse party as defendant. This practice was, in *Rawalt v. Brewer*, 16 Neb. 444, explained substantially as follows: Suppose A B commences an action against C D, and C D files a set-off. If A B, after the set-off of C D was filed, should dismiss his action and pay the costs, as in this case, the action would not proceed further under that title. That action would be dismissed, and if the defendant desired a trial of his set-off or cross-action, the justice would make the proper entry in his docket showing the dismissal of the action, the set-off of the defendant, and give it the proper title, C D v. A B, and the cause would proceed under that title, as C D would be the plaintiff in that action.

Compare cases cited in *Nebraska* Consol. Stat. 1891, § 4644.

In *Iowa*, the dismissal of an action without prejudice by the plaintiff will not entitle him to a dismissal of a counterclaim. *Sigler v. Hidy*, 56 Iowa 504.

The *Iowa Code*, § 2846, in providing that where a counterclaim has been filed defendant shall have the right to proceed to the trial of his claim, although plaintiff may have dismissed his action

or failed to appear, was construed not to contemplate the introduction, by defendant, of a cause of action not involved in the case at the time of plaintiff's dismissal. *Page v. Sackett*, 69 Iowa 226.

It was held in *Kansas*, that a plaintiff may, after having been allowed to dismiss his action without prejudice, come in and defend against the defendant's counterclaim, which goes to trial as if the defendant were plaintiff and had sued upon the claim. *Sale v. Bugher*, 24 Kan. 432.

2. *Bowen v. Pickett*, 26 Kan. 219; *Theobald v. Colby*, 35 Me. 179; *Cary v. Bancroft*, 14 Pick. (Mass.) 315; 25 Am. Dec. 393; *Muirhead v. Kirkpatrick*, 5 W. & S. (Pa.) 506; *Gallagher v. Thomas*, 2 Brews. (Pa.) 531; *Dove v. Hanks*, 3 McCord (S. Car.) 558.

But under the *Michigan* statute a set-off once asserted against a creditor's demand upon a decedent's estate cannot be withdrawn. *People v. McCutcheon*, 40 Mich. 244.

3. *Broughton v. McIntosh*, 1 Ala. 103.

4. 1 Whart. Ev., § 789; *Holmes v. Statler*, 57 Ill. 209.

5. *Rule Under the Doctrine of Compensation in the Civil Law.*—The difference between set-off and compensation of the civil law is here well illustrated. Under the civil-law doctrine of compensation the cross-debt to the same amount was, by mere operation of law, and independent of the act of the parties, extinguished, consequently the rule in the civil law is contrary to that stated in the text. 2 Story Eq. Jur., § 1440, citing *Pothier on Oblig.*, n. 599; 1 Domat., b. 4, tit. 2, § 1, art. 4. It seems to resemble our payment, in this respect, rather than set-off.

pairing his right to establish his claim in a separate action,¹ or to use it in a subsequent action by the same plaintiff,² or to plead it to an action on the judgment.³ And where the defendant is not prepared, at the time the plaintiff sues him, to prove his demand, it is most advisable not to plead or give notice of set-off, for in case he should go into evidence upon the trial in support of his cross-demand, and fail in the attempt, he cannot afterwards proceed in an action for the amount.⁴ It is, however, better that a claim should be settled by set-off, when that can properly be done, because it saves both expense and time to do this. And courts have censured parties for not pleading a demand by way of set-off, when there was nothing to show that it might not have been made perfectly available to the defendant in that way. Besides, the possibility of the plaintiff in the action in which a demand can be set off becoming insolvent before an independent action can be instituted and judgment recovered, should be considered. But it has been held that when a judgment creditor becomes insolvent after obtaining his judgment, equity may compel allowance of any set-off the debtor may have against him, though it existed at the time suit was brought, provided it was not adjudicated against in the suit.⁵

1. *Brown v. Pigeon*, 2 Campb. 595; *Baskerville v. Brown*, 2 Burr. 1229; *Brisbane v. Dacres*, 5 Taunt. 148; *Garrow v. Carpenter*, 2 Port. (Ala.) 359; *De Sylva v. Henry*, 3 Port. (Ala.) 132; *Broughton v. McIntosh*, 1 Ala. 103; *Hobbs v. Duff*, 23 Cal. 596; *Morton v. Bailey*, 2 Ill. 213; 27 Am. Dec. 767; *Chicago, etc., R. Co. v. Field*, 86 Ill. 270; *Judah v. Brandon*, 5 Blackf. (Ind.) 506; *Bartlett v. Pearson*, 29 Me. 9; *Minor v. Walter*, 17 Mass. 237; *McEwen v. Bigelow*, 40 Mich. 215; *Huntoon v. Russell*, 41 Mich. 316; *Himes v. Barnitz*, 8 Watts (Pa.) 39. But it seems, in *Michigan*, that costs are not recoverable by the plaintiff in such subsequent action. *Huntoon v. Russell*, 41 Mich. 316.

So the statute of *New York*, authorizing set-off in the higher courts was held to be not compulsory, and that the defendant might waive the set-off and resort to an action. *Carpenter v. Butterfield*, 3 Johns. Cas. (N. Y.) 146.

It was held that one who fails to make a set-off at law cannot have relief in equity, although the omission is due to surprise or accident, unmixed with negligence, because he still has a legal remedy by suit. *Hudson v. Kline*, 9 Gratt. (Va.) 379.

2. In a suit to enforce a vendor's lien on land, it was held that, though the plaintiff had obtained a judgment

on the note for the unpaid purchase money, before filing a bill to enforce his lien on the land, the defendant was not precluded from setting off a cross-demand, which would have been available as a set-off in the action at law, but which was not introduced in that suit. *Weaver v. Brown*, 87 Ala. 533.

3. *Leake Contr.* (2d ed.) 1005; *Roach v. Privett*, 90 Ala. 391. See *Weaver v. Brown*, 87 Ala. 533.

4. A plea to an action of debt, alleging that in a former action brought by the defendant against the plaintiff, the latter had pleaded a set-off in respect of the same money now sought to be recovered, but the jury had found for the plaintiff, on which judgment was given, is a good plea of estoppel, and the plaintiff cannot reply that he was not prepared to support his plea of set-off at the former trial. *Eastmure v. Lawes*, 7 Dowl. 431.

5. *Chicago, etc., R. Co. v. Field*, 86 Ill. 270. See *Hughes v. M'Coun*, 3 Bibb (Ky.) 254. But see *Wolcott v. Jones*, 4 Allen (Mass.) 367.

But where a defendant purposely omitted to set off certain claims in an action at law, and afterwards came into equity to have them set off against the judgment, it was held that, under the circumstances, this could not be done. The court, by Curtis, J., said: "He (the complainant) purposely omitted

It is, in the statutes of some States, provided, in effect, that if the defendant, when an action is brought against him in which a set-off may be made, neglects to set off his claim, a subsequent suit for its recovery is thereby barred.¹ In order that a suit may be barred by the operation of a statute of this kind, it must ap-

to set off these alleged claims in the action at law, and now asks a court of equity to try these unliquidated claims and ascertain their amount, and enable him to have the same advantage which he has once waived, when it was directly presented to him in the regular course of legal proceedings. Courts of equity do not assist those whose condition is attributable only to want of due diligence, nor lend their aid to parties, who, having had a plain, adequate and complete remedy at law, have purposely omitted to avail themselves of it. It is suggested that courts of equity have an original jurisdiction in cases of set-off, and that this jurisdiction is not taken away by the statutes of set-off, which have given the right at law. This may be admitted, though it has been found exceedingly difficult to determine what was the original jurisdiction in equity over this subject. 2 Story's Eq. Jur., 656, 664. But whatever may have been its exact limits, there can be no doubt that a party sued at law has his election to set off his claim, or resort to his separate action. And if he deliberately elects the last, he cannot come into a court of equity and ask to be allowed to make a different determination, and to be restored to the right which he has once voluntarily waived.

"Similar considerations are fatal to the plaintiff's claim for relief, on the ground that the defendant resides out of the State, and that therefore he should have the aid of a court of equity, to subject the judgment at law to the payment of the complainant's claim. When the complainant elected not to file these claims in set-off in the action at law, he knew that defendant, who was plaintiff in that action, resided out of the State. If that fact was deemed by the complainant insufficient to induce him to avail himself of his complete legal remedy, it can hardly be supposed that it can induce a court of equity to interpose to create one for him." *Hendrickson v. Hinckley*, 17 How. (U. S.) 443.

1. *New Jersey*. See *Schenck v. Schenck*, 10 N. J. L. 276.

In *Pennsylvania*, it is provided by the act of March 20, 1810, that in an action before a justice of the peace, the defendant must set off any claim which he may have against the plaintiff not exceeding \$100, or be forever barred of its recovery. *Herring v. Adams*, 5 W. & S. (Pa.) 459.

Where a justice of the peace issues his process, which is served according to law on a defendant, the latter cannot turn round and sue the plaintiff before another justice for any debt or demand within his jurisdiction, but must submit his claim by way of set-off to the justice before whom the plaintiff has brought his suit. *Slyhoof v. Flitcraft*, 1 Ashm. (Pa.) 171; *White v. Johnson*, 2 Ashm. (Pa.) 146.

Under this act an employé cannot sue for wages for manual labor performed while a suit by the master in another court for damages, arising from the same transaction and *ex contractu*, is still pending and undetermined. *Felipel v. Hershour*, 128 Pa. St. 587.

Where a party is sued in the court for the trial of small causes, in *New Jersey*, he is not at liberty to bring a cross-action for a demand which is the subject matter of set-off; if not claimed as set-off, the right to recover it is barred by statute. *Righter v. Van Riper*, 3 N. J. L. 715; *Johnson v. Pennington*, 15 N. J. L. 188; *Henry v. Milham*, 13 N. J. L. 266.

So in *Illinois*, the defendant is obliged to set off his debt against the plaintiff's demand, in actions before justices of the peace. *Morton v. Bailey*, 2 Ill. 213; 27 Am. Dec. 767.

The seventh section of the act of *Pennsylvania* of March 20, 1810, only requires a defendant to make a set-off when his demand against a plaintiff does not exceed the sum of \$100. Where, therefore, the demand of a defendant which was founded on a book account exceeded the sum of \$100, it was held that he was not bound to submit particular items or any part of his demand, by way of set-off against the claim of the plaintiff, to the jurisdiction of the justice, before whom the plaintiff had brought his suit; and that he was not

pear that the suit by the defendant was one in which a set-off might be had,¹ and that the plaintiff's claim was a proper subject of set-off, and might have been so employed by the plaintiff when he was defendant in the former action.² Although a joint and several note, being a separate debt against each of the makers as well as a joint debt against both, may be set off in a suit by either of the makers against the holder, the holder is, nevertheless, not bound to set it off.³

g. RELINQUISHMENT AND DEPRIVATION OF RIGHT.—It has been held that the right of set-off may be insisted on, though an express promise has been made to relinquish it.⁴ Although goods were to be paid for in ready money when delivered, it was, under

barred by his neglect or refusal so to do from recovering any part of his said demand, in a subsequent suit against such party plaintiff. *Simpson v. Lapsley*, 3 Pa. St. 459.

1. Since the defendant cannot set off in an action of trespass, it is certainly no objection to the defendant's set-off in an action of assumpsit, that the defendant had not pleaded his set-off in a former action of trespass. *Allen v. Horton*, 7 Johns. (N. Y.) 23.

2. Where the plaintiff, in a justice's court, declared on a special contract, by which the defendant agreed to transfer to him \$1,000 worth of railroad stock, and to pay him \$50 in goods, but claimed damages to \$100 only, and the defendant pleaded that in a former action, on contract, brought by himself against the plaintiff before a justice, the plaintiff had neglected to set off his present demand, held that the plea was bad, because the demand was either unliquidated or was for \$1,050; and in either case, could not have been set off in the former action. *Babcock v. Peck*, 4 Den. (N. Y.) 292.

In an action on a promissory note, it is sufficient excuse for not filing such note in set-off, in a former action by the defendant against the plaintiff that such note was, at the time of the former trial, out of the plaintiff's hands by assignment. *Boylan v. Vighie*, 2 N. J. L. 95.

It was held that where the plaintiff objects to admissibility of a note in set-off, when offered by the defendant, he cannot afterwards, in an action upon such note, object that it was not set off in the former action. *Phinney v. Earle*, 9 Johns. (N. Y.) 352.

3. *Culver v. Barney*, 14 Wend. (N. Y.)

161. The court by Sutherland, J., said: "By doing so, and taking judgment against the plaintiff for the balance which would have been found in his favor, he would probably have lost his remedy against the other maker. He could not afterwards have sued him upon the note. The demands which the defendant must set off are demands against the plaintiff in the action, and not against the plaintiff and some other person either jointly or severally." 2 *New York Rev. Stat.* 236, § 50, subd. 7.

4. Though the debt from the defendant arises on a loan by the plaintiff, on making of which the defendant promised not to set off his demand against the plaintiff, such demand may nevertheless, be availed of in set-off. *Lechmere v. Hawkins*, 2 Esp. 626; *Taylor v. Okey*, 13 Ves. 180.

It was held that the words, "without defalcation for value received," in a sealed note, do not preclude the defendant in an action thereon from making the defense of set-off. *Louden v. Tiffany*, 5 W. & S. (Pa.) 367.

But in *Missouri* it was held that a set-off cannot be pleaded to an action on a note made "payable without defalcation." *Collins v. Waddle*, 4 Mo. 452; *Maupin v. Smith*, 7 Mo. 402. But see *Baker v. Brown*, 10 Mo. 396.

It has been decided that an express agreement by a broker that he will sell goods for his principal, and pay over the whole proceeds, without setting off a debt then due to him from his principal, is not binding upon the broker, so as to deprive him of his legal right of lien or set-off, even though the plaintiff declare specially upon such agreement. *McGillivray v. Simson*, 2 C. & P. 320; 9 D. & R. 35; 12 E. C. L. 146.

the *English* statute, held that the defendant, in a suit for the price, might plead a set-off.¹

A party cannot be deprived of his right of set-off by anything less than a contract.² A person owing a balance upon an account, but having a greater sum due him for merchandise subsequently furnished, is not estopped from pleading the latter as a set-off, by a promise to pay the former balance. Such promise is without consideration to support it, unless in consequence thereof the promisee has acted so as to alter his previous position, and the breach thereof would operate to his injury.³ One who has given a bond to secure the payment of an unliquidated demand against which he has a set-off, may plead his set-off in an action on the bond, although he did not reserve the right therein.⁴ Similarly, if the maker of a note, having an equitable set-off, which is available against an assignee after maturity, executes a mortgage to the assignee to secure the payment of the note, this does not estop him from afterwards setting up against the assignee his equitable set-off.⁵ So, where a vendor takes a guaranty from a third person for goods sold and delivered, their value may, notwithstanding, be set off by the vendor in an action against him by the vendee.⁶

It seems that, under the general well-settled doctrine that a person may waive many statutory or constitutional provisions intended for his benefit, a party entitled to a right of set-off may waive it by an agreement deliberately made upon a good consideration.⁷ So, an agent or attorney who, by virtue of special

1. Leake Contr. (2d ed.) 1005; Eland v. Karr, 1 East 375; Chapman v. Lathrop, 6 Cow. (N. Y.) 110; 16 Am. Dec. 433; See Clarke v. Fell, 4 B. & Ad. 404; 24 E. C. L. 87; *Ex parte* Fletcher, L. R., 6 C. D. 350.

In an action for goods sold at auction for cash, the defendant may set off the plaintiff's note. Stettinius v. Myer, 4 Cranch (C. C.) 349.

In *Louisiana* the statute (*Louisiana* Rev. Code, art. 2210) provides that compensation shall not take place against a claim for the restitution of a thing of which the owner has been unjustly deprived. And it was held that compensation cannot be set up to extinguish a claim for the price of commodities sold for cash, possession whereof was obtained by a breach of trust. This defense rests essentially on good faith. Mutual Nat. Bank v. Keenan, 35 La. Ann. 1129.

2. Reed v. Penrose, 36 Pa. St. 234. So, on the distribution of the estate of A's employer, it was held that, in the absence of any express contract to the contrary, wages unpaid should be applied to the judgment on a judgment

note previously given him by A in settlement of A's old debt to him. Lloyd's Appeal, 95 Pa. St. 518.

3. Hodgen v. Kief, 63 Ill. 146.

The giving of new notes in renewal of some given for a defective machine, on the agreement that it should be made good, is not a waiver of the right to a counterclaim for said defects. Case v. Grim, 77 Ind. 565.

4. Van Sandt v. Dows, 63 Iowa 594; 50 Am. Rep. 759.

5. Carrol v. Malone, 28 Ala. 521.

6. Dunmore v. Taylor, Peake 41.

7. Gutches v. Daniels, 49 N. Y. 605; Tagg v. Bowman, 108 Pa. St. 273; 56 Am. Rep. 204. See Allgoever v. Edmunds, 66 Barb. (N. Y.) 579.

The execution after the rendering of services by the maker of the note to the payee of a promissory note with a *cognovit* authorizing the entry of judgment thereon, was considered a waiver of the right to interpose the value of such services as a set-off to the note; and, in such case, the court refused to stay proceedings on the judgment, it not appearing that services of any material value had been rendered since the exe-

authority, has received money, cannot, when sued by his principal, set off a debt due to himself in a matter not arising out of his agency. By accepting the special trust he waives the general right of set-off.¹ An agreement to pay in a specific way has been held to waive the right of set-off.²

4. SET-OFF AGAINST A SET-OFF.—The right to set off was designed to protect a defendant; consequently there cannot, under the generally prevailing statutes, be a set-off against a set-off.³

cution of the note and *cognovit*. Gross v. Weary, 90 Ill. 256.

Where the parties had expressly agreed that a particular question should be tried between them, the court refused the defendant the advantage of a set-off, which it was the intention of both parties he should not have. Gould v. Oliver, 6 Scott 648.

M, being a housekeeper with a family, and owning but one cow, agreed to sell her to W, to enable him to buy another that gave milk, W knowing at the time the object of the sale. Held, that M. was entitled to recover the whole price of the cow in money from W, and the latter could not set off against it any debt he might hold against him. Muliken v. Winter, 2 Duv. (Ky.) 256; 87 Am. Dec. 495.

1. In Tagg v. Bowman, 108 Pa. St. 273, 56 Am. Rep. 206, the court by Sterrett, J., said: "The receipt of money by one person from another, to be applied to a specific purpose, implies an agreement on the part of the former not to apply it to any other use, and, of course, not to his own by pleading a set-off. Smuller v. Union Canal Co., 37 Pa. St. 68; Bank of U. S. v. Macalister, 9 Pa. St. 475; Ardesco Oil Co. v. North American Oil, etc., Co., 66 Pa. St. 375. In Simpson v. Pinkerton, 10 W. N. C. (Pa.) 423, we held that an attorney at law or in fact employed to collect a claim, when he has received the money, has no right to set off an antecedent debt or claim of his own against his constituent, without first showing that the latter agreed he might retain his demand out of the money. It was also ruled, in Middletown, etc., Turnpike Road v. Watson, 1 Rawle (Pa.) 330, that an agent of the company, who had received money to its use, could not in a suit against him set off debts of the company which he had paid, without showing he had authority to pay them. It is there said: 'As long as the agent acts within the scope of his authority, and no longer, he is

protected. It was the duty of Watson to collect and pay over the funds as they came into his hands. It was for the company to direct the application of the money when in the treasury or under their control, to the discharge of their debts, the repair of the road, or whatever purposes they might suppose most beneficial to the corporation. This they have been prevented from doing by an assumption of power by their agent and a misapplication of the funds of the company. If such a breach of trust should be permitted, it would in practice lead to great abuses by introducing a scene of speculation and fraud the most disastrous, and of the most secret and dangerous nature. A principal may give a special authority to his agent to settle and liquidate his debts; but previous to the introduction of such a defense to a suit brought for money had and received as agent, the special authority should be shown.'"

2. Where the plaintiff had given the defendant a note payable in work, it was held that such note could not be set off in an action by him against defendant for a money demand, although such debt accrued for the same kind of work. Prather v. McEvoy, 7 Mo. 598.

3. Hall v. Cook, 1 Ala. 629; Hudnall v. Scott, 2 Ala. 569; Hill v. Roberts, 86 Ala. 523; Spencer v. Almonney, 56 Md. 551; Ulrich v. Berger, 4 W. & S. (Pa.) 19; Gable v. Parry, 13 Pa. St. 181.

Where the defendant has by mistake overpaid the amount actually borrowed by him, and in an action brought to recover the money loaned, sets up the fact by way of counterclaim, the plaintiff cannot set up by way of set-off that the defendant is indebted to him, in dealings and transactions between them entirely distinct from and foreign to the subject-matter of the issues made by the petition, answer, and counterclaim, and such claims of set-off are properly rejected. West v. Meddock, 16 Ohio St. 417.

But under the Massachusetts statutes

i. CONSTRUCTION OF STATUTES—LEX LOCI.—Statutes of set-off, being regarded as remedial acts, tending to prevent circuity of action, and thus settle controversies speedily, are to be liberally construed.¹ As a general rule, equity, in relation to set-off as in other matter, follows the law; courts of equity, except in cases where there exist special supervenient equities, which justify them in granting relief beyond the rules of law,² follow the course adopted in the construction of the statutes by courts of law.³

Set-offs, being allowed in order to prevent multiplicity of actions, ought not to be so allowed as to be themselves the cause of new disputes.⁴ Since the right of set-off was considered a mere mat-

(*Massachusetts Gen. Stats.*, ch. 130), a plaintiff may file a set-off to the defendant's set-off. *Galligan v. Fannan*, 9 Allen (Mass.) 192.

In *Indiana*, the plaintiff, in a suit on a note where a set-off is filed, may put in a counterclaim to reduce the set-off. *Turner v. Simpson*, 12 Ind. 413.

If plaintiff has a note and an account against defendant, he may sue on the note, and reply the account as a set-off against an equal amount pleaded as a set-off by defendant. He may do this if he held the claim which he seeks to set off at the time the defendants' plea was filed; it is not necessary that the claim replied should be held by the plaintiff at the time his action was commenced. *Blount v. Rick*, 107 Ind. 238.

1. *Sargent v. Southgate*, 5 Pick. (Mass.) 312; 16 Am. Dec. 409; *Richards v. Blood*, 17 Mass. 66; *Temple v. Scott*, 3 Minn. 419; *Chandler v. Drew*, 6 N. H. 469; 26 Am. Dec. 704; *Chamboret v. Cagney*, 10 Abb. Pr. N. S. (N. Y.) 31; *Good v. Good*, 5 Watts (Pa.) 116. See *Truesdell v. Wallis*, 4 Pick. (Mass.) 63.

2. See *infra*, this title, note, *Equity Jurisdiction as to Set-offs*, p. 217.

3. *Green v. Farmer*, 4 Burr. 2214; *Greene v. Darling*, 5 Mason (U. S.) 201; *Jackson v. Robinson*, 3 Mason (U. S.) 138; *Tuscombina, etc.*, R. Co. v. *Rhodes*, 8 Ala. 206; *McKinley v. Winston*, 19 Ala. 301; *Cave v. Webb*, 22 Ala. 583; *Simmons v. Williams*, 27 Ala. 507; *Jones v. Brevard*, 59 Ala. 499; *Brown v. Scott*, 87 Ala. 453; *Naglee v. Palmer*, 7 Cal. 543; *Palmer v. Green*, 6 Conn. 16; *Jordan v. Jordan*, 12 Ga. 77; *Elder v. Lasswell*, 2 Blackf. (Ind.) 349; *Collins v. Jarquar*, 4 Litt. (Ky.) 153; *Graham v. Tilford*, 1 Metc. (Ky.) 112; *Robertson v. Parks*, 3 Md.

Ch. 71; *Gibbs v. Cunningham*, 4 Md. Ch. 322; *Watkins v. Zane*, 4 Md. Ch. 13; *Scott v. Scott*, 17 Md. 78; *Lockwood v. Beckwith*, 6 Mich. 168; 72 Am. Dec. 69; *Hendricks v. Toole*, 29 Mich. 340; *Brown v. Warren*, 43 N. H. 435; *Black v. Whittall*, 9 N. J. Eq. 572; 59 Am. Dec. 423; *Holbrook v. Union F. Ins. Co.*, 6 Paige (N. Y.) 220; *Duncan v. Lyon*, 3 Johns. Ch. (N. Y.) 351; 8 Am. Dec. 513; *Hackett v. Connett*, 2 Edw. Ch. (N. Y.) 73; *Lane v. Bailey*, 47 Barb. (N. Y.) 404; *Bell v. Ward*, 10 R. I. 503.

It was held that under the *New York Revised Statutes*, set-offs are allowed in the court of chancery, in the same manner as at law; and a statement of the set-off in the answer, and proof thereof, at the hearing, is sufficient without filing a cross-bill. *Irving v. McKay*, 10 Paige (N. Y.) 319.

In *Michigan* and *Colorado*, the statutes provide that, in suits for the recovery and payment of money, set-offs are to be allowed in equity in the same manner, and with the like effect, as in actions at law. *Laws of Michigan* (ed. 1857), p. 1010; *Colorado Stats.* 1867, p. 93.

4. *Mangle v. Stiles*, 31 Pa. St. 72.

Since the purpose of allowing set-off was to do away with circuity of action, an accounting in set-off must be of such a character that the record will protect the party against an action relating to the same matter. So where the plaintiff had purchased a horse from the defendant for \$125, but had been taken back by the defendant on the plaintiff's promise to do what was right about it, or to leave it to a third person, it was held that the defendant could not set off a claim for use of and damages to the horse while in the plaintiff's pos-

ter of grace, it was held that a creditor cannot compel a third person who has had mutual dealings with him and his insolvent debtor to assist the former in obtaining a set-off.¹

The right of set-off belongs to the remedy, and is therefore to be governed by the law of the place where the action is brought.² So, a foreign statute of set-off, going merely to the remedy, will not be regarded as affecting a debt, but the *lex fori* will exclu-

sion, since a recovery by the defendant for "use and damage" to the horse would be no answer for the plaintiff in a suit by the defendant for the value of the horse when sold, nor for the difference in value when taken on resale. *Stevens v. Blen*, 39 Me. 420.

In an action for damages for breach of special contract, the breach consisting of negligence in keeping the plaintiff's sheep, whereby some were greatly injured, and others died, it was held that the defendant could not deduct from such damages the amount to which he was entitled for the keeping of the sheep. *Crowninshield v. Robinson*, 1 Mason (U. S.) 93. The court said: "In our judgment, the true rule under the circumstances of this case, is to estimate the full value of the plaintiff's damages, without taking into account the possible claims of the defendants for the keeping of the sheep. If the defendants are entitled to anything for the keeping, they may recover it in another form of action to the extent to which they can show a performance of their contract, and a benefit derived by the plaintiff. A recovery in this action would be no necessary bar to such a suit; and, therefore, the plaintiff might be doubly charged if the deduction were now made. Besides, if the defendants were entitled to a meritorious compensation equal to the injury sustained by the plaintiff, then upon the ground stated, notwithstanding such injury, the verdict of the jury ought to be that the defendants are not guilty, which would throw the costs of the suit upon the plaintiff. And certainly, in that event a judgment for the defendants in this action, would be no bar to an action on a *quantum meruit* for keeping the sheep; for it never could judicially appear that the former verdict was given upon this special ground, and not upon the ground that the plaintiff had sustained no injury. The verdict would affirm nothing but a general finding in favor of the defendants; and the private grounds upon which the jury

proceeded could never be a fit subject of inquiry, even supposing, what might well be doubted, that they were all agreed on the same grounds. We think it safest, though the point is certainly not free from difficulty, to adhere to the old doctrine, and to confine the later doctrine to such cases only where it is incontestable that the parties cannot be prejudiced. It is, at most, an equitable offset which ought not to be admitted when it may work against equity. The case might have admitted of a very different consideration if the present defendants had brought an action upon the contract for compensation for keeping the sheep; for to such an action gross negligence and injury would be a complete defense, since they would establish the fact of a non-performance of the contract according to the express engagement of the defendants. And even on a *quantum meruit*, such negligence or injury might, under circumstances, constitute a bar to the action, or be proper evidence to reduce the amount of the compensation."

1. The plaintiff had deposited \$3,000 with the F. & M. Bank; he then got them to discount his note for \$1,500, and they indorsed it to defendant, who had collateral to secure them in all such transactions. The F. & M. Bank became insolvent, and this suit was brought to compel defendants to apply their surplus collateral as set-off to this note of \$1,500. The demand was not allowed, and it was said that the plaintiff had no right of set-off either at law or in equity. *Munger v. Albany City Bank*, 85 N. Y. 580.

2. *Greene v. Darling*, 5 Mason (U. S.) 201; *Roach v. Privett*, 90 Ala. 391; *Savery v. Savery*, 3 Iowa 271; *Davis v. Morton*, 5 Bush (Ky.) 160; 96 Am. Dec. 345; *Gibbs v. Howard*, 2 N. H. 296; *Ruggles v. Keeler*, 3 Johns. (N. Y.) 263; 3 Am. Dec. 482. See Second Nat. Bank *v. Hemingray*, 31 Ohio St. 168; *Moore v. Tate*, 87 Tenn. 725; *Carver v. Adams*, 38 Vt. 500.

sively govern.¹ It has, however, been submitted by good authority that when a foreign statute of set-off goes to extinguish a debt subject to it, it should have extra-territorial force.²

3. In What Actions Available.—By a reference to the terms of the more commonly adopted statutes of set-off, it will be seen that set-off is permitted if there exist mutual debts between the parties, or, according to some of the statutes, the defendant may set off those claims against the plaintiff, which are defined by statute, when an action is brought for the recovery of any debt.³ And in those States where the right has not been enlarged to counterclaim, a set-off will be permitted only in actions where the plaintiff's demand is in the nature of a debt. It cannot be resorted to in an action where the plaintiff claims unliquidated damages, *i. e.*, damages which cannot be ascertained by mere calculation, without the intervention of a jury.⁴ Accordingly, set-off is not

1. *Meyer v. Cresser*, 16 C. B., N. S. 646; 111 E. C. L. 644. See *MacFarlane v. Norris*, 2 B. & S. 783; 110 E. C. L. 782.

In a suit brought in *Kentucky*, it was held that the laws of a sister State regulating set-offs to notes will not be enforced in an action on a note made in such sister State. *Bank of Gallipolis v. Trimble*, 6 B. Mon. (Ky.) 599.

2. 2 Whart. Contr., § 1009.

3. To an action of debt on an account stated, an independent debt, not included in such account, may be set off. *Vuyton v. Brenell*, 1 Wash. (U. S.) 467.

Where a bank sues a depositor for the amount of an overdraft, there is a waiver of the tort, and the defendant is entitled to the right of set-off. *Bank of U. S. v. Macalester*, 9 Pa. St. 475.

Where the defendant had received certain money belonging to plaintiffs, and converted it to his own use, the amount which plaintiffs were entitled to recover was not considered "unliquidated or uncertain" within the *Texas Rev. Stat.*, art. 649; *Jones v. Hunt*, 74 Tex. 657.

Where A remitted a bill of exchange to B to be paid to a third person on A's account, and B discounted the bill, but did not pay over the proceeds, upon which A sued him in assumpsit for money had and received, it was held that in this action a set-off was admissible. *Thorpe v. Thorpe*, 3 B. & Ad. 580; 23 E. C. L. 146.

4. *Hardcastle v. Netherwood*, 5 B. & Ald. 93; 7 E. C. L. 37; *Crampton v. Walker*, 3 E. & E. 321; 107 E. C. L. 320; *Howlett v. Strickland*, Cowp. 56;

Hutchinson v. Reid, 3 Campb. 319; *Colson v. Welsh*, 1 Esp. Cas. 378; *Morley v. Inglis*, 5 Scott 314; *Grant v. Royal Exch. Assurance Co.*, 5 M. & S. 439; *Crowninshield v. Robinson*, 1 Mason (U. S.) 93; *Collins v. Grose*, close, 40 Ind. 414; *Wright v. Quirk*, 105 Mass. 44; *Barry v. Cavanagh*, 127 Mass. 394; 130 Mass. 436; *Tracy v. Grant*, 137 Mass. 181; *Smith v. Warner*, 16 Mich. 390; *State v. Modrell*, 15 Mo. 421; *Johnson v. Jones*, 16 Mo. 494; *Taylor v. Stout*, 1 N. J. L. 53; *State v. Welsted*, 11 N. J. L. 397; *Gould v. Kelley*, 16 N. H. 551; *Pattison v. Richards*, 22 Barb. (N. Y.) 143; *Titus v. Himrod*, 39 Barb. (N. Y.) 581; *Willmot v. Hurd*, 11 Wend. (N. Y.) 584; *Osborn v. Etheridge*, 13 Wend. (N. Y.) 339; *Dowd v. Fawcett*, 4 Dev. (N. Car.) 92; *Webster v. Lee*, 6 Rand. (Va.) 519. See *Burgess v. Tucker*, 5 Johns. (N. Y.) 105.

The *Texas* statute provides: "If the plaintiff's cause of action be a claim for unliquidated or uncertain damages, founded on a tort or breach of covenant, the defendant shall not be permitted to set off any debt due him by the plaintiff." *Texas Rev. Stats.*, art. 649.

In determining the right of set-off it was said that a claim for the failure to deliver 40½ bushels of corn alleged to be worth \$1.25 per bushel, based upon a verbal contract of sale, was unliquidated in its nature. *Sanders v. Bridges*, 67 Tex. 93.

Mutual Credits Under Bankrupt Acts.—So, mutual credits cannot be pleaded by way of set-off under the bankrupt acts, where the action is for unliqui-

allowed in actions for a tort,¹ in actions upon the case,² trespass,³ detinue,⁴ replevin,⁵ or trover.⁶ Nor is it admissible in an action to recover unliquidated damages for breach of

dated damages. 2 Chit. Contr. 1285. No set-off, by reason of mutual credit, could be pleaded to a claim by the assignees resulting from the misapplication of the defendant of money placed in his hands by the bankrupt for the purpose of meeting his acceptances, such claim being held to be for unliquidated damages. *Bell v. Carey*, 8 C. B. 887; 65 E. C. L. 885; *Hill v. Smith*, 12 M. & W. 618.

1. *Humphrey v. Merritt*, 51 Ind. 197; *Brown v. Phillips*, 3 Bush (Ky.) 659; *Gould v. Kelley*, 16 N. H. 560; *Keeler v. Adams*, 3 Cal. (N. Y.) 84; *Dean v. Allen*, 8 Johns. (N. Y.) 390; *Gottler v. Babcock*, 7 Abb. Pr. (N. Y.) 392, note; *Dygert v. Coppernoll*, 13 Johns. (N. Y.) 210; *Sanderson v. Pennsylvania Coal Co.*, 102 Pa. St. 370.

A tort cannot be pleaded as a set-off in an action for a tort. *Hart v. Davis*, 21 Tex. 411.

In an action for negligence and breach of duty, the defendant cannot claim to set off his account for services. *Collins v. Groseclose*, 40 Ind. 414.

2. *Bull. N. P.* 181.

3. *Allen v. Horton*, 7 Johns. (N. Y.) 23.

In an action for trespass for disregarding the claim of the debtor to the benefit of the exemption law, the debt cannot be defalked against the plaintiff's damages. *Wilson v. McElroy*, 32 Pa. St. 82.

4. *Bull. N. P.* 181.

5. *Fairman v. Fluck*, 5 Watts (Pa.) 516; *Peterson v. Haight*, 3 Whart. (Pa.) 150; *Beyer v. Fenstermacher*, 2 Whart. (Pa.) 95.

But under the *Iowa Code*, § 1740, where the plaintiff in replevin sought restitution of cattle and damages for their detention, it was held that the defendants might set up a claim in set-off for rescuing, taking care of, and feeding them. *Dunham v. Dennis*, 9 Iowa 543.

Under the *Kansas* statute providing that any cause of action arising from contract, whether it be for a liquidated demand or for unliquidated damages, constitutes a set-off against any action founded on contract (*Kansas Civ. Code*, §§ 94, 98), it was held, in an action of replevin, that it did not follow that a set-off cannot be pleaded in a replevin suit, against a claim to the re-

plevied property arising from contract. *Gardner v. Risher*, 35 Kan. 93. But *Johnston, J.*, did not concur, saying: "Under our statute a set-off can only be pleaded in an action founded on contract. This was an action of replevin, which is in the nature of a tort, and is founded upon the wrong of the defendant and not upon contract."

In a later case in the same State it was decided that a set-off cannot be pleaded as a defense in an action of replevin. In delivering the opinion of the court, *Johnston, J.*, said: "Such an action is founded upon the wrong or tort of the defendant, and not upon contract; and § 98 of the code specifically provides that 'a set-off can be pleaded in an action founded on contract.'" *Kennett v. Fickel*, 41 Kan. 211.

6. *Keaggy v. Hite*, 12 Ill. 99; *Stow v. Yarwood*, 14 Ill. 424; *Dole v. McGraw*, 71 Mich. 106; *Fishwick v. Sewell*, 4 Har. & J. (Md.) 393; *Donohue v. Henry*, 4 E. D. Smith (N. Y.) 163; *Moore v. Davis*, 11 Johns. (N. Y.) 144; *Arthur v. Sylvester*, 105 Pa. St. 233.

After tender of the amount secured by a mortgage, and refusal by the mortgagee, he cannot set it off in an action of trover. *Fuller v. Parish*, 3 Mich. 211.

Where stock was pledged as security for a loan of money, and the lender agreed that he would give to the borrower thirty days' notice to redeem stock, after the note should become due, and before a transfer thereof, and in case of a sale of the stock, to pay the borrower the balance, after satisfying the note and \$20 for expenses, and an action was brought by the borrower against the lender to recover damages for selling the stock at private sale, and without notice to the plaintiff, it was held that this was not an action in trover for conversion, but was an action upon contract and would admit of a set-off. *Seaman v. Reeve*, 15 Barb. (N. Y.) 454.

Under the *Connecticut* statutes (*Connecticut Gen. Stats.*, tit. 19, ch. 8, §§ 17, 18), which provides that in all actions for trespass, other than of assault and battery, and for the taking of property exempt from being taken on execution, in which judgment shall be

contract.¹ So there can be no set-off in a proceeding *in*

rendered for the plaintiff, the defendant may, upon petition to the same court, be allowed to set off against such judgment any debt that he may hold against the plaintiff; it was held that this relief could be had in an action of trover for attaching exempt property. *Williams v. Stratton*, 45 Conn. 566.

1. *George v. Cahawla, etc.*, R. Co., 8 Ala. 234; *Frick v. White*, 57 N. Y. 103.

In an action for the recovery of damages for the breach of a warranty in the sale of goods, the defendant is not entitled to a set-off of demands against the plaintiff. *Wilmot v. Hurd*, 11 Wend. (N. Y.) 584.

A set-off cannot be pleaded to an action of covenant for uncertain damages. *Warn v. Bickford*, 7 Price 550; *Welgal v. Waters*, 6 T. R. 488; *Dowd v. Faucett*, 4 Dev. (N. Car.) 92. Nor can it be opposed to an action for breach of covenant to deliver specific articles. *Barnes v. Lloyd*, 1 How. (Miss.) 584.

It has been held that a set-off is not available in an action for not accepting, according to contract, a bill of exchange for the price of goods; *Hutchinson v. Reid*, 3 Campb. 329; nor in an action for breach of warranty in the sale of goods. *Wilmot v. Hurd*, 11 Wend. (N. Y.) 584.

Where a bill of exchange was delivered by A to B, for a special purpose, *e. g.*, to deliver it to a creditor of A, in payment of a debt; but B, instead of doing this, received and retained the amount of the bill, it was said that if the plaintiff had brought a special action for the breach of duty, there could have been no set-off, because it would have been an action for unliquidated damages, but it was held that, since the plaintiff declared in assumpsit for money had and received, a set-off by B was available. *Thorpe v. Thorpe*, 3 B. & Ad. 580; 23 E. C. L. 146.

Set-off is not allowed in an action for not indemnifying plaintiff from certain taxes. *Cooper v. Robinson*, 1 Chit. 161.

It has been held that a set-off cannot be pleaded to a special count for not indemnifying the plaintiff for having been forced, as the accommodation acceptor of a bill, to pay such bill with interest and expenses, because if the contract declared upon was such as might entitle the plaintiff to recover

special damages, the statutes of set-off did not apply, even though no special damage was laid, and the jury might simply give damages in such a case for the manner in which the plaintiff had been forced and compelled to pay the bill. *Hardcastle v. Netherwood*, 5 B. & Ald. 93; 7 E. C. L. 37.

But it was said in this case that the defendant might, perhaps, have pleaded a set-off to that part of the count which charged the defendant with the amount of the acceptance paid by the plaintiff. And in the case of *Crampton v. Walker*, 3 E. & E. 321; 30 L. J. Q. B. 19; 107 E. C. L. 320, where the action was to recover the amount which the plaintiff, as the accommodation acceptor of the bill, had been forced and obliged to pay, and also the amount of the costs and expenses incurred in defending and settling an action brought by the payee against the plaintiff as acceptor, it was held that set-off might be pleaded to so much of the declaration as related to the plaintiff's claim in respect of his payment of the amount of the bill and interest, because such claim was a liquidated demand capable of being ascertained with precision at the time of pleading, and was separable from the rest of the claim, though mixed up with it in one count, but that set-off could not be pleaded to the costs and expenses incurred by plaintiff, but not paid, and therefore not constituting the liquidated demand to which a set-off could be pleaded. In a later case, where the plaintiff declared on an agreement by the defendant to indemnify the plaintiff against the costs which he might be obliged to pay in a certain suit, and the declaration alleged that the plaintiff was compelled to pay the sum of 131*l.* 18*s.* 10*d.* for costs in the said suit, and assigned as a breach that the defendant had not indemnified the plaintiff, nor paid the said sum, it was held that a plea of set-off pleaded to so much of the said breach as related to the non-payment of the said sum of 131*l.* 18*s.* and 10*d.* was good. *Brown v. Tibbits*, 11 C. B. N. S. 855; 103 E. C. L. 855.

In Action on Bonds.—So set-off is not allowable in an action on a bond conditioned for replacing stock, *Gillingham v. Waskett*, McCl. 198; or conditioned, not against the payment of a liquidated demand, but, to indemnify generally,

Attwool v. Attwool, 2 E. & B. 23; 75 E. C. L. 23; as for the performance of covenants, *Bull. N. P.* 179; 2 Burr. 1024.

Thus, in an action upon the bond of executors, against the principals and sureties, alleging breaches in various acts of misconduct by the principals, the damages to be recovered are not necessarily liquidated, and the action is not, therefore, one in which a set-off is allowed. *State v. Modrell*, 15 Mo. 421.

In a suit upon an appeal bond for unliquidated damages a set-off was held not admissible. *May v. Kellar*, 1 Mo. App. 381.

In an action on a bond where the failure of the defendant to support the plaintiff, his mother and sister, was alleged as a breach, it was doubted by the court whether the defendant could set off demands against the plaintiff. *Hepburn v. Hoag*, 4 Cow. (N. Y.) 57.

But where a bond is conditioned for the payment of an annuity, *Collins v. Collins*, 2 Burr. 820, or of liquidated damages, *Fletcher v. Dyche*, 2 T. R. 32, a set-off may be allowed. In an action of debt, brought on the penalty of a bond conditioned for the performance of the award of arbitrators, to recover the sum awarded, it was held that the defendant might set off a debt due to him from the plaintiff. *Burgess v. Tucker*, 5 Johns. (N. Y.) 105.

In an action on a bond for the faithful and honest discharge of the obligor's duty as agent, where the specific allegation of the breach was that the defendant did not compensate the plaintiff for the loss sustained by the defendant's making way with \$395 received by him for the plaintiff, it was held that, as the precise sum thus made away with by the defendant would compensate the plaintiff for its loss, and it would necessarily recover neither more nor less than this sum, so that the breach thus alleged was obviously the same in substance as though the breach had been a non-payment of this sum, a set-off was admissible. *Baltimore, etc., R. Co. v. Jameson*, 13 W. Va. 833; 31 Am. Rep. 775.

In Actions on Insurance Policies.—So set-off cannot be pleaded in an action to recover a partial loss on a valued policy of insurance. *Castelli v. Boddington*, 1 E. & B. 66; 72 E. C. L. 65; *Boddington v. Castelli*, 1 E. & B. 879; 72 E. C. L. 879.

Even though the loss has been ad-

justed, a set-off cannot be pleaded in such action. *Luckie v. Bushby*, 13 C. B. 864; 76 E. C. L. 862; 24 Eng. L. & Eq. 256. This is on the ground that the adjustment does not make the debt so ascertained and certain as to place it upon the footing of a claim for liquidated damages. While the adjustment may be strong evidence to determine the amount of the plaintiff's claim upon the policy, it is still only a mode of enabling the jury more easily to arrive at the proper estimate. In a suit upon a marine policy to recover from the insurers their contributory share payable to the assured, on the adjustment of a general average, after a partial loss, it was held that the insurers could not set off promissory notes due from them to the insured, although they had assented to the amount to be paid by them on the policy, provided such set-off would be permitted. *Diehl v. General Mut. Ins. Co.*, 1 Sandf. (N. Y.) 257.

In an action on an open policy of insurance a set-off cannot be made even though the plaintiff claims for a total loss. *Gordon v. Bowne*, 2 Johns. (N. Y.) 156.

But, in an action on a policy in which there is an express stipulation that the premium due shall be deducted out of any loss claimed, the premium due will be deducted from the amount of a partial loss ascertained by assessors. *Livermore v. Newburyport M. Ins. Co.*, 2 Mass. 232. See *supra*, this title, note 1, p. 216.

Statutes Allowing Set-off in All Actions Founded on Contract.—The statutes in some States have been construed to authorize a set-off in any action *ex contractu*, although it be for the recovery of unliquidated damages.

Such is the construction in *Kansas* where the statute (*Kansas Civ. Code*, § 94) says: "A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of the court." *Stevens v. Able*, 15 Kan. 584; *Read v. Jeffries*, 16 Kan. 534.

And the same construction was given to the statute of *Nebraska* (*Nebraska Code Civ. Pro.*, § 100), which is an exact counterpart of that of *Kansas*. *Raymond v. Green*, 12 Neb. 215; 41 Am. Rep. 763.

Under the *Texas* statute, a claim unliquidated in its nature, growing out of a breach of contract, is subject to set-

*rem.*¹ From the nature of a tax, a debt due a municipal corporation or county for taxes cannot be offset by a debt due the corporation or county.²

off by an unliquidated claim growing out of the breach of a different contract. *Sanders v. Bridges*, 67 Tex. 93; *Bodman v. Harris*, 20 Tex. 31.

Under the *Ohio* Rev. Stat., § 5075, providing that "a set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract or ascertained by the decision of a court," it was held, in an action on account for the sale of two organs, that a breach of warranty in the sale of two other organs was properly pleaded. *Needham v. Pratt*, 40 Ohio St. 186.

Under the *Kansas* statute, where the plaintiff stated such facts as were necessary to sustain an action to recover chattels on the implied contract, and none showing a purpose to rely on the tort, except in using the words, "did convert the same to her own use and benefit," it was held that the defendant might treat the action as *ex contractu*, and plead a set-off. *Smith v. McCarthy*, 39 Kan. 308.

In a suit by a corporation against its former treasurer for money appropriated to his own use, it was held that this was, within the meaning of the statute, a cause of action founded on contract, against which a set-off was available. *St. Louis, etc., R. Co. v. Chenault*, 36 Kan. 51.

Statutes Allowing Set-Off in Action on Contract or Agreement, Express or Implied.—In *Illinois*, under a statute providing that a defendant "in any action brought upon any contract or agreement, either express or implied, having claims or demands against the plaintiff may set up the same and have them allowed him upon the trial," it was held that a judgment is not a contract within the meaning of the statute, and that a set-off could not be pleaded in an action of debt upon a judgment recovered in a sister State. *Rae v. Hulbert*, 17 Ill. 572. In the decision of this case the court, by Caton, J., said: "It (the judgment) is the conclusion of the law upon the rights of the parties, and it is not very common that it is entered up by the agreement of the unsuccessful party, but the reverse is generally the case. In this statute the words 'action,' 'contract' and 'agreement' are used in their ordinary sense, and not with the

intention of embracing every imaginable litigation upon every cause of action. A judgment is no more a contract than is a tort. In one sense it is true that every member of society impliedly agrees to pay all judgments which may be regularly rendered against him; and, in the same sense, does he impliedly agree to make amends for all torts which he may commit. No one will pretend that actions for torts are within the spirit and intent of the statute, and yet they are certainly as much so as are actions upon judgments."

Under a statute requiring that the claims against which a set-off is allowable must be founded on "contract express or implied," it was held that a plea in set-off is allowable against a claim for usury, a claim for usury being founded upon an implied contract within the meaning of that term as used in this statute. *Blair v. Ellsworth*, 55 Vt. 415.

1. See 2 Whart. Contr., § 1030; *Johnson v. Lytle's Iron Agency*, 5 Ch. Div. 687; 22 Moak's Rep. 399.

A set-off cannot be made in an action of ejectment. *Nutwell v. Tongue*, 22 Md. 419.

A bill in equity to enforce a vendor's lien has been considered a proceeding *in personam*, in which all legal set-offs are allowable. *Hooper v. Armstrong*, 69 Ala. 343.

In Suits to Foreclose Mortgage.—In *New Jersey* it is considered that a suit to foreclose a mortgage is a proceeding *in rem*, and that a set-off is not admissible therein. *Dolman v. Cook*, 14 N. J. Eq. 56; *Bird v. Davis*, 14 N. J. Eq. 467; *Parker v. Hartt*, 32 N. J. Eq. 225.

But, under the statutes of *New York*, a set-off may be allowed in a foreclosure suit. *Holden v. Gilbert*, 7 Paige (N. Y.) 208.

And see FORECLOSURE OF MORTGAGES, vol. 8, p. 231, n. 1.

2. *Apperson v. Memphis*, 2 Flip. (U. S.) 363; *Himmelmänn v. Spanagel*, 39 Cal. 389; *Finnegan v. Fernandina*, 15 Fla. 379; 21 Am. Rep. 292; *Scobey v. Decatur Co.*, 72 Ind. 551; *Newport, etc., Bridge Co. v. Douglass*, 12 Bush (Ky.) 673; *New Orleans v. Davidson*, 30 La. Ann. 541; 31 Am. Rep. 228; *Cobb v. Elizabeth City*, 75 N. Car. 1;

The right of set-off has been denied in penal actions for taking usurious interest.¹

But it is not needful that the action should be an action of debt; for a debt may be recovered by the action of assumpsit when the promise is not under seal, or in an action of covenant, when it is under seal, as well as by the action of debt; and the material question is not what the action is, but what is the nature of the plaintiff's demand.² The general rule has been laid down by some judges, and in some statutes, that a set-off is allowed only when the suit is based on a demand which could itself be used as a set-off.³

Gatling v. Carteret Co., 92 N. Car. 536; 53 Am. Rep. 432. See also *McCracken v. Elder*, 34 Pa. St. 239.

Such was the rule in the civil-law doctrine of compensation. *Domat's Civ. L.*, § 2299.

So it was held that, in a suit on a special tax bill, the defendant can set off a debt due to him from the owner of the bill. *Kansas v. Ridenour*, 84 Mo. 253.

See also, as to set-off in tax proceedings, *Hoffmire v. Rice*, 22 Kan. 749; *Nebraska City v. Nebraska Gas, etc.*, Co., 9 Neb. 339.

But it has been held that a set-off was admissible in a debt on bond for a penalty, although the bond had been given to secure the collection and payment of public taxes. *Concord v. Pillsbury*, 33 N. H. 310.

1. It has been held that, in a suit against a national bank under U. S. Rev. Stat., § 5198, to recover penalties for taking unlawful interest, there can be no set-off. *Morehouse v. Second Nat. Bank*, 30 Hun (N. Y.) 628; *Lebanon Bank v. Karmany*, 98 Pa. St. 65.

But, where the action was merely to recover usurious interest paid, a set-off was allowed. *Blair v. Ellsworth*, 55 Vt. 415.

A plea of set-off in an answer "for money paid to the plaintiff for the use and forbearance of payment of said sums," is defective in not charging that the money so paid was usurious interest. *Wilson v. Flemmg*, 23 Ind. 119.

2. See 4 Min. Inst., pt. 1, p. 657; *Downer v. Eggleston*, 15 Wend. (N. Y.) 51; *Chambers v. Lewis*, 11 Abb. Pr. (N. Y.) 210; 2 Hilt. (N. Y.) 591; 10 Abb. Pr. (N. Y.) 206; *Baltimore, etc., R. Co. v. Jameson*, 13 W. Va. 833; 31 Am. Rep. 775; *Birch v. Depeyster*, 4 Campb. 385, by Gibbs, C. J.

So it was said in a decision allowing

a set-off in an action of covenant, that if the action "be for money expressly ascertained, whether the action be debt, covenant, or otherwise, the defendant is unquestionably at liberty to plead a set-off." This was an action of covenant. The second matter assigned for breach in the plaintiff's declaration was the defendant's failure to pay plaintiff twenty-five dollars. As to the sum mentioned in this second breach the defendant pleaded in set-off an indebtedness due him from the plaintiff, and the plea was sustained. *Roebuck v. Tennis*, 5 T. B. Mon. (Ky.) 82.

3. See *Montague v. Boston, etc., Iron Works*, 97 Mass. 502; *Smith v. Warner*, 16 Mich. 390; *State v. Modrell*, 15 Mo. 421; *Wilmot v. Hurd*, 11 Wend. (N. Y.) 584; *Osborn v. Etheridge*, 13 Wend. (N. Y.) 339; *Downer v. Eggleston*, 15 Wend. (N. Y.) 51; *Hills v. Tallman*, 21 Wend. (N. Y.) 674; *Diehl v. General Mut. Ins. Co.*, 1 Sandf. (N. Y.) 257; *Gordon v. Bowne*, 2 Johns. (N. Y.) 156; *Burgess v. Tucker*, 5 Johns. (N. Y.) 105; *Dale v. Cooke*, 4 Johns. Ch. (N. Y.) 11; *Dowd v. Faucett*, 4 Dev. (N. Car.) 92.

In *Maryland*, under the peculiar provisions of the act of 1785, it has been held that a set-off is permissible even when the action is on an unliquidated claim. Thus, it has been held that a promissory note drawn by P in favor of D, may be set off in an action on an open policy of insurance brought by P against D. *Baltimore Ins. Co. v. McFadon*, 4 Har. & J. (Md.) 31. In this case the court by Johnson, J., said: "No reason can be urged why a person who has an uncertain claim should be permitted to recover from him who had a certain demand. If any difference ought to be made it should be in favor of that which is certain; for a great length of time might be necessary to ascertain the one, and perhaps it might totally

The joinder by the plaintiff of an unfounded claim for unliquidated damages in the same suit with other claims which are subject to set-off, will not deprive the defendant of his right to urge a set-off.¹

4. What May be the Subject of Set-off—*a. UNDER THE COMMON STATUTES OF SET-OFF—*(1) *Debts.*—With regard to the nature of the demands to be set off against each other the common provisions of the statutes specify only mutual debts; consequently, a claim, in order to be the subject of set-off, must, like the demand against which it may be opposed,² be in the nature of a debt,³ and not of unliquidated damages.⁴ And

fail for want of proof, and therefore it might be unreasonable to compel the certain creditor to await the termination of the uncertain demand on him. But, if he thinks proper to retain his certain demand to meet that which is uncertain, why should he be prevented?" The court says that he ought not to be prevented unless the statute permitting set-off positively precludes the employment of set-off where the plaintiff's claim is unliquidated, and, by recurring to the terms of the act of 1785, concludes that this is not done by that statute. *Dyer v. Dorsey*, 1 Gill & J. (Md.) 443; *Annan v. Houck*, 4 Gill (Md.) 330; 45 Am. Dec. 133; *Warfield v. Booth*, 33 Md. 63; *Tyrrell v. Tyrrell*, 54 Md. 169.

1. *Smith v. Warner*, 16 Mich. 390.

2. See *supra*, this title, *In What Actions Available*.

3. **Taxes.**—Under statutes defining the demands which may be set off as those "founded upon judgment or upon contract," taxes due a municipality may not be set off in an action against it. *Pierce v. Boston*, 3 Met. (Mass.) 520; *Home Sav. Bank v. Boston*, 131 Mass. 277.

And it was so held under a statute providing that a set-off "must be a cause of action arising upon contract, or ascertained by the decision of the court." *Nebraska City v. Nebraska City Gas, etc., Co.*, 9 Neb. 339.

So, it has been held, under a statute permitting a "debt and demand" to be set off, that a claim of a town to taxes assessed could not be set off. *Hibbard v. Clark*, 56 N. H. 155; 22 Am. Rep. 442. But see, *contra*, *Maine Rev. Stats.*, ch. 86, § 9.

Stock in Corporation.—In an action by a bank as the indorsee of a promissory note, the defendant cannot set off stock which he may have in the bank.

Whittington v. Farmers' Bank, 5 Har. & J. (Md.) 489; *Harper v. Calhoun*, 7 How. (Miss.) 203.

A debtor to a bank for borrowed money cannot, even in equity, set off against his note, on a judgment rendered thereon, the dividend that will be coming to him as a stockholder, unless there is an express agreement to set off the debts against each other *pro tanto*. *Ruckersville Bank v. Hemphill*, 7 Ga. 396.

Liens.—In an action to recover for the amount of a promissory note executed by the defendant, the latter cannot set off the amount of a lien for the unpaid balance of the purchase-money on a tract of real property purchased and held by the plaintiff with full knowledge of such lien, which is due and owing from an insolvent former owner of such real property, on his purchase thereof from defendant. It was considered that this was not a ground for the recovery of a personal judgment by the defendant against the plaintiff. All the cause of action which the defendant could show against plaintiff would be that he owned a lot, and knew at the time he purchased it that the defendant had a vendor's lien thereon. This would not constitute a cause of action for a personal judgment against him. While he would have his election to pay off the lien on his property, or suffer the lien to be enforced against it, the lien holder would have no election of remedies, but could only enforce the lien against the property. The court compared it to the case of one holding a mortgage on property, without any personal promise to pay the debt. *Brake v. King*, 54 Ind. 294.

4. *Leigh* N. P. 153; *Bull.* N. P. 161; *Montague on Set-off* 13; *Morley v. Inglis*, 4 Bing. N. Cas. 58; 33 E. C. L. 58; *Thomas v. McConnell*, 3 McLean

(U. S.) 381; U. S. v. Williams, 5 McLean (U. S.) 133; The Zouave, 29 Fed. Rep. 296; Hale v. Brown, 11 Ala. 87; Pulliam v. Owen, 25 Ala. 492; Woodruff v. Laffin, 4 Ark. 527; Ricketson v. Richardson, 19 Cal. 330; Crenshaw v. Jackson, 6 Ga. 509; 50 Am. Dec. 361; Grimes v. Reese, 30 Ga. 330; De Forrest v. Oder, 42 Ill. 500; McCord v. Crooker, 83 Ill. 556; M'Kinney v. Bellows, 3 Blackf. (Ind.) 31; Abbott v. Smith, 4 Ind. 452; Tribble v. Taul, 7 T. B. Mon. (Ky.) 455; Pike v. Wells, 24 La. Ann. 208; Smith v. Washington Gaslight Co., 31 Md. 12; 100 Am. Dec. 49; Cunningham v. Hall, 7 Gray (Mass.) 559; Loring v. Otis, 7 Gray (Mass.) 563; Corey v. James, 15 Gray (Mass.) 543; Carvell v. Bridge, 9 Allen (Mass.) 355; Mahan v. Ross, 18 Mo. 121; Pratt v. Menkens, 18 Mo. 158; Brake v. Corning, 19 Mo. 121; Drew v. Towle, 27 N. H. 412; 59 Am. Dec. 380; Barker v. Barker, 62 N. H. 366; State v. Welsted, 11 N. J. L. 397; Thompson v. Ellsworth, 1 Barb. Ch. (N. Y.) 624; Hepburn v. Hoag, 6 Cow. (N. Y.) 613; Davis v. American L. Ins., etc., Co., 4 Edw. ch. (N. Y.) 308; Allen v. McNew, 8 Humph. (Tenn.) 46; Clark's Cove Guano Co. v. Appling, 33 W. Va. 470.

But where the equities exist which will afford a court of equity opportunity to grant equitable relief independently of the statutes of set-off (see *supra*, this title, note, *Equity Jurisdiction as to Set-offs*, p. 217), it seems that a court of equity may permit unliquidated demands to be set off. See *Davis v. Milburn*, 3 Iowa 163. *Contra*, *Duncan v. Magette*, 25 Tex. 245; *Howard v. Randolph*, 73 Tex. 454.

In *Texas*, it is declared by statute that "if the suit be founded on a certain demand, the defendant shall not be permitted to set off unliquidated or uncertain damages founded on a tort or breach of covenant on the part of the plaintiff." *Texas Rev. Stat.*, art. 649. Under this statute it was held that in an action on a promissory note for the purchase of land, and to foreclose the vendor's lien, the maker cannot plead in reconvention unliquidated damages, resulting to him from the action of the plaintiff in selling another tract of land for defendant, in violation of a trust, for less than its value. *Riddle v. McKinney*, 67 Tex. 29.

Demand.—Many of the statutes in defining the matters which may be set off, make use of the term "demands" as well as "debts." In *Hanna v.*

Pleasants, 2 Dana (Ky.) 269, the court by Nicholas, J., says, in regard to the meaning of the word demand, that it "may have been used in the statute in addition to the word debt, for the purpose of silencing a doubt, whether under the *English* statute set-off could have been pleaded in the actions of assumpsit and covenant. Be that as it may, the statute means moneyed demand in its strict legal sense, which renders it of about the same signification as the term debt, and excludes the idea of allowing a set-off in actions for torts, and upon contracts for the payment of property and choses in action." The insertion of the word "demands" in the statute does not change the law so as to allow uncertain damages to be set off. *Gould v. Kelley*, 16 N. H. 560; *Drew v. Towle*, 27 N. H. 412; 59 Am. Dec. 380; *Hepburn v. Hoag*, 6 Cow. (N. Y.) 613.

Claim.—In *Iowa*, under section 1740 of the Code of 1851, providing that the defendant may "set up, by way of set-off or cross-action, any claim which would have been the subject of an action against the plaintiff," etc., it was held that claims for damages arising from a tort, as well as those for money due on a contract, may be pleaded as set-off. *Campbell v. Fox*, 11 Iowa 318.

Demands Not Sounding in Damages Merely.—In *Alabama* not only debts, but liquidated and unliquidated demands not sounding in damages merely, are the subject of set-off. And an unliquidated demand not sounding in damages merely which is made the subject of set-off, is defined as one which, when the facts upon which it is based are established, the law is capable of measuring accurately by a pecuniary standard. *Eads v. Murphy*, 52 Ala. 520; *Sledge v. Swift*, 53 Ala. 110; *Collins v. Greene*, 67 Ala. 211. Therefore, under this statute, if a vendee, with covenants of warranty, buys in an outstanding vendor's lien, at a price less than the amount of the purchase money and interest, this demand, if reasonable, would be a good set-off in an action on the note given for the purchase money. *Holley v. Young*, 27 Ala. 203. It was held that a claim in favor of a mortgagor against the mortgagee for conversion of personalty, may be relied upon to reduce the mortgage debt, in a suit to redeem land sold under a power of sale in the mortgage. *Conner v. Smith*, 88 Ala. 300. In the decision of this case, as to the question

whether the claim based upon the conversion of the personalty necessarily sounded in damages merely, the court by McClellan, J., said: "It is quite an error to suppose that these demands necessarily sound in damages merely, within the language of our statute of set-off. It is true that an action of trespass *de bonis asportatis* would lie for their recovery, and it is also true such action sounds in damages merely. But it is equally true that trover would lie, and in that action the law furnishes a standard by which damages may be admeasured, and the recovery regulated and limited. *Curry v. Wilson*, 48 Ala. 638." If, however, the law does not fix the measure of damages, but they are committed to the judgment of the jury, and depend upon the circumstances of the particular case, the demand sounds in damages merely and is not available as a set-off. So, it was held that where the defendant's cause of action is recoverable only in an action *de bonis asportatis*, the demand was one sounding in damages merely, and was excluded from the statute of set-off, on the ground that, vindictive damages being recoverable, the law did not furnish a pecuniary standard of measurement. *Walker v. McCoy*, 34 Ala. 659; *Rosser v. Bunn*, 66 Ala. 89.

In an action on a note, it was held that the defendant cannot set off damages for injury to one's farming operations, arising from a trespass committed by the plaintiff in wrongfully seizing and carrying off defendant's stock. *Nelmes v. Hill*, 85 Ala. 583. A cause of action which would give both special and vindictive damages can be no ground of set-off, as both cannot be ascertained, and the party cannot split up his claim. *Walker v. McCoy*, 34 Ala. 659.

But it has been held that, in an action for rent, the defendant may set off damages done to his crop by plaintiff's mules. It was said that damage done to a growing crop matured and ungathered, has a legal standard of measurement, and may be pleaded as a set-off. *Johnson v. Aldridge* (Ala. 1891), 9 So. Rep. 513. In *Mobile, etc., R. Co. v. Clanton*, 59 Ala. 392; 31 Am. Rep. 15, an action by a railway conductor against his employer for wages, it was held that the employer might set off damages resulting to him from the conductor's negligence in performing the work. The court by Manning, J.,

said: "... if the loss resulting from such negligence consists only of the damage done to cars or other property, the amount of which depends upon the expense of making them good by repairs, or of putting the defendant, in these particulars, in as good condition as it was in before, such damages may be considered as 'fixed by a legal standard.' The computation is founded on the ascertainable value of material things, as it would be in an action of assumpsit concerning the same values."

So damages for breach of covenant of warranty may be set off in an action for purchase money. *Kingsbury v. Milner*, 69 Ala. 502. It was held that damages on account of the lessor's misrepresentations as to the capacity or the condition of a mill on the leased premises, may be set off in an action of covenant by lessor for rent reserved. *Cage v. Phillips*, 38 Ala. 382. Likewise damages which a mortgagor has sustained by reason of the mortgagee's violation of instructions to postpone the sale of his cotton, are a proper subject of set-off. *Gafford v. Proskauer*, 59 Ala. 264.

A demand for the value of corn delivered may be pleaded as an offset, though the price of the corn had not been agreed on. *Smith v. Huie*, 14 Ala. 201. An attorney's fee for services rendered, is a good set-off, though the amount of the fee had not been liquidated, between the attorney and his client. *Briggs v. Moore*, 14 Ala. 433.

Goods Delivered, Moneys Paid, or Services Done.—Under the *Massachusetts* act of 1793, ch. 75, authorizing the defendant to give in evidence upon the general issue his demands for "goods delivered, moneys paid, or services done," it was held that an account for board, washing, mending, and finding a room was a proper matter of set-off. *Witter v. Witter*, 10 Mass. 223. And, under the same statute, it was even considered that money received by the plaintiff to defendants' use might be called money paid, and was accordingly allowed to be set off. *Richards v. Blood*, 17 Mass. 66; *Truesdell v. Wallis*, 4 Pick. (Mass.) 63.

Statutes Allowing Set-off in the Nature of Recoupment.—But unliquidated damages growing out of the contract sued on may sometimes be recouped. See *infra*, this title, *Recoupment*. And the statutes of set-off in some States have provisions to this effect. See *Kaskaskia Bridge Co. v. Shannon*, 6

this is as far as the privilege of set-off can be allowed consistently with expediency and justice; for, were it more generally allowed, as the proceeding is of a summary nature, the parties must be deprived of the ordinary modes of trial of controverted claims and of the established methods of review and redress for error;¹ besides, where the plaintiff's claim is for a certain amount, no rule ought to be favored which would permit the defendant to urge an independent unliquidated claim as a set-off thereto, and thereby delay the plaintiff's recovery for the length of time necessary to ascertain the amount due the defendant, when it is considered that a great length of time might be necessary to ascertain the amount, and that even then the claim might fail for want of proof.²

It follows that a claim which could only be recovered in an action *ex delicto*, as in trespass, replevin, or case, cannot in general be set off.³ While no demand can be set off for which *indeb-*

Ill. 15; DeForrest v. Oder, 42 Ill. 500; McCord v. Crooker, 83 Ill. 556.

But unliquidated damages which do not arise out of the contract or cause of action sued on, are not, even under these statutes, a proper subject of set-off. Hawks v. Lands, 9 Ill. 227; Harts-horn v. Kinsman, 16 Ill. App. 555; Weaver v. Penny, 17 Ill. App. 628. See *infra*, this title, *Recoupment*, for a treatment of these statutes.

1. See State v. Welsted, 11 N. J. L. 397; Tribble v. Taul, 7 T. B. Mon. (Ky.) 455.

2. See Baltimore Ins. Co. v. M'Fad-on, 4 Har. & J. (Md.) 31.

3. 1 Chit. Pl. 599; Huddersfield Canal Co. v. Buckley, 7 T. R. 45; Saps-ford v. Fletcher, 4 T. R. 512; Bull. N. P. 181; Freeman v. Hegett, 1 W. Bl. 394; Vose v. Philbrook, 3 Story (U. S.) 335; U. S. v. Buchanan, 8 How. (U. S.) 83; Pulliam v. Owen, 25 Ala. 492; Bloom v. Lehman, 27 Ark. 489; Robin-son v. L'Engle, 13 Fla. 482; Hall v. Penny, 13 Fla. 621; Smith v. Printup, 59 Ga. 610; Robinson v. Hibbs, 48 Ill. 408; Indianapolis, etc., R. Co. v. Bal-lard, 22 Ind. 448; Shelly v. Vanarsdoll, 23 Ind. 543; Harris v. Rivers, 53 Ind. 216; Zeigelmuehler v. Seamer, 63 Ind. 488; West v. Hayes, 104 Ind. 251; Hop-kins v. Megguire, 35 Me. 78; Pitts v. Holmes, 10 Cush. (Mass.) 92; Whitaker v. Robinson, 8 Smed. & M. (Miss.) 349; Ordiorne v. Woodman, 39 N. H. 541; Edwards v. Davis, 6 N. J. L. 394; Sherman v. Ballow, 8 Cow. (N. Y.) 304; Dean v. Allen, 8 Johns. (N. Y.) 390; Kahlin v. Mulhallon, 1 Yeates (Pa.) 571; 2 Dall. (Pa.) 237; Gogel v. Jacoby, 5 S. & R. (Pa.) 117; 9 Am.

Dec. 339; Hall's Appeal, 40 Pa. St. 409; Gibbes v. Mitchell, 2 Bay (S.Car.) 351; Manning v. Watson, Cheves (S. Car.) 60; Schwerzer v. Weiber, 6 Rich. (S. Car.) 159; Parks v. Dial, 56 Tex. 261; Conklin v. Parsons, 1 Chand. (Wis.) 240.

A tort cannot be pleaded as a set-off in an action for a tort. Hart v. Davis, 21 Tex. 411. Thus, one trespass can-not be set off against another. Shelly v. Vanarsdoll, 23 Ind. 543; Lovejoy v. Robinson, 8 Ind. 399.

The rule disallowing a claim of dam-ages for a tort to be set off was applied in an action to recover for the boarding of stage horses which the defendant averred had been detained away from him by the plaintiff, contrary to an agreement to permit the defendant to have a certain use of them. Hudson v. Nute, 45 Vt. 66.

The Florida statute making "all demands mutually existing . . . whether liquidated or not, proper sub-jects of set-off," was construed to mean matters growing out of contract, ex-press or implied, and it was held that damages growing out of a conspiracy could not be set off thereunder. Robin-son v. L'Engle, 13 Fla. 482.

While the statutes of Pennsylvania permit claims for unliquidated damages founded on contract to be set off (see *infra*, this title, note, *Statutes Author-izing Claims Arising Out of Contract to be Set Off*, p. 251), it was held that B could not set off a claim for gas con-ducted away from the land and con-sumed by A without right, such claim sounding in tort, not in contract. Kitchen v. Smith, 101 Pa. St. 452.

italus assumpsit will not lie, the converse of the rule is not equally true.¹ Even if an action *ex contractu* could be based upon the claim, it cannot be set off if the amount is unliquidated or incapable of being ascertained by calculation.² The gist of the

But under the *Iowa Code* of 1851, § 1740, it was held that a claim sounding in tort might be pleaded in set-off. *Campbell v. Fox*, 11 Iowa 318.

In *Georgia* it is provided that a tort may be set off against a tort. *Georgia Code*, § 3261. And it has been so held. *Ingram v. Jordan*, 55 Ga. 356; *Melson v. Dickson*, 63 Ga. 682; 36 Am. Rep. 128.

1. *Edwards v. Davis*, 6 N. J. L. 394; *Sickels v. Fort*, 15 Wend. (N. Y.) 559. That the mere fact that *indebitatus assumpsit* will lie on a demand does not conclusively determine that it may be the subject of set-off, would seem a necessary deduction, from the fact that *indebitatus assumpsit* will lie to recover an uncertain demand. See *Gunn v. Scovill*, 5 Day (Conn.) 113; 4 Am. Dec. 208. But see *Brazier v. Fortius*, 10 Ala. 516; *Smith v. Hine*, 14 Ala. 201; *Crenshaw v. Jackson*, 6 Ga. 509; 50 Am. Dec. 361; *Banton v. Hoomes*, 1 A. K. Marsh. (Ky.) 19; *Littell v. Shockley*, 4 J. J. Marsh. (Ky.) 245; *Jenkins v. Richardson*, 6 J. J. Marsh. (Ky.) 441; 22 Am. Dec. 82; *Ebersole v. Moore*, 3 Bush. (Ky.) 49; *Austin v. Feland*, 8 Mo. 309; *Bolinger v. Gordon*, 11 Humph. (Tenn.) 61; *Ragsdale v. Buford*, 3 Hayw. (Tenn.) 192; *Baltimore, etc., R. Co. v. Jameson*, 13 W. Va. 833; 31 Am. Rep. 775.

2. 1 Chit. Pl. 599; *Gillet v. Mawman*, 1 Taunt. 137; *Gallagher v. Roberts*, 1 Wash. (U. S.) 320; *U. S. v. Barker*, 1 Paine (U. S.) 156; *Winchester v. Hackley*, 2 Cranch (U. S.) 342; *Olyphant v. St. Louis Ore, etc., Co.*, 39 Fed. Rep. 308; *McCord v. Williams*, 2 Ala. 71; *Martin v. Wharton*, 38 Ala. 637; *Dugan v. Cureton*, 1 Ark. 31; 31 Am. Dec. 727; *Stewart v. Scott*, 54 Ark. 187; *Clause v. Bullock Printing Press Co.*, 118 Ill. 612; *Smith v. Smith*, 1 Ind. 476; *Rudman v. Baldwin*, 2 Ind. 105; *Abbott v. Smith*, 4 Ind. 452; *Morrison v. Hart, Hard.* (Ky.) 157; *Collins v. Farquar*, 4 Litt. (Ky.) 153; *Adams v. Manning*, 17 Mass. 178; *Howell v. Medler*, 41 Mich. 641; *Holland v. Rea*, 48 Mich. 218; *Carter v. Jaseph*, 48 Mich. 615; *Brake v. Corning*, 19 Mo. 125; *Babcock v. Peck*, 4 Den. (N. Y.) 292; *Warner v. Gouverneur*, 1 Barb. (N. Y.) 36; *Holbrook v. American F.*

Ins. Co., 6 Paige (N. Y.) 220; *McCracken v. Elder*, 34 Pa. St. 239; *Bolinger v. Gordon*, 11 Humph. (Tenn.) 61; *McSmith v. Fernster*, 4 W. Va. 673.

A claim for services for so much as they were reasonably worth cannot be set off. *Bell v. Ward*, 10 R. I. 503. So, in an action on a note, it was held that unliquidated claims for defendant's services as attorney could not be set off. *Berens v. Ker*, 28 La. Ann. 96.

A demand for money paid cannot be set off, unless it is a sum that is liquidated, or one that may be ascertained by calculation. *Taft v. Larkin*, 123 Mass. 598.

A covenant to pay in such money as was received in a certain bank is not pleadable in set-off. *Hanna v. Pleasants*, 2 Dana (Ky.) 269.

A claim for damages for breach of contract is not a proper subject of set-off. *Smock v. Warford*, 4 N. J. L. 306; *Clyde v. Knight*, 12 R. I. 194.

A contract for the delivery of specific articles, the value of which is not fixed by the contract, cannot be allowed in set-off. *Bolinger v. Gordon*, 11 Humph. (Tenn.) 61.

Uncertain damages arising upon breach of covenant cannot be set off. *Cochran v. Lester*, 2 Root (Conn.) 348; *Hawks v. Lands*, 8 Ill. 227; *Hunt v. Middlesworth*, 44 Mich. 448; *Gridley v. Tucker*, 1 Freem. Ch. (Miss.) 209; *Duncan v. Lyon*, 3 Johns. Ch. (N. Y.) 351; 8 Am. Dec. 513; *Livingston v. Livingston*, 4 Johns. Ch. (N. Y.) 287; 8 Am. Dec. 562; *Tone v. Brace*, 8 Paige (N. Y.) 597; *Bonana v. Sorrel*, 21 Ga. 108; *State v. Eldridge*, 65 Mo. 584.

A breach of covenant for the non-delivery of goods according to contract is not a subject of set-off. *Howlett v. Strickland*, Cowp. 56; *Wright v. Smyth*, 4 W. & S. (Pa.) 527.

Damages arising from deceit in the sale of a chattel cannot be set off in a suit for the purchase-money. *Johnson v. Wideman*, Rice (S. Car.) 325. A cause of action founded on deceit cannot be set off in an action on a contract. *Dean v. Allen*, 8 Johns. (N. Y.) 390.

A charge for rent by way of set-off,

there being no contract as to the price, cannot be sustained. *Hall v. Glidden*, 39 Me. 445; *Carter v. Joseph*, 48 Mich. 615.

So in debt upon a bond given for the consideration money of a tract of land and mill sold by the plaintiff to the defendant, with a reservation of the right to raise and swell the water so as not to injure the mill, the defendant cannot set off unascertained damages occasioned by the plaintiff's having raised the water so as to injure the mill. *Kahlin v. Mulhallon*, 2 Dall. (Pa.) 237.

So in an action by assignees of a bankrupt for money due the bankrupt as supercargo of a ship, the defendant cannot set off a claim against the bankrupt for not keeping the vessel fully insured according to orders, as the damages are uncertain. *Brown v. Cuming*, 2 Cai. (N. Y.) 33. See *M'Cumber v. Goodrich*, 1 Johns. (N. Y.) 56.

Where the defendant had sold a horse to the plaintiff, and afterwards taken it back under a promise from the plaintiff that he would pay for the use of the horse, and any damage it might have sustained while in his possession, or leave it to a third person to determine, it was held that a claim for such use and damage, the same not having been determined by the third person named, was not the subject of set-off in an action between the parties for another cause. *Stevens v. Blen*, 39 Me. 420.

Where A gave B an order on C, payable at sight, with the understanding that the amount when received was to be placed to A's credit, and B took the drawee's acceptance payable at sixty days, but before the expiration of that time the acceptor died insolvent, it was held that A's claim against B for a failure to collect the draft was wholly uncertain and could not be set off in a suit brought by B to recover his original demand, since it is manifest that such claim might be either merely nominal or it might amount to the sum mentioned in the draft. For if the drawee was insolvent at the date of the bill, or when it came into B's hands, or if any other cause rendered it prudent for him to take an acceptance at sixty days, the jury would give no damages, and other circumstances might vary the amount. *Harrison v. Wortham*, 8 Leigh (Va.) 296.

In a suit by A against B upon a note, it appeared that B had delivered to A

for collection, a note against C, and taken a receipt from A to the effect that when such note was collected he would indorse it on the note from B. But the note was never collected, and all remedy thereon was barred by statute when the suit was commenced. There was no evidence of the responsibilities of C, or whether the note was collectible. Defendant claimed that he had a right to have the amount of the note set off against the note sued on. It was held that, even if the receipt which A had given to B could be regarded as an express promise to collect, it did not follow as a matter of course that he was charged with the whole amount of the note for a failure to collect it. The damages in such a case must depend upon the value of the note and the probability of collection, so that if the maker was irresponsible, the damages could only have been nominal. The damages were, therefore, unliquidated and not the subject of set-off. *Mitchell v. Shuert*, 16 Mich. 444.

It has been held that debtors to a banking company cannot set-off the bills and notes of such company in an action by the company against them. *Hallowell, etc., Bank v. Howard*, 13 Mass. 235. *Contra*, *Niagara Bank v. Roosevelt*, 9 Cow. (N. Y.) 409; *Bruyn v. Middle Dist. Bank*, 9 Cow. (N. Y.) 413, note.

Where a promissory note was given in payment for seventeen articles of machinery with no separate valuation, and five of the articles being at the time under a valid attachment against the vendor, were afterwards sold upon execution in the attachment suit, it was held that, since the value of these articles was wholly uncertain, the plaintiff should have judgment for the whole note. *Riddle v. Gage*, 37 N. H. 519; 75 Am. Dec. 151.

In an action on a promissory note, the defendant cannot, under the plea of set-off, give in evidence a writing by which the plaintiff promised to pay to him "fifty barrels of corn," if the value of the corn was neither stated in the contract nor any criterion provided by either of the parties or the law for its ascertainment. *Handley v. Dobson*, 7 Ala. 359.

In an action for money due for cloth furnished, it was held that the defendant could not show, by way of set-off, that a former bale, which the defendant had bought of the plaintiff, was damaged by being burnt in the pressing,

but that he would be compelled to bring a separate action for the damages. *Freeman v. Hegett*, 1 W. Bl. 394.

So in an action for rent, the defendant will not be permitted to plea by way of set-off, a breach of agreement to repair on the part of the plaintiff. *Weigal v. Waters*, 6 T. R. 488; *Sickles v. Fort*, 15 Wend. (N. Y.) 559. Nor can the defendant in such action set off damages which he has sustained by breach of the covenant of the plaintiff, contained in a lease reserving the rent, to the effect that the sub-cellar of the demised premises should, at all times during the term, be free from the percolation of water through the walls or floor thereof. *Benkard v. Babcock*, 2 Robt. (N. Y.) 175.

Nor, to an action of freight, could there be set off damages accruing to the defendant from the plaintiff's delay in getting the ship ready, except so far as such damages are assessed by the charter party; *Seeger v. Duthie*, 8 C. B. N. S. 45; 98 E. C. L. 45; or a claim for damages to the goods carried; *Meyer v. Dresser*, 16 C. B. N. S. 646; 111 E. C. L. 644; *Dowland v. Thompson*, 2 W. Bl. 919; or for the loss of the goods, *Clyde v. Knight*, 12 R. I. 194. So the plea of the defendant that by reason of the plaintiff's negligence and unskillfulness, the coal which had been intrusted to the plaintiff was lost, and that the price of the coal was equal to the plaintiff's demand, was held bad as a set-off. *Stimson v. Hall*, 40 Eng. L. & Eq. 442. But by recent *American* and *English* statutes, this has been changed, and damages sustained by goods in transportation may be pleaded as a set-off. See *FREIGHT*, vol. 8, p. 977, n. 8.

Loss Under Policy of Insurance.—Unliquidated losses on a policy of insurance cannot be made the subject of set-off. *Thompson v. Redman*, 11 M. & W. 487; *Grant v. Royal Exch. Assur. Co.*, 5 M. & S. 439; *St. Louis Perpetual Ins. Co. v. Homer*, 9 Met. (Mass.) 39. So a demand on an insurance policy for a partial loss may not be set off. *Union Ins. Co. v. Howes*, 124 Mass. 470; *Diehl v. General Mut. Ins. Co.*, 1 Sandf. (N. Y.) 257. And a loss under an open policy of insurance cannot be set off, although it be a total loss. *Gordon v. Bowne*, 2 Johns. (N. Y.) 150. But it is otherwise as to a total loss on a valued policy. *Columbia Ins. Co. v. Black*, 18 Johns. (N. Y.) 149.

Liability Under Guaranty.—It is held

that a mere liability under a guaranty cannot form the subject of set-off because the sum due from the guarantor upon default of the principal debtor is not certain or liquidated, but is a question of the amount of damages. Thus, in an action of assumpsit, the defendant relied on a set-off founded on a guaranty given to him by the plaintiff for goods to be sold by the defendant to A, who, after having obtained the goods, became bankrupt. It was held that there was no foundation for the set-off, there not having been an absolute debt by the plaintiff to the defendant, but an engagement for the deficiency of A only, and it being impossible to say to what extent plaintiff was liable until it was ascertained how much was paid by A's estate. *Crawford v. Sterling*, 4 Esp. 207. A stronger case was where the plaintiff had guaranteed the payment of 1,600*l.*, which the defendant advanced to J. C. at the plaintiff's request, and also of any further sums which might then or thereafter be owing from J. C. to defendant, and the defendant afterwards advanced J. C. 3,000*l.*, which sum, as well as the 1,600*l.*, remained due at the time the plaintiff sued defendant for a debt; it was held that the defendant could not use these sums as a set-off. The liability of the plaintiff was considered not to be for an ascertained sum, nor for a sum which was capable of being ascertained without a jury. A guaranty is a contract peculiarly sounding in damages. There was no original debt between the plaintiff and the defendants, but merely a collateral engagement to see the debt of J. C. paid; that undertaking could only be the subject of a suit for unliquidated damages. *Morely v. Inglis*, 4 Bing. N. Cas. 58; 33 E. C. L. 279.

But there may be a set-off if the damages are certain. *Collins v. Wallis*, 11 Moore, 248.

Statutes Authorizing Claims Arising Out of Contract to be Set Off.—By the *Kansas* statute, a set-off must be a cause of action arising upon contract, or ascertained by the decision of the court, and any cause of action arising from contract, whether it be for a liquidated demand or for unliquidated damages, may constitute a set-off, and may be pleaded as such in any action founded on contract. *Kansas Civ. Code*, §§ 94-98. Under this statute, a claim for damages sustained by plaintiff for breach of contract to deliver goods

was 'held a good set-off. *Stevens v. Able*, 15 Kan. 584. And a cause of action founded upon an implied contract may be set off. *Fenson v. Linsley*, 20 Kan. 235. Compare *Kansas Gen. Stat.* 1889, §§ 4178-4189.

Under the *Pennsylvania Defalcation act of 1705* (1 Sm. Laws 40), the defendant may set off unliquidated damages arising out of contract distinct and independent from the plaintiff's cause of action. *Ellmaker v. Franklin F. Ins. Co.*, 6 W. & S. (Pa.) 439; *Phillips v. Lawrence*, 6 W. & S. (Pa.) 150; *Speers v. Sterrett*, 29 Pa. St. 192; *Hunt v. Gilmore*, 59 Pa. St. 450; *Halfpenny v. Bell*, 82 Pa. St. 128. See *Shoup v. Shoup*, 15 Pa. St. 361.

And the *South Carolina Discount act of 1759* has been construed to authorize the setting off of uncertain damages for the breach of an independent contract. *Haynes v. Prothro*, 10 Rich. (S. Car.) 318.

By some of the statutes the right of set-off is extended to causes of action arising out of contract, express or implied.

In *Vermont*, where the statute allows the defendant to plead in offset whenever the plaintiff is indebted to him on contract, expressed or implied, it was held that unliquidated damages may be set off. *Hubbard v. Fisher*, 25 Vt. 539; *Keyes v. Western Vt. Slate Co.*, 34 Vt. 81. In an action of assumpsit it was held that the defendant might, under the contract of hire, recover compensation for the use of a carriage, and also for damages resulting thereto by plaintiff's negligence; such claim being "founded upon contract, express or implied" within the meaning of the statute. *Thompson v. Congdon*, 43 Vt. 396.

In an action of assumpsit to recover the difference agreed to be paid on the exchange of lands, the defendant sought to set off the value of the rails which he had, before the exchange, placed along the line for the purpose of constructing a fence, and which the plaintiff, after the exchange, had taken and converted to his own use. The parties admitted that the only matter in dispute was the admissibility of this matter as set-off. They also admitted that the rails were worth \$50. Although the demand for the rails was, therefore, a liquidated one, yet the court held that it was not a subject of set-off under the statute, and it was not a demand arising upon a judgment or contract, expressed

or implied, in the sense in which the term was used in the statute; that the term referred to demands resulting from the voluntary engagement of an individual to another, either express or implied in law, as distinguished from the liability originating in tort or wrong unconnected with an agreement. *Conklin v. Parsons*, 1 Chand. (Wis.) 240. But it should be observed that *Whitton, J.*, in delivering the opinion of the court in this case, said that "Where rails are promiscuously placed along the line of a contemplated fence and before its erection the land is conveyed, the better opinion is that they pass by the conveyance as a part of the realty."

So in an action brought to recover for services rendered by the plaintiff in the defendant's store, it was held that the defendant might not prove by way of set-off that during the time that plaintiff was clerk in his store he had embezzled and appropriated to his own use and deposited in bank to his own credit, several sums of money amounting to several hundred dollars under such circumstances as would make him guilty of larceny. It was insisted on the part of the defendant that, inasmuch as his claim against the plaintiff was for a liquidated sum, and an action for money had and received could have been maintained to recover the stolen money, it was a proper subject of set-off. But the court by *Cole, J.*, said: "The statute applies to demands arising upon contract in contradistinction to those arising in tort, although it is a very familiar principle of law that when goods have been tortiously taken and sold, the owner may waive the tort and bring an action of assumpsit for money had and received against the wrongdoer and recover the proceeds. It follows from this view of the statute that a demand to be the proper subject of offset must not only be liquidated or capable of being ascertained by calculation, but must be one arising upon contract in contradistinction to one resulting from a tort." *Pierce v. Hoffman*, 4 Wis. 277.

But subdivision 3 of the Revised Statutes of 1849, ch. 94, § 1, which provided that the set-off "must be for a demand for real estate sold, or for personal property sold, or for money paid, or for services done, or if it be not such a demand, the amount must be liquidated or be capable of being ascertained by calculation," was omit-

ted in the provision of 1858, and it was thereafter held that the defendant might waive tort, and sue in assumpsit upon implied contract, or set off such demand in an action against him on contract. Thus, if A commits a trespass against B, by laying down B's fences and letting in cattle upon B's land, B may waive the tort, and sue for the value of the pasturage of A's cattle, upon an implied contract, and he may set off such a demand in an action against him by A, as in other cases of demand on contract. *Worden v. Jones*, 33 Wis. 600; 14 Am. Rep. 782. This decision was under a statute which reads as follows: "In the following cases, and under the following circumstances, a defendant may set off demands which he had against the plaintiff: 1. It must be a demand arising upon judgment or upon contract, express or implied, whether such contract be written or unwritten, sealed or without a seal; and if it be founded upon a bond or other contract having a penalty, the sum equitably due by virtue of its condition only, shall be set off." *Wisconsin Rev. Stat.* 1858, ch. 126, § 1; 2 *Tay. Stats.* 1448.

In the decision of a case arising under the *Kansas* statute permitting the set-off of a demand arising out of any kind of contract, in which the defendant was permitted to waive the tort on which his claim was really founded, and treat his cause of action as one arising upon an implied contract, the general rule was laid down that wherever one party commits a wrong or tort against the estate of another with the intention of benefiting his own estate, the law will, at the election of the party injured, imply or presume a contract on the part of the wrongdoer to pay to the party injured the full value of all benefits resulting to such wrongdoer. *Fenson v. Linsley*, 20 Kan. 235. It was held that if an agent who has embezzled his principal's money, sues his principal on a note, the principal, under his right to waive the tort, may set off the amount embezzled. *Challiss v. Wylie*, 35 Kan. 506.

It was held that a demand made by the United States for the proceeds of Indian trust bonds converted by persons who had illegally procured and sold them, was a demand arising upon an implied contract, or one which might be so treated by waiver of the

alleged fraud in the conversion of the bonds, and was, therefore, a proper subject of set-off. *Allen v. U. S.*, 17 Wall. (U. S.) 207.

It was held that a claim, under a *Michigan* statute, making the owner of logs or lumber becoming jammed in navigable streams liable to any person who shall cause such jam to be broken, for the costs and expenses incurred in so doing, is not a demand arising "upon contract express or implied," within the meaning of the statute of set-off. *Woods v. Ayres*, 30 Mich. 345; 33 Am. Rep. 396.

In an action by one town against another, for supplies furnished to a pauper, it was held that the defendant town could not, under a statute allowing only such demands to be set off as are founded on judgment, or an express or implied contract, set off a claim for the support of a pauper of the plaintiff; such a demand for the support of or relief of paupers was considered not to be founded on contract, but the liability was said to originate solely in positive provisions of statute, and has in it none of the elements of a contract, express or implied; and the demand of the defendants did not, according to the testimony, rest upon any special contract. *Augusta v. Chelsea*, 47 Me. 367.

Under the *Indiana* Revised Statutes of 1888, § 348, which provides that a set-off must consist of "matter arising out of debt, duty, or contract," it was held that a defendant's claim arising out of a series of torts cannot be set off, although the defendant expressly waives the tort, the waiver of the tort by the defendant not being considered as making his claim "matter arising out of debt, duty, or contract." *Richey v. Bly*, 115 Ind. 232.

Where the defendant sold a horse to the plaintiff, but after having possession of the horse some time, the plaintiff induced the defendant to take him back, on saying that he would do what was right about it, or would leave it to a third person, it was held that the defendant could not use a claim for use of and damages to the horse by the plaintiff, while he held a title to it, in set-off. The statute provided that no demand shall be set off unless it is founded upon a judgment or contract, but the contract may be either express or implied. There was no proof of an express contract on the part of the plaintiff to pay the defendant for the use of the horse, nor for

requirement is that the claim must be for a certain amount. So a claim the amount of which can only be settled in an accounting cannot be set-off.¹

It has been said that "damages resulting from the breach of contract are unliquidated when there is no criterion provided by the parties, or by law, for their ascertainment."² But there is nothing illegal or unreasonable in the parties, by their mutual agree-

damages done to him, and it was said that the law would not, under the circumstances, raise any such promise by implication. While the title and possession of the horse were in the plaintiff, he alone had a right to his services, and if he misused him, it gave the defendant no right to recover damages therefor. *Stevens v. Blen*, 39 Me. 420.

Where the defendant, in answer to the plaintiff's claim to recover balance due on a book account, pleaded in set-off "damages to her crop by the stock of the plaintiff, in the sum of fourteen dollars," it was held that this did not state a proper matter of set-off. *Christy v. Jones*, 39 Kan. 183.

Where A sued out an attachment against B, giving a bond which was conditioned to pay costs and damages sustained by B in case A should fail to successfully prosecute the attachment, and the attachment was afterwards dissolved by order of the court, it was held, in an action of assumpsit subsequently brought by A for the same debt, that B might set off damages sustained by reason of the attachment; that the damages arose *ex contractu*, not *ex delicto*, and could be liquidated within the meaning of the *Pennsylvania Defalcation Act*. *Plunkett v. Sauer*, 101 Pa. St. 356.

1. *Ratliff v. Davis*, 38 Miss. 107; *Duncan v. Lyon*, 3 Johns. Ch. (N. Y.) 351; 8 Am. Dec. 513; *Sherman v. Bal-lou*, 8 Cow. (N. Y.) 304; *Sennett v. Johnson*, 9 Pa. St. 335; *Russell v. Mil-ler*, 54 Pa. St. 154. A claim which must be established, if it can be estab-lished at all, by an accounting, may not be set off within 2 *New York Rev. Stats.* 354, § 32. *Cummings v. Morris*, 3 Bosw. (N. Y.) 560.

In *Russell v. Miller*, 54 Pa. St. 154, the court by Agnew, J., said: "A debt or the damages which can be set off as an independent counterclaim, must be such as a jury can find and liquidate in the ordinary way just as if the defendant were a plaintiff suing in debt, assumpsit, or covenant. But where the right of the defendant

is only to call the plaintiff to an ac-count, and his demand is such as must be settled in an action of account ren-der, or by a bill in equity for an ac-count, it is not a proper set-off. A jury cannot pass on a question of this nature without great inconvenience. A set-off to a set-off will not be permitted, and it would be much worse to try before a jury at bar an unadjusted question of account and of profits arising out of a long and complicated business to be found only in numerous books of ac-count."

Though also open to the objection that the principle that one partner can-not sue the other upon matters involv-ing the partnership accounts would preclude an action upon the demand (see *infra*, this title, note 1, p. 273), it has been said that a claim arising out of the unsettled dealings of either partner with the firm, cannot, because of its un-liquidated nature, be set off in an action at law by one partner against the other. *Ordiorne v. Woodman*, 39 N. H. 541. Where the members of a voluntary trading association had voted to close its business and divide the property, and this was accordingly done, but the affairs of the company were not settled, it was held that a claim of one of the members of the company for his part of the property could not be set off in an action upon a note given to the treas-urer of the company. *Farge v. Saun-ders*, 4 Allen (Mass.) 378. See *Ives v. Miller*, 19 Barb. (N. Y.) 196; *Cummings v. Morris*, 3 Bosw. (N. Y.) 560. But in *Indiana* it was held, under a statute allowing unliquidated demands to be set off, that an unliquidated demand growing out of unsettled copartnership accounts may, the partnership having been dissolved, be pleaded as a set-off in a suit between the members of the late firm; *Irish v. Snelson*, 16 Ind. 365; but the plea must show a balance due the defendant growing out of the entire transaction. *Hendry v. Hendry*, 32 Ind. 349.

2. See *McCord v. Williams*, 2 Ala.

ment, settling the amount of damages uncertain in their nature at any sum upon which they may agree.¹ And, where the damages are assessed and liquidated by the contract they may be the subject of set-off.² But it is otherwise where the agreement is so construed that the stipulated sum will be deemed a penalty.³

If the demand is for a certain sum, and also conforms to the requirements subsequently stated,⁴ it may be set-off.⁵ The claim

1. See *Kemble v. Farren*, 6 Bing. 141; 19 E. C. L. 34. See LIQUIDATED DAMAGES, vol. 13, p. 847.

2. *Leake Contr.* (2d ed.) 1010; *Legge v. Harlock*, 12 Q. B. 1015; 64 E. C. L. 1013; *Fletcher v. Dyche*, 2 T. R. 32; *Caldwell v. Hawkins*, 1 Litt. (Ky.) 212.

So, where, by the contract of employment, a particular sum is to be paid in lieu of notice on the dismissal of a servant, such sum may constitute a set-off. *East Anglian R. Co. v. Lythgoe*, 10 C. B. 726; 20 L. J. C. P. 84; 70 E. C. L. 724.

Where it was stipulated by articles of agreement for altering and repairing a warehouse for a fixed price, that, in the event of the work not being completed in three months, the builder should forfeit and pay to his employer the sum of £5 weekly, and every week, such penalty to be deducted from the amount which might remain due on the completion of the work, it was held, in an action brought for extra work, that the employer was entitled, after having paid the contract price, to set off the penalty against the amount claimed for extra work. *Duckworth v. Alison*, 1 M. & W. 412.

In *assumpsit* for work and labor, specified penal sums for the plaintiff's refusal or non-performance of work, being in the nature of liquidated damages, may be set off against his claim. *Marshal v. Hann*, 17 N. J. L. 425. See LIQUIDATED DAMAGES, vol. 13, p. 847.

3. 2 Chitt. Contr. 1274; *Nedriffe v. Hogan*, 2 Burr. 1024; Bull. N. P. 180; *Freeman v. Hegett*, 1 Bl. 394; *Dowland v. Thomson*, 2 Bl. 910; *Howlett v. Strickland*, Cowp. 56; *Gillett v. Mawman*, 1 Taunt. 137; *Tayloe v. Sandiford*, 7 Wheat. (U. S.) 13.

So, although the amount due on the condition of a bond may generally be pleaded in set-off, the penalty may not, for this may be reduced both at law and in equity. *Burgess v. Tucker*, 5 Johns. (N. Y.) 105; *Nedriffe v. Hogan*, 2 Burr. 1024.

But, although a bond is merely a security for unliquidated damages, yet

where the course prescribed by law is to render judgment for the entire penalty, and the hearing is to be afterwards had in chancery, and, if the condition is single, execution awarded only for the amount found actually due, or, if there are several conditions, a like hearing is had to ascertain the amount due at the time of the rendition of the original judgment on each subsequent breach, as it may occur, it was held that a set-off is admissible in an action of debt on the bond for the recovery of the penalty. *Concord v. Pillsbury*, 33 N. H. 310.

4. See *infra*, this title, *What Subjects of Set-off May be Set off*.

5. *Eads v. Murphy*, 52 Ala. 520; *Johnston v. U. S. L. Ins. Co.* (Mass. 1891), 27 N. E. Rep. 882; *Hannah v. Pleasants*, 2 Dana (Ky.) 269; *Greathouse v. Greathouse*, 60 Tex. 597.

A claim against the plaintiff's intestate for the value of a note by him converted to his own use, was held not to be for unliquidated damages, and was a proper subject of set-off. *Gunn v. Todd*, 21 Mo. 303.

A covenant to give thirty dollars as rent, to be paid in splitting rails, repairing fences, etc., was treated as a legitimate subject of discount. It was considered that, until the performance of the work, the thirty dollars would stand, either as the specific rent or for liquidated damages for the non-performance. *Whisenant v. Towers*, 2 Rich. (S. Car.) 110. But a claim for rent and horse pasture cannot be set off when the amount has neither been agreed upon nor means furnished for definitely ascertaining what it should be. *Carter v. Joseph*, 48 Mich. 615.

One partner in a firm sold his interest in a stock of goods belonging to the firm to his co-partners, receiving their promissory note therefor, and subsequently, to prevent a seizure and sale of the goods for delinquent taxes, which were a lien on the entire stock when the interest was so purchased, said co-partners paid off the amount of the taxes. It was held that the partners who

had thus purchased the interest could set off, against a like portion of the sum due on the note, the amount of taxes so paid by them which constituted a lien on the interest so purchased. *Evans v. Bradford*, 35 Ind. 527.

Where the vendor was to deliver goods at a particular place, free of charge, it was held that the vendee might pay the government duties and set them off in a suit for the price. *Fitch v. Archibold*, 29 N. J. L. 160.

Where the defendant had purchased and paid for belting, with an express or implied warranty of quality, and the quality could only be ascertained upon trial of the belting, when it proved to be wholly worthless, it was held that the defendants could set off the price paid therefor in a suit for the price of a subsequent purchase of belting by them from the plaintiff. *Gutta Percha, etc., Co. v. Wood*, 84 Mich. 452.

Where a party has actually paid money for another under a guaranty, the money so paid may be set off in an action by the latter as money paid to his use. *Hutchinson v. Sydney*, 10 Exch. 438.

In *Pennsylvania* it has been held that in distress for rent, taxes paid by the tenant may be set off. *Franciscus v. Reigart*, 4 Watts (Pa.) 98, 476. So it was held that under the plea of payment on a contract for the sale of lands, the defendant may give evidence of taxes due by the former owner, which he has paid on the lands by way of set off. *Fulweiler v. Baugher*, 15 S. & R. (Pa.) 45.

And under the *Indiana* statute (1 Gav. & H., § 199) taxes paid were held a good set-off in an action for use and occupation. *Grossman v. Lauber*, 29 Ind. 618.

Where A, the payee of a draft on B, at the time of the acceptance of the draft gave to B a release, written on a separate paper, of all obligations to pay if the draft should fall into the hands of an innocent holder for value before due, and the draft afterwards did fall into the hands of such holder, to whom B was compelled to pay it, the court held, in a subsequent suit by A against B on another acceptance, that the amount paid on the first draft could be set off, no funds of the drawer being in hand. The fact that B was bound to pay the draft if an innocent holder presented it, because on the face of it, the acceptance was unconditional and the draft negotiable, was said to give B an

action for money paid out to A's use at his special instance and request, and therefore, in that event, he could set it off. *Cannon v. Campbell*, 69 Ga. 263.

When plaintiff has received a certain sum of money on the re-sale of property, to one-half of which, after making certain deductions, the defendant is justly entitled, the property having been purchased for the benefit of both parties, the defendant has legal right to have the same set off against any just claim the plaintiff may have against him. *Pope v. McGee*, 33 N. J. L. 271.

Money had and received has been deemed a proper matter of set-off—royalties, for instance, actually collected. *Harris Wire Co. v. Moore*, 55 Mich. 610. Where a plaintiff received of the defendants certain instruments under an arrangement to sell the same, and to give defendant thirty-six dollars per gross as profits on such sales, it was held that the defendants were entitled, in a proper suit, to set off against the plaintiff's demand, whatever sums of such profits the plaintiff received under the arrangement. *Josselyn v. Bishop*, 25 Mich. 397.

Under a statute providing that money paid for unlawful purchases of liquors sold in violation of the liquor laws shall be deemed to have been received without consideration, and may be recovered back, it was held that the liability for the same is thereby put on the same footing as other money had and received, and may be set off. *Roethke v. Philip Best Brewing Co.*, 33 Mich. 340.

Where the defendant had given the plaintiff a note for a balance found upon a settlement, and it was ascertained, shortly after the settlement, that by mistake, the note was for \$30 too much, the defendant, in an action upon the note, was permitted to set off the excess. *Bentley v. Hollenback*, Wright (Ohio.) 168.

An average loss, the amount which the underwriter has acknowledged, may be set off by a broker with a *del credere* commission, in an action against him for the amount of premiums. *Weinholt v. Roberts*, 2 Campb. 586.

Where A promised and agreed to pay B three hundred dollars, if B would release A's son from all damage and liability in consequence of a battery committed by his son on B, and B in consideration of such promise executed and delivered the release, it was held that A was liable upon his promise to

is sufficiently certain if it is capable of being reduced to a certainty simply by calculation.¹

b. UNDER THE BANKRUPTCY ACTS—(1) *Mutual Credits*.—There is some difference between the allowance of claims in set-

pay the three hundred dollars, and that B could plead it, by way of set-off, in a suit instituted against him by A. *McCormick v. Oliver*, 7 Yerg. (Tenn.) 24.

Where, in an action on contract, the defendant seeks to set off against the plaintiff a claim on an instrument acknowledging the receipt of a sum of money in trust, it was held that such sum, being liquidated and payable on demand, is a proper matter of set-off, whether considered as a trust or as a mere debt. The court, in the decision of this case, by Holmes, J., said: "If the instrument imports a 'trust,' properly so called, rather than a debt, so that the plaintiff was bound to keep the fund identified, but was only responsible for reasonable care in its preservation, and was not personally answerable for an equivalent sum from her assets generally, and at all events, still we think that the defendant's demand could be set off, under Pub. St., ch. 168, §§ 1, 14, consistently with §§ 2, 3. The trust was a naked one, which the defendant could terminate as matter of right. *Underwood v. Boston Five Cents' Sav. Bank*, 141 Mass. 305. Upon demand and refusal to pay it over, the money could be recovered in an action of assumpsit; that is, upon an implied contract. *Johnson v. Johnson*, 120 Mass. 465. It would serve no useful purpose to exclude the set-off of such a demand by a narrow construction of the statute." *Gannon v. Ruffin*, 151 Mass. 204.

Overpayments.—It seems that overpayments, when properly pleaded, may be set off. See *O'Brien v. Anniston Pipe Works* (Ala. 1891), 9 So. Rep. 415; *Bracken v. Dillon*, 64 Ga. 243; 37 Am. Rep. 70. In an action brought against a city by assignees of a claim for printing done in 1871, it was held that the fact that an amount for advertising in 1869, included a gross overcharge that had been fraudulently presented, passed upon and obtained by the assignor association, was a proper matter of set-off. *Taylor v. Mayor*, etc., of N. Y., 20 Hun (N. Y.) 292. So it was said that where the State has overpaid a contractor, under a mistake of fact, the amount overpaid may be

set off against amounts due the contractor on other contracts than that on which the overpayment was made. *Belden v. State*, 31 Hun (N. Y.) 409.

Claims for Taking Usurious Interest, etc.—It is held that a claim under U. S. Rev. Stat., § 5198, to recover double the amount of usurious interest paid to a national bank, is not a proper matter of set-off under statutes requiring a set-off to be a "cause of action arising upon contract." *Fraker v. Cullum*, 24 Kan. 679; *Hade v. McVay*, 31 Ohio St. 231.

In other cases it has been laid down more broadly as a general rule, that such claim cannot be set off; that the party is restricted to his legal remedy by an independent action. *Barnet v. National Bank*, 98 U. S. 555; *First Nat. Bank v. Childs*, 133 Mass. 248; 43 Am. Rep. 509.

But where the claim sought to be set off, was simply to recover usurious interest paid, it has been allowed to be set off. So, a claim arising from a *bonus*, paid on a usurious loan, is the subject of a set-off; such claim cannot properly be said to have grown out of a tort. *Dey v. Jackson*, 39 N. J. L. 535. And it was held that the defendant in an action may set off the excess of interest taken of him by the plaintiff in a transaction different from that on which the action is brought. *Thomas v. Shoemaker*, 6 W. & S. (Pa.) 179.

1. *Leigh N. P.*; *Gibson v. Bell*, 1 Bing. N. Cas. 743; 27 E. C. L. 562; *Rose v. Simms*, 1 B. & Ad. 526; 20 E. C. L. 437; 2 Saund. Pl. & Ev. 790; *Spencer v. Morgan*, 5 Ind. 146; *Ashby v. Carr*, 40 Miss. 64; *Casper v. Thigpen*, 48 Miss. 635; *Drew v. Towle*, 27 N. H. 412; 59 Am. Dec. 380; *Rayburn v. Hurd*, 19 Oregon 59; *Moore v. Weir*, 3 Sneed (Tenn.) 46; *Memphis, etc., R. Co. v. Walker*, 2 Head (Tenn.) 467.

It has been said that the true construction of the words in a statute which define the matters which may be set off to be demands for a "sum liquidated, or one which may be ascertained by calculation," is to "limit them to such judgments, or contracts,

only as that the amount of the defendant's demand can only be ascertained by the contract itself or by mathematical calculations on the same." *Hall v. Glidden*, 39 Me. 445; *Smith v. Eddy*, 1 R. I. 476. See *Clyde v. Knight*, 12 R. I. 194.

Where the defendant, in an action by the plaintiffs to recover £30 which he had received to their use, showed that he had been employed at a salary of £140, under an agreement that the contract of employment should be determinable at three months' notice, or on payment of three months' salary, it was held that since he had been dismissed without the stipulated notice, the three months' salary became a debt due the defendant, and he might set it off against the plaintiffs' claim. *East Anglian R. Co. v. Lythgoe*, 10 C. B. 726; 70 E. C. L. 724; 20 L. J. C. P. 84; 2 E. L. & Eq. 331.

So, where a statute (48 Geo. III, ch. 149, § 24) enacted "that where the full purchase or consideration money" for a conveyance, "should not be truly expressed or set forth" therein, "it should be lawful for the purchaser to recover back from the seller so much of the purchase or consideration money as should not be expressed and set forth in an action for money had and received for the use of the party suing for the same," it was held that such a sum of money might be made the subject of a plea of set-off. *Gingell v. Parkins*, 4 Exch. 720.

In an action on a bill of exchange the defendant was allowed to set off the sum to which the plaintiff was under a legal obligation to insure a vessel, but which he neglected to do, and the vessel was lost. *De Talset v. Crousellat*, 1 Wash. (U. S.) 504.

In an action on a note, the defendant sought to set off a claim against the plaintiff, arising on the following transaction: The plaintiff had sold hides in a vat to the defendant at one dollar and fifty cents a hide, under an agreement that if they fell short of a specified number the plaintiff should repay the defendant for the deficiency, and if they exceeded that number the defendant should pay for the excess. The hides fell short. It was held that the defendant could set off his account for the deficiency. *Daniel v. Trice*, 31 Ga. 162.

In an action by a collector of taxes against a town to recover the amount of an order by the selectmen on the

treasury of the town, the defendants were permitted to set off their claim against the plaintiff, by reason of the plaintiff's neglect to account for and pay over money received by him on tax bills committed to him for collection, and which he had not accounted for nor paid over. *Donelson v. Colerain*, 4 Met. (Mass.) 430.

Where the parties entered into a written contract by which the defendant agreed to build a house for the plaintiff upon the terms therein stipulated, but the plaintiff broke the contract and the defendant justifiably abandoned and rescinded it, the court held that the defendant might set off the value of the work done and materials furnished before the breach and abandonment, such claim not being for unliquidated damages for breach of contract. *Ford v. Burchard*, 130 Mass. 424. But in *Smith v. Eddy*, 1 R. I. 476, under a similar state of facts, the defendants were not permitted to set off such demands. The court by Haile, J., said: "The defendants seek to recover, not by force of their contract and for performance of the same, but a reasonable sum for their services. This sum can be ascertained only by proof of such breach of the contract by the plaintiff, as would excuse the defendants from performing their part of the contract, and proof of the value of their services. Such evidence was not admissible to establish a claim to set-off by the defendants." And in *Butts v. Collins*, 13 Wend. (N. Y.) 139, Chancellor Walworth treated the defendant's claim for the value of a certain number of pieces of flannel, which had been placed in the plaintiff's hands to be dressed, but had never been returned, as uncertain and unliquidated, although the number of yards in each piece and value per yard were proved. But Mr. Senator Maisson took a different view.

It was held that an obligation for money to be paid in the bonds of a railroad company by a given day, may if not complied with, be the subject of set-off in a suit against the original holder of such obligation, or his assignee, for money due said corporation. And it seems that this is so whether the obligation does or does not fix the value at which the bonds are to be received, the law having established a rule by which the value may be ascertained and rendered certain. *Memphis, etc., R. Co. v. Walker*, 2 Head (Tenn.)

off, under the bankruptcy acts before referred to,¹ and the ordinary statutes of set-off, by reason of the employment of the term "mutual credits" therein. It is said that this term is of larger import than the term "mutual debts," and that under them many cross-claims may be allowed in cases of bankruptcy, which in common cases would be rejected.²

The claim need not be a debt due and payable before bankruptcy.³ It is sufficient if the claim, originating in a mutual credit before bankruptcy,⁴ has become due and payable after the

467. Where sundry bank stocks, railroad stocks, railroad bonds and coupons for interest on such bonds, were placed in the hands of a creditor as security, and were wrongfully disposed of by him so that the debtor had a claim upon him for damages for their loss, it was held that such damages could be set off against the debt, *pro tanto*, in an action at law brought by the creditor for the recovery of the debt. *Bulkeley v. Welch*, 31 Conn. 339. See *Ainsworth v. Bowen*, 9 Wis. 348. In the former case (*Bulkeley v. Welch*, 31 Conn. 342), the court by Sandford, J., said: "Upon the case stated in the bill the petitioner has an election of actions at law against the pledgee. He may maintain trover for the wrongful conversion of the goods, or, waiving the tort, he may bring assumpsit for the value of the property or for the money received upon its sale; but as he makes no claim on account of any peculiar quality or any extraordinary value of the property itself, or of any aggravating circumstances attending its conversion, the market value of the property would be the measure of his damages, whatever the form of the remedy which he might adopt. What the value of the property was can be shown by the testimony of witnesses acquainted with the market. The petitioner's claim, therefore, is not to such unliquidated damages, depending upon the opinion, judgment, or discretion of a jury, as cannot be set off against the respondents' debt in suit."

An obligation was executed for the payment of \$5,000, payable in bonds of the obligor company, at par. It was held that this obligation could properly be employed as a set-off since, under this contract, the value of the bonds is not uncertain; it is the nominal value and not the value at which they might be rated in the market. *Memphis, etc., R. Co. v. Walker*, 2 Head (Tenn.) 467.

1. See *supra*, this title, note 3, p. 217.

2. See *Ex parte Ockenden*, 1 Atk. 234, opinion by Lord Hardwicke; *Rose v. Hart*, 8 Taunt. 499; 2 Sm. L. C. 308; 4 E. C. L. 185.

3. An accommodation acceptor to a bill, which did not fall due until after the bankruptcy, and was then outstanding in the hands of third persons, and paid by him after commission issued, was held entitled to a set-off under the words mutual credit. *Smith v. Hodson*, 4 T. R. 211.

4. In order that a case may be protected as one of mutual credit, it must appear that such mutual credit existed at the time of the bankruptcy. *Boyd v. Mangles*, 16 M. & W. 337.

It is to be observed that, in all the cases where set-off has been allowed under the bankruptcy acts, except, perhaps, the case of *Ex parte Deeze*, 1 Atk. 228, there were dealings between the parties before the bankruptcy, which by the efflux of time had ripened into mutual debts. In the latter case Lord Hardwicke held that goods, in the hands of a packer, who was a debtor of the bankrupt, could be retained not only for the price of packing them, but for a sum of £500 lent to the bankrupt on his note, though if there had been no bankruptcy, the debt could not have been set off in an action at law for the recovery of the goods, the holder having no lien on them, or having a lien on them for a portion only of his debt. *Ex parte Deeze*, 1 Atk. 228. But in the case of *Ex parte Ockenden*, 1 Atk. 234, which came before Lord Hardwicke about six years after the former, he very much narrowed the extensive construction that he had before put on the words "mutual credits," in the statute of 5 Geo. II, ch. 30, § 28.

The question of mutual credit cannot arise where the credit is altogether created after notice of an act of bankruptcy. *Birdwood v. Raphael*, 5 Price 593. It should appear that the obliga-

bankruptcy.¹ And claims originating before bankruptcy, and due absolutely, have been allowed in set-off, although they were not

tion commenced previously thereto, or that there was some connection in the origin of the transaction. *Gibbs, J.*, in *Ouchterlony v. Easterly*, 4 Taunt. 888. If the set-off claimed be a note made or a bill accepted by the bankrupt and indorsed to defendant, it should appear that the indorsement was made before notice of the bankruptcy. *Marsh v. Chambers*, 2 Str. 1234; *Lucas v. Marsh*, Barnes 453; *Dickson v. Evans*, 6 T. R. 57; *Ogden v. Cowley*, 2 Johns. (N. Y.) 278. In *New York*, a defendant who, at the time of obtaining a note of plaintiffs, was chargeable with notice of their assignment, could not avail himself of the note as a set-off, *Johnson v. Bloodgood*, 1 Johns. Cas. (N. Y.) 51; 1 Am. Dec. 93; *Anderson v. Van Alen*, 12 Johns. (N. Y.) 344. But a bill or note may form an item of credit, although the person claiming it as such item may not have had it in his hands at the moment of the bankruptcy. 5 Rob. Prac. 995; *Ex parte Hale*, 3 Ves. 304, and *Ex parte Burton*, 1 Rose's B. C. 320, are distinguished from *Bolland v. Nash*, 8 B. & C. 105; 15 E. C. L. 157. The propriety of this decision is not doubted in *Collins v. Jones*, 10 B. & C. 777; 21 E. C. L. 169.

1. In *Ex parte Boyle, Re Shepherd*, Cooke B. L. (8th ed.) 571, Lord Cork, to accommodate Shepherd, who was his solicitor, drew four notes, two payable to Nibbs or order, and two to Shepherd or order, making, on the whole, 981*l.* os. 3*d.* Lord Cork having been forced to take up one of them before the bankruptcy, and two afterwards, the question was whether these payments could be set off against a debt due from his lordship to Shepherd's estate. The Lord Chancellor at first thought that the account must be taken as it stood at the time of the bankruptcy; but afterwards his lordship said he had considered the case, and was of opinion that the petitioner was entitled to set off the debt against the payments after the bankruptcy.

That an accommodation acceptance, not paid till after the bankruptcy by the acceptor, could be set off against the estate of the party accommodated was also decided in *Ex parte Wagstaff*, 13 Ves. 65; and *Russell v. Bell*, 8 M. & W. 277; and these cases were cited with approbation by Parke, B., in *Hulme v. Muggleston*, 3 M. & W. 31.

In this case, in an action of money had and received to the use of the assignees of John Smith, the defendant pleaded that before notice of the bankruptcy, he indorsed a bill for Smith's accommodation, and discounted another for him, both of which he was obliged to take up after the bankruptcy; that before the bankruptcy, Smith lent him a check, the proceeds of which he received after the bankruptcy, which was the same money now sued for, and against which he claimed to set off the dishonored bills. The court held the plea good. See, under bankrupt law of *Scotland*, *Macfarlane v. Norris*, 2 B. & S. 793. In *Sheldon v. Rothschild*, 8 Taunt. 156; 4 E. C. L. 55; 2 Moore 43, Otte drew a bill on B. & Co. for 400*l.*, which they accepted without value. They afterwards owed Otte 236*l.*, 11*s.* 3*d.*, and drew on him for 163*l.* 8*s.* 9*d.*, the balance. This bill they sold to the defendant and afterwards became bankrupts, the 400*l.* bill remaining in Otte's hands unpaid. Otte accepted without notice of the bankruptcy, and paid the 193*l.* 8*s.* 9*d.* to the defendant, on which the assignees of B. & Co. brought an action as for money had and received; but the court held that there was a mutual credit between the bankrupt and Otte, and that inasmuch as he could have set off his demand on the estate in any action brought against him, the defendant, whom he had indemnified, and who stood in his place, could do so also. In *Collins v. Jones*, 10 B. & C. 777, 21 E. C. L. 169, it was laid down by Bayley, J., that "whoever takes a bill must be considered as giving credit to the acceptor; and whoever takes a note, credit to the drawer." See *Arbouin v. Tritton*, Holt. N. B. 408; 3 E. C. L. 164; *Edmeads v. Newman*, 1 B. & C. 418; 8 E. C. L. 178.

In *Bittleston v. Timmis*, 1 C. B. 389; 50 E. C. L. 387, it was held that a demand which originated before *fiat*, and before notice of any act of bankruptcy, could be set off against a claim for money had and received to the use of the assignees, arising out of a credit given by the bankrupt before *fiat* and before notice of any act of bankruptcy. It thus seems that the debt need not be due and payable before the bankruptcy.

Where bills had been indorsed in blank by E. & Co. to the defendants,

yet payable.¹ Nor was it considered necessary that the bankrupt and the creditor should particularly intend to trust each other, or

who were their bankers, for the purpose of being discounted, and, before the bills became due, E. & Co. became bankrupt, the defendants having then in their hands a sum of money belonging to E. & Co., much less than the amount of the bills, and the assignees of E. & Co. sued the defendants to recover the money of E. & Co., which was so in their hands, as aforesaid, it was held that the defendants were entitled, as indorsees of the bills, to set them off in that action. *Alsager v. Currie*, 12 M. & W. 751.

R, being indebted, by an open account, to an incorporated railroad company, the latter assigned the debt to one S, to whom the company was largely indebted, and by whom suit was brought against R, in the name of the company, and a judgment obtained thereon. Pending the suit against him, R paid for the company a large debt, as its surety, which debt existed previous to the assignment by the company to S. It was held that, as the company was insolvent at the time of the assignment to S of the debt of R, the latter could set off in equity the money he had paid for the company, against the judgment obtained by S. *Tuscumbia, etc., R. Co. v. Rhodes*, 8 Ala. 206.

A premium note given for a policy of insurance, and a loss incurred under the policy, are "mutual credits" within the meaning of 2 *New York Rev. Stat.* 47, § 36, and the insured are entitled to offset the loss against the note, although, by the terms of the policy, the loss was not payable until sometime after proof of loss, and no proof was furnished until after the insolvency of the insurers. *Pardo v. Osgood*, 5 Robt. (N. Y.) 348; *following Osgood v. De Groot*, 36 N. Y. 348.

So in *Graham v. Russell*, 5 M. & S. 498, it was held that an underwriter, in an action by the assignees of a bankrupt assured upon a loss which happened after the bankruptcy, may set off a sum due to him for premiums on the balance of accounts between the bankrupt and himself. The court said that the case depended much upon the construction of 19 Geo. II, which provided that the assured in any policy should be admitted to prove his debt as if the loss had happened before the commission issued, and shall receive dividend in like manner. "This

statute," says Lord Ellenborough, "relates to the case of a bankrupt underwriter, and the case before us is that of a bankrupt assured, but the judges are of the opinion that as the set-off is to be allowed in the case of the bankrupt underwriter, by parity of reason there ought to be the same allowance on the part of the bankrupt assured. The question must, in effect, be the same as if the underwriter had become bankrupt, the assured being indebted to him and remaining solvent, and therefore it may be considered in that way."

1. Thus in *Ex parte Prescott*, 1 Atk. 230, a person owed the bankrupt a sum payable at a future day, and the bankrupt was indebted in a smaller sum then due. Lord Hardwicke held that although not strictly a mutual debt, it was a case of mutual credit within the meaning of the bankrupt law, and the sum owing by the bankrupt was set off and applied upon the demand owing to the bankrupt not then due.

Where an insolvent was indebted to a creditor in a certain amount due at the time of the insolvency, and the creditor owed a note due in a few days, it was held to be a mutual credit and a set-off allowable. *Jones v. Robinson*, 26 Barb. (N. Y.) 310, decided under 2 *New York Rev. Stat.* 47, § 36. So in *Massachusetts*, in an action by the assignees in insolvency, the defendants, who, before notice of the insolvency, had taken a promissory note made by the insolvent, may set off the note, if it is due absolutely, though not payable till afterwards. *Demmon v. Boylston Bank*, 5 Cush. (Mass.) 194; *Aldrich v. Campbell*, 4 Gray (Mass.) 284.

Thus, in *Rose v. Sims*, 1 B. & Ad. 521; 20 E. C. L. 437, it was held that an agreement to indorse a bill of exchange did not create such a credit as the statute intends; in *Gibson v. Bell*, 1 Bing. N. Cas. 748; 27 E. C. L. 562, that an agreement to accept a bill did not create such a credit. These cases turned on the distinction between an acceptance, which creates a debt, and an indorsement which creates only a suretyship. See *Wallis v. Swinburne*, 1 Exch. 203.

An agreement to pay the bankrupt for goods sold prompt two months, or by acceptance, was held a claim against which a debt due from the bankrupt

to raise a cross-demand.¹ It has been said that the leading rule on the subject of mutual credits is, that, to be within the meaning of the bankrupt laws, they must be such credits as would terminate in debts—*e. g.*, where a debt was due from one party, and credit was given by him on the other hand, for a sum of money payable at a future day, and which would then become a debt; or where there was a debt on one side, and delivery of property with directions to turn it into money, on the other.² In the latter case,

might be set off. *Groom v. West*, 8 A. & E. 758; 35 E. C. L. 520.

1. Where a bill of exchange, accepted by A got into the hands of B, it was held that there was a mutual credit between A and B, even though the former did not know the bill was in the hands of the latter. *Hankey v. Smith*, 3 T. R. 507.

Money was borrowed of an insurance company, for the purpose of erecting buildings upon a certain lot, secured by a mortgage upon the premises. After the completion of the buildings they were insured by the same company; and by a subsequent fire, by which the company was rendered insolvent, the buildings were destroyed, whereby the whole amount of the policy became due. Upon a bill by the mortgagor, the receivers were ordered to allow a set-off of the policy against the mortgage debt. *In re Globe Ins. Co.*, 2 Edw. Ch. (N. Y.) 625.

2. 2 Chitt. Contr. 1284. See *Rose v. Hart*, 8 Taunt. 499; 2 Sm. L. C. 315; *Naoroji v. Chartered Bank*, L. R., 3 C. P. 444; *Astley v. Gurney*, L. R., 4 C. P. 714; *Young v. Bank of Bengal*, 1 Moore P. C. 150.

In the decision of the above cited case of *Rose v. Hart*, the court, by Gibbs, C. J., said that the principle there laid down (which has been adopted in the text), would support all the cases in the string of cases between *Ex parte Ockenden* and this case, beginning with *French v. Fenn*, 1 Atk. 228; 3 Dougl. 261; *Cooke B. L.* (7th ed.) 536 (8th ed.), 565; 26 E. C. L. 99, decided in 1783, and extending over a period of thirty years, during which *French v. Fenn*, 1 Atk. 228, was the leading case upon this subject, and ending with *Olive v. Smith*, 5 Taunt. 58.

In *French v. Fenn*, 1 Atk. 228; *Cooke B. L.* (7th ed.) 536, (8th ed.) 565; 26 E. C. L. 99, there was a debt due from Cox, the bankrupt, to Fenn, and Cox had intrusted Fenn with his share or interest in a string of pearls, to be sold

by Fenn, and the profits on such share to be paid to Cox. Fenn sold the pearls after Cox's bankruptcy, and Cox's assignees brought an action against Fenn for his share of the profit. It was insisted on the part of the defendant that there was a mutual credit, though not a mutual debt, at the time of the bankruptcy, and that one could not be demanded without satisfying the other. The court determined that Fenn was protected from the claim of Cox's assignees by the clause of mutual credits.

So where the defendant had lent his acceptance to the bankrupts on a bill which did not become due till after the act of bankruptcy, and which was then outstanding in the hands of third persons, yet the defendant, having paid the amount after commission issued, and before the action brought by the assignees, was held entitled to set off that amount. *Smith v. Hodson*, 4 T. R. 211; 2 Sm. L. C. 126.

In *Atkinson v. Elliott*, 7 T. R. 378, the defendant sold the bankrupt a parcel of tar for 430*l.*, at six months' credit, for which the bankrupt accepted a bill, and afterwards bought another parcel for 230*l.*, on the same terms. On the first bill becoming due, he gave the defendant two bills on third persons, making together 600*l.*, and the defendant undertook, on their being paid, to return 170*l.*, it not being intended to do more than take up the bill accepted for the price of the first parcel. In an action for the 170*l.*, the defendant was allowed to set off his demand for the second parcel of goods.

A, a merchant, employed B, a broker, to effect policies and sell goods, and trusted him with the possession of the policies; A being indebted to B for premiums on insurance, and having obtained an advance of money upon a pledge of goods placed in B's hands for sale, but not on those goods, to the exclusion of A's general creditors, became bankrupt; afterwards a loss

the credit given by the delivery of the property must in its nature terminate in a debt, and the balance will be taken on the two debts; the words of the statute will in all cases be complied with. But where there is a mere deposit of property, without any authority to turn it into money, no debt can ever arise out of it, and, therefore, it is not a credit within the meaning of the statute.¹

happened, and B received it from the underwriters. It was held that this was a mutual credit within the 5 Geo., II., ch. 30, § 28, and that B might retain the sum received for the loss, in liquidation of his advances, as well as of the balance due for premiums. *Olive v. Smith*, 5 Taunt. 56; 2 Rose 122. See also *Parker v. Carter*, Cooke B. L. 548; *Arboun v. Tritton*, Holt N. P. 408; 3 E. C. L. 164.

But subsequent to *Olive v. Smith*, 5 Taunt. 56, in a case in which the goods themselves had not been intrusted by the bankrupt to his creditor, but where goods had been consigned by the bankrupt to a third party, under an agreement between the former and his creditor, whereby the proceeds of such goods must necessarily pass through the hands of the creditor, it was held that this was a case of mutual credit. *Easum v. Cato*, 5 B. & Ald. 861; 7 E. C. L. 282. In this case, J. S., being desirous of making a shipment at his own risk, but not in his own name, represented to the merchants through whom the shipment was to be made, that the goods were A's, and procured A to write to them to insure, and make advances on the goods, which was done. J. S. having become a bankrupt, it was held that A might recover the proceeds of the goods, and set off a debt due from him to J. S., in an action for them by the assignees. But see *Young v. Bank of Bengal*, 1 Deac. 622; *Moore P. C.* 150; 38 E. C. L. 627.

Deposit in Bank.—When money is deposited with a bank, the bank becomes the debtor of the depositor to the amount of the deposit. See *BANKS AND BANKING*, vol. 2, p. 94, n. 1. When, therefore, the depositor is indebted to the bank, it is a case of mutual credit, and the bank may set off against the claims of the depositor to the amount deposited, a debt due from him to the bank. *Winslow v. Bliss*, 3 Lans. (N. Y.) 220; *Scammon v. Kimball*, 92 U. S. 362. See *Demmon v. Boylston Bank*, 5 Cush. (Mass.) 194; *Fort v. McCully*, 59 Barb. (N. Y.) 87.

1. Thus, in *trover* for cloths deposited by the bankrupt, previous to his

bankruptcy, with the defendant, who was a fuller, for the purpose of being dressed, it was held that the defendant was not entitled to detain them for his general balance for such work done by him for the bankrupt previously to his bankruptcy; for that there was no mutual credit. *Rose v. Hart*, 8 Taunt. 499; 2 Sm. L. C. 308; 4 E. C. L. 185. See *Sampson v. Burton*, 2 B. & B. 89; 6 E. C. L. 50.

A. and Co., merchants in Liverpool, remitted a bill to B. and Co. in London, with directions to get it discounted, and apply the proceeds in a particular way. B. and Co. did not get the bill discounted, but received the money when it became due. Before that time A. & Co. had stopped payment, and demanded the return of the bill. A commission of bankruptcy having been issued against them before the money was received on the bill by B. and Co., it was held, in an action by the assignees of the bankrupts to recover the amount so received, that B. and Co. could not set off a debt due to them from A. and Co. *Buchanan v. Findlay*, 9 B. & C. 738; 17 E. C. L. 486. A bank cannot set off notes left with them for discount, which they have refused to discount, in an action subsequently brought by the assignees in insolvency of the depositor, on a debt due from the bank to him before his insolvency. *Stetson v. Exchange Bank*, 7 Gray. (Mass.) 425.

H. owed the firm of S. & Co. two debts, one on a promissory note secured by a mortgage on real estate, and the other upon a merchandise account. H. remitted to S. & Co. five sums at different times, in each case directing the sum to be applied toward the payment of the note. Three of these sums were applied as directed. The last two sums were not so applied. Soon afterwards H. was adjudged a bankrupt. In an action by S. & Co. to foreclose the mortgage, it was claimed that against the sum of the last two remittances, which were not applied on the note, the unsecured debt could be set-off under the mutual credit clause of the

It has been suggested that the rule which has been laid down "that mutual credits, within the meaning of the bankrupt laws, are credits which must in their nature terminate in debts," means, not, as has been contended in some cases, credits which must, *ex necessitate rei*, terminate in debts, but, credits which have a natural tendency to terminate in debts, and not in claims differing in nature from a debt.¹

But a mere liability which may or may not, but has not become, a debt, cannot be set off.²

bankrupt act. (Bankrupt Act, § 20; U. S. Rev. Stats., § 5073.) But it was held that the remitting of moneys by H. to S. & Co. to be applied according to instructions, made S. & Co., not the debtor, but the trustee of H. *Libby v. Hopkins*, 104 U. S. 303; 25 Alb. L. J. 153.

A had pledged stock in a corporation for the payment of a promissory note given to the defendant, with the authority to the pledgee to sell the same on the non-payment of the note. Subsequently the maker assigned all his property to a trustee for the benefit of his creditors. On the maturity of the note, the trustee tendered the amount of the note to the holder, and on his refusal to deliver the shares, brought a bill in equity to redeem the same. It was held that there was not that mutual credit under the statute (*Massachusetts Gen. Stats.*, ch. 118, § 26) which would allow the defendant to set off other debts due him from the pledgor at the time the note matured. *Hathaway v. Fall River Nat. Bank*, 131 Mass. 14.

It has been stated that when goods are held with a mere power of sale, which the debtor or his assignee may defeat, and which the creditor has not even signified his election to exercise, it does not yet appear that they are to be accounted for as money by the creditor, and therefore he is not yet in a position to set the debts due him against the proceeds if he sells. So, A, the insolvent, had given the defendant a promissory note, payable on demand, and secured by a transfer of shares of stock, and the defendant made other advances to A before and after this transaction, receiving other notes. Demand was made on the note secured three days before the date of the assignment to the plaintiff for the benefit of creditors, but no notice of intentions to sell the security was given; and the defendant bank afterwards became a party to the

assignment. Subsequently the defendant sold the stock held as security. In an action by the plaintiff as trustee under the assignment to recover the surplus of the proceeds of the sale remaining after the payment of the note, the defendant sought to set off certain claims against A on the ground that at the time of the assignment there were mutual credits within the *Massachusetts* statutes (*Gen. Stats.* ch. 118, § 26; *Pub. Stats.* ch. 157, § 27). But it was held that the transaction did not show that the stock was held by the defendant "to be converted into money, so that the liability to account for it would ultimately become a debt," so that there was not a mutual credit within the statute. *Brown v. New Bedford Sav. Inst.*, 137 Mass. 262. See *Tallman v. New Bedford Five Cents' Bank*, 138 Mass. 330.

1. Thus it was settled in *Smith v. Hodson*, 4 T. R. 211; 2 Sm. L. C. 126, that an accommodation acceptance is a credit, given by the acceptor to the party accommodated; and yet it is not certain to end in a debt, for the party accommodated ought to provide for the bill, at maturity, and, if he do, there will be no debt. *Yates v. Hoppe*, 9 C. B. 541; 67 E. C. L. 541.

2. Where A, B, and C, dissolved partnership, there being at that time due from the firm to one H a sum of 51,891*l.* 12*s.*, and from A to the firm the sum of 6,817*l.* 9*s.*, 8*d.*, and it was agreed that A should pay to B and C the debt due from him to the firm, and that B and C should keep the stocks and assets of the firm and should pay H, but B and C became bankrupts while the greater part of H's debt still remained unpaid, it was held that A's liability to pay H was in the nature of a guaranty, in respect of which he might never be called upon to pay anything, and that consequently he could not set off the sum of his liability to H in an action by the assignees of

It is to be remembered that the same mutuality is required in the case of setting off credits under the bankruptcy laws, as is required in order that debts may be set off under the ordinary statutes of set-off.¹

(2) *Mutual Dealings*.—The right of set-off in the case of bankruptcy has, in England, been extended to "mutual dealings" between the bankrupt and his debtor. But it is difficult to determine from the decided cases whether this permits other claims to be set off than those which could have been so employed under the earlier statutes, which authorized the practice only where there were mutual "debts" and "credits."²

5. *What Subjects of Set-off May be Set off*.—*a. IN GENERAL*.—When it is determined that a particular demand is comprehended by the terms of the governing statute of set-off, whether the right is thereby, as in the more common provisions, limited to mutual debts, or is more generally allowed, as is done by some statutes which allow unliquidated claims, and by others (the bankruptcy acts) which permit mutual credits and dealings to be set off, it is necessary that it should conform to certain requirements which

the bankrupts. *Abbott v. Hicks*, 7 Scott 715. And see *Sampson v. Burton*, 2 B. & B. 89; 6 E. C. L. 50; *Arbouin v. Tritton*, Holt. N. P. 408; 3 E. C. L. 164; *Wood v. Dodgson*, 2 M. & S. 195.

1. 8 Bac. Abr. 651; *Staniforth v. Fellowes*, 1 Marsh. 184. See *infra*, this title, *The Requirement of Mutuality as to Claims in Set-off*.

2. The English Bankrupt Act, 1869, § 39, makes use of the term "mutual dealings," as well as the term "mutual credits" and "mutual debts", which alone are to be found in the older bankrupt acts. Still it has been supposed that the meaning of this term is not materially different from the others; that it would probably be held to mean such dealings only as, in the natural course of business, would end in debts. 2 Chitt. Contr. 1285.

But some authorities have been disposed to give a wider meaning to the term. 2 Sm. L. C. 328.

In *Booth v. Hutchinson*, L. R., 15 Eq. 30, which was the case of a deed incorporating the provisions of the Bankruptcy Act, 1869, it was held that a claim for damages for breach of covenant which were ascertained at the date of the deed might be set off against the claim for rent due and accruing due to the insolvent estate up to the time of the distribution of the estate under the deed. In delivering judgment, Malins, V. C., said: "If the case were under

the old law I should probably have concluded that there was no right of set-off, but the old decisions rested on the construction which the courts had put upon the words 'mutual' and 'mutual credits.' . . . The language of the act of 1869 is altered from that of previous acts and made more comprehensive; and I must therefore conclude that the right of set-off given by the previous acts was considered to be too restricted, and was intended to be enlarged."

In *Ex parte Barnett, In re Deveze*, L. R., 9 Ch. 293, *Barnett & Co.* had had business transactions with a trader who became bankrupt, and at the time of the bankruptcy the bankrupt owed *Barnett & Co.* £3010, and *Barnett & Co.* owed the bankrupt £88, in respect of which sum he had a lien upon goods of *Barnett & Co.* in his possession. On a claim by the trustee in bankruptcy that *Barnett & Co.* should pay the £88 in full, and should prove, for the whole sum of £3,010 against the bankrupt's estate, it was held that they were entitled to have the sum of £88 set off against their claim, so as to free the goods from the lien, and to prove for the balance against the bankrupt's estate. But though this case was decided upon the recent act, Lord Selbourne, C. guarded himself from expressing an opinion upon the effect of the additional words.

A contractor failed to carry out his

result from the very nature of set-off, although they are sometimes also demanded by the express terms of the statute. The object of these statutes of set-off is, as has been said, to do away with circuity of actions as much as practicable; this is sought to be accomplished by the abrogation of the common-law necessity of resorting to an independent action for the recovery of the demands comprehended by these statutes, and permitting them to be recovered in an action by the plaintiff. Set-off is, then, in the nature of a cross-action; the defendant must, to sustain the matter of his set-off, show whatever would be necessary to support an independent action thereon, and may be met by the same defenses.¹ And a claim must, in order to be set off, be one upon which an action could be maintained by the defendant against the plaintiff.²

In the construction of the statute of 2 Geo. II, it had been doubted whether debts of a superior nature could be set off against those of an inferior nature, and *vice versa*.³ This occasioned the enactment of the 8 Geo. II, which settled that mutual debts could be set off against one another notwithstanding that such debts are deemed in law to be of a different nature.⁴

contract, and had gone into liquidation. There was a clause in the agreement empowering the employers to use the plant left by the contractor on the premises in case of his default, and a portion had accordingly been used up by a contractor duly substituted under the contract. The balance remaining unused was sold by agreement, and the sum realized was claimed by the trustees. The employers sought to set off the damages sustained by them through the breach of contract, contending that there had been mutual dealings between them and the debtor, in respect of which they were entitled to the set-off. This contention the learned judge overruled, being of the opinion that inasmuch as the employers acquired no property in the plant, but only a right to use it in a certain event, there had not, under the circumstances, been a dealing in respect of the sum realized. *Ex parte Bolland, In re Winter*, 8 Ch. D. 225; 47 L. J. Bkcy. 52.

1. As to garnishee's right of set-off, see Ill. Rev. Stat. 1891, p. 750, § 13; Colo. Annot. Stat. 1891, § 2732; 5 Rob. Pr. 961; *Dickson v. Evans*, 6 T. R. 57; *Shaw v. Arden*, 9 Bing. 287; 23 E. C. L. 278; *Gorham v. Bulkley*, 49 Conn. 91; *Olmstead v. Scutt*, 55 Conn. 125; *Messmore v. Larson*, 86 Ill. 268; *Stephens v. Beard*, 4 Wend. (N. Y.) 604; *Collins v. Butts*, 10 Wend. (N. Y.) 399; *Leas v. Laird*, 6 S. & R. (Pa.) 129; *Mandeville v. Patton*, 3 Call (Va.) 9.

So, where notes sued upon are proven to have been given upon a settlement, and the defendant sets up a claim which accrued prior thereto, he must show that it was not included in the settlement. *Perry v. Roberts*, 17 Mo. 36; *Campbell v. Hays*, 1 Ind. 547. See *Gould v. Chase*, 16 Johns. (N. Y.) 226; *Henry v. Brown*, 19 Johns. (N. Y.) 49.

Where a contractor sued the defendant for work performed upon a building, and the defendant sought to set off the price of certain lime which had been furnished and charged, first to the contractor and then to the defendant, as owner, it was held that to establish the set-off, the burden of proof rested upon the owner to show, either that he had paid for the lime, or that he and not the contractor was liable for it. *Belshaw v. Colie*, 1 E. D. Smith (N. Y.) 213.

2. See *infra*, this title, *Must be Subsisting Cause of Action*.

3. *Hutchinson v. Sturges*, Willes 262. But it was subsequently said that under this statute a debt by a simple contract might be set off against a specialty debt. See next note, *infra*.

4. *De Grey, C. J.*, in *Barker v. Braham*, 2 W. Bl. 869.

It should be observed that the day after this act of 8 Geo. II. passed, Lord Hardwicke, C. J., delivered the opinion of the court of king's bench, that a debt by a simple contract might, by the former act, have been set off against a

b. MUST BE SUBSISTING CAUSE OF ACTION.—Only such demands, as constitute a subsisting cause of action can be set off; nothing can be pleaded as a set-off on which a separate action cannot be maintained.¹ A claim, in order that it may be set off, must be a legal demand.² So a claim founded upon an agree-

specialty debt. *Brown and Holyoak*, 8 Geo. II., Bull. N. P. 179.

Notes not secured by mortgage may be set off against such as are thus secured. *Spencer v. Chrisman*, 15 Ind. 215.

Under a statute providing that debts may be set off "although such debts are of a different nature," the cross-demands do not have to grow out of the contract or cause of action upon which plaintiff sues; it was held that a claim for pasturing plaintiff's cattle might be set off against plaintiff's claim for services rendered. *McCum v. Frazier*, 38 Mo. App. 63.

1. *Mangum v. Ball*, 43 Miss. 288; 5 Am. Rep. 488; *Battle v. Thompson*, 65 N. Car. 416; *Moore v. Tate*, 87 Tenn. 725; *Evans v. Bell*, 45 Tex. 553; *Ewing v. Griswold*, 43 Vt. 400.

Under a statute providing that "if any inn-holder or tavern keeper shall trust any person (other than travelers) above the sum of \$1.25 for any sort of strong or spirituous liquors, or other tavern expenses, he shall lose every such debt, and be incapable of suing for the same or any part thereof," a tavern bill, unless against a traveler, cannot be set off. *Evernghim v. Ensworth*, 7 Wend. (N. Y.) 326.

Under the *Massachusetts* act of 1808, regulating manufacturing corporations, no action can be maintained by a manufacturing corporation, either against a stockholder or his executor, to enforce the payment of assessments laid on his shares; and, consequently, such corporation cannot set off a claim for unpaid assessments, in an action against it by such executor, for a debt due to the stockholder. *Cutler v. Middlesex Factory Co.*, 14 Pick. (Mass.) 483.

Where A, the maker, paid a note held by B, although the note had not been indorsed by the payee to the holder, A being ignorant of this fact, he was not, in a subsequent action, on the principle of recovering money paid by mistake, allowed to set off the sum thus paid. This was not a case where there could have been a recovery as of money paid by mistake or ignorance of facts; it appeared con-

clusively that, although not indorsed, the note was transferred to the holder before maturity for a valuable consideration, and that the omission to indorse happened by inadvertence. *Franklin Bank v. Raymond*, 3 Wend. (N. Y.) 69.

Under a statute which, after enumerating the demands that may be set off, provided that "no debt or demand shall be set off as aforesaid, unless a right of action existed thereon at the commencement of the plaintiff's action," a tax assessment was held not to be a debt or demand which might be set off, since the right which the collector of taxes had to collect a tax assessed in his list was considered not to be a right of action under this statute. *Hibbard v. Clark*, 56 N. H. 155; 22 Am. Rep. 442.

2. *Kelley v. Garrett*, 6 Ill. 649.

So, there cannot, where the common law disability of the wife to contract has not been altered by statute, be set off a debt claimed to be due on a contract with the wife after marriage, for, during coverture, she can do no act which will operate as a contract to charge either herself or her husband. *Norris v. Booth*, 8 Ala. 907.

The plaintiff, being a joint owner with the defendants, of a vessel, proceeded with her from the United States to the port of one of two belligerent nations with whom the United States were at peace, and there fitted her out as a privateer, and cruised with her against the subjects of the other belligerent. In a suit in chancery for the application of a proportion of the expenditures of the plaintiff, in such enterprise, to a debt due from him to the defendants, it was held that, the object for which these expenditures were made being illegal, a court of chancery would leave the parties, with respect to them, where it found them. *Pond v. Smith*, 4 Conn. 297.

The general rule being that no right of contribution exists between wrongdoers (see CONTRIBUTION, vol. 4, p. 12, n. 1) it was held that a judgment recovered against the plaintiff and defendant as *tort feorsors*, and paid in full by

ment without a consideration cannot be set off;¹ nor one

the defendant, cannot be set off. *Percy v. Clary*, 32 Md. 245.

After a specific performance of a contract for the sale of land had been decreed in a suit for that purpose, the plaintiff refused to complete the contract. It was held that he could not, in an action for the rents of the property, offset the amount paid by him upon the contract. *Clark v. Hale*, Clark's Ch. (N. Y.) 349.

If, under a contract for the purchase and sale of real and personal property, the seller delivers the personal property to the purchaser, and fails to carry out the residue of the contract, but the contract is not rescinded, the seller cannot set off the value of the property delivered in an action upon an independent debt from him to the purchaser. *Wheeler v. Parks*, 15 Gray (Mass.) 527.

On the principle that no person can make another his debtor without that person's knowledge or consent (see *DEBTOR AND CREDITOR*, vol. 5, p. 180, notes 6 & 7), it was held that the defendant in assumpsit could not be permitted to set off a quantity of yarn, which he had delivered to the plaintiff without the plaintiff's knowledge. *Broughton v. Dyson*, Cheves (S. Car.) 208.

Payment by A of the debt of B, without his consent, cannot be allowed as a set-off in a suit by B against A on a due-bill. *Patillo v. Smith*, 61 Ga. 265.

In an action for willful trespass for carrying away plaintiff's wheat, the jury cannot deduct from the damages the probable expense that the plaintiff would have incurred in harvesting the wheat. *Bull v. Griswold*, 19 Ill. 631. For a similar case, see *Chicago, etc., Branch Dock Co. v. Dunlap*, 32 Ill. 207.

A compromise of an outstanding claim by the grantee of land without the knowledge or consent of the grantor gives the grantee no claim to a set-off in an action for the purchase money. *Taggart v. Stanbery*, 2 McLean (U. S.) 543.

The payment of an outstanding incumbrance by the purchaser of land, with a covenant that the land is free of incumbrances, cannot be the subject of offset in an action for the purchase-money. *Dunn v. White*, 1 Ala. 645.

On the principle that no claim to compensation can arise from the per-

formance of services as a mere gratuity or gift, it has been held that where a defendant did not intend to charge the plaintiff anything for various items when they were furnished, he cannot, after an action has been commenced, make charges for them in set-off and recover thereon. *Collins v. Martin*, 43 Kan. 182.

A defendant is not at liberty, for the purpose of turning the plaintiff out of court, to set up and claim the benefit of a contract which he concedes he refused to regard and expressly repudiated. *McQueen v. Gamble*, 33 Mich. 344.

Where A holds an assignment of a claim against B, which is not enforceable against the latter without his acceptance of the assignment, a note made by A to B, and transferred by the latter to C, will not be subject to set-off of the first-mentioned claim. *Stanbery v. Smythe*, 13 Ohio St. 495.

When a man makes a will, all prior advancements are considered as merged, and, therefore, a writing given by a child to a father, acknowledging the receipt of an advancement, was not allowed to be used by way of set-off in a suit by the child to recover a legacy given to him in a will afterwards made by his father. *Jones v. Richardson*, 5 Met. (Mass.) 247.

1. *Bunnell v. Butler*, 23 Conn. 65; *Tryon v. Mooney*, 9 Johns. (N. Y.) 358.

A, being employed as overseer on a plantation, was conscripted by the confederate military authorities. The owner of the plantation, by his influence, and by the payment of money and provisions secured the release of the conscript from active duty, and had him detailed as overseer of the plantation. In an action by A for services rendered by him as overseer, it was held that the defendant's claim for such money and goods paid out could not be pleaded in reconvention, for the reason that the arrangements and treaties entered into with the confederate government, looking to the exemption of the plaintiff from military service, were not binding on the plaintiff, who was not legally bound to the so-called confederate states, and consequently no right of action was acquired against him in consequence of such payment. *Callehan v. Stafford*, 18 La. Ann. 556.

founded upon a gaming consideration;¹ nor a debt not actionable under the Statute of Frauds.² Nor can a debt which was contracted by the plaintiff during infancy and has not been ratified by him after full age, and hence is not actionable, be so employed.³ But if a part of a divisible demand be legal, and a part illegal, that which is legal may be set off accordingly.⁴ It is incumbent upon the person claiming the set-off to separate the part admissible from the part objectionable; otherwise the whole will be rejected.⁵

A demand which is only conditional or contingent cannot be set off;⁶ it must be due and payable.⁷ Where a contingent liability on the part of the defendant on behalf of the plaintiff is shown to exist, it, nevertheless, cannot be set off unless it is also shown that it has actually been discharged by the defendant.⁸

1. *Payne v. Loudon*, 3 Bibb (Ky.) 250; *Caldwell v. Caldwell*, 2 Bush (Ky.) 446.

2. *Sennett v. Johnson*, 9 Beav. 335; *Lawrence v. Smith*, 27 How. Pr. (N. Y.) 327.

3. *Rawley v. Rawley*, 1 Q. B. Div. 460.

In an action by minors against a stepfather for rent, it was held that, under the circumstances of the case, he might set off the value of necessities furnished by him to the minors. *Grossman v. Lauber*, 29 Ind. 618.

4. *Rice v. Welling*, 5 Wend. (N. Y.) 595; *McCraney v. Alden*, 46 Barb. (N. Y.) 272; *Crippen v. Heermance*, 9 Page (N. Y.) 211; *La Farge v. Herter*, 11 Barb. (N. Y.) 168.

5. *Rootes v. Wellford*, 4 Munf. (Va.) 215.

6. *U. S. v. Wells*, 2 Wash. (U. S.) 161. See *Hinrichsen v. Reinback*, 27 Ill. 205.

7. *Wolfe v. Washburn*, 6 Cow. (N. Y.) 261.

In an action by the payee of a promissory note the defendant cannot set off a demand against a third person, in consequence of the payee's having made a valid engagement that the maker shall receive such demand out of the payee's estate after his decease. *Foot v. Martin*, 1 Met. (Mass.) 273.

In an action upon a promissory note the defendant cannot set off a bond given to him by the plaintiff conditioned for the delivery of a certain quantity of metal to a third person or order "at any time when called on" without first proving that the delivery of the metal had been demanded. *Leas v. Laird*, 6 S. & R. (Pa.) 129.

A surety paying a claim before it is

due cannot set off the sum paid before the debt has become due. *Jackson v. Adamson*, 7 Blackf. (Ind.) 597.

In an action by executors against a legatee to recover a claim which was held by the testator against him, it seems to have been held that the defendant can set off the amount of a legacy which the testator had bequeathed to him, if the time has not arrived when by statute it is demandable. *Sorrelle v. Sorrelle*, 5 Ala. 245.

Where suit is brought by executors against a legatee under the will of their testator, on an account for money alleged to be due, he cannot plead as a set-off the amount of his legacy, unless he shows the estate to be solvent and in a condition to be distributed. *Dobbs v. Prothro*, 55 Ga. 73.

So, a plea in set-off for money paid at plaintiff's request, which did not allege directly or by inference that the demand was due and unpaid, was held to be demurrable. *Johnson v. Tyler*, 1 Ind. App. 387.

8. *Griggs v. Detroit, etc., R. Co.*, 10 Mich. 116; *Detroit, etc., R. Co. v. Griggs*, 12 Mich. 45.

The defendant cannot set off a draft drawn on him unless he has paid it. *Wakeman v. Vanderbilt*, 3 Cal. 380.

In an action to recover the hire of a slave, it was held that the defendant could not set off a physician's account for attending the slave when sick, though the owner might be liable therefor; it not appearing that the defendant had paid the bill. *Brooks v. Cook*, 20 Ga. 87.

An incumbrance of unpaid taxes upon land must be paid before the vendee can plead the same in set-off to an action for the recovery of the purchase

money. *Mills v. Saunders*, 4 Neb. 190.

Where the plaintiff sold land to the defendant, and the defendant gave a note for part of the price and agreed to pay the costs of a suit against the plaintiff, and that the costs so paid were to be credited on the note, it was held in an action to enforce the purchase-money note against the land, that the defendant could not reduce a recovery on account of such costs, except by showing payment thereof; the fact that he had suffered judgment to be entered against him therefor was considered immaterial. *Hembree v. Glover*, 93 Ala. 622.

One who purchases real property, taking a warranty deed therefor and giving back a mortgage to secure purchase money, cannot, on foreclosure of such mortgage, set off the amount of a prior incumbrance which he has not paid, if he has not otherwise been damaged. *Griggs v. Detroit, etc., R. Co.*, 10 Mich. 117; 12 Mich. 45.

Liability of Surety.—(See SURETYSHIP).—A surety until he pays the money for his principal, has no demand against him available as a set-off. *Jenkins v. Neal*, 52 Ark. 418; *Walker v. McKay*, 2 Metc. (Ky.) 294; *Backus v. Spaulding*, 129 Mass. 234.

It was held that a surety who has made a note for the purpose of raising money to satisfy a judgment recovered against him for the default of his principal, but who has not paid any money on account of such judgment, is not entitled to set off the judgment against a debt due from him to the principal. *Jones v. Wolcott*, 15 Gray (Mass.) 541. But it has also been held that if a principal brings an action against his surety on a money demand, the surety may set up in defense the fact of the recovery against him of a judgment on his contract of suretyship. *Hannay v. Pell*, 3 E. D. Smith (N. Y.) 432.

A gave his note to B, who assigned it to C, who sued A on it. A was security for B, on two notes to other parties, which A had taken up by giving his own notes to those parties, which were unpaid and were not commercial paper. It was held that these facts would not give the defendant a right to set off this liability as security for A in an action against him, and hence could not be set off against the plaintiff. *Judah v. Potter*, 18 Ind. 224. Where A obtained credit from B upon an agreement to pay and take up, as

they should become due, certain notes made by B, and indorsed by C, but failed to do so, it was held that B might recover the amount due, and that A could not avail himself of his liability as a set-off. *Colvin v. Carter*, 4 Ohio 354.

But where land is conveyed subject to a mortgage for which the grantor is personally liable, and the deed declares that the grantee is to pay the mortgage as a part of the purchase money, the contract made by the assumption in the deed is not one of indemnity merely; it is a contract to pay, and the grantor in the deed may set it off against him in a suit brought by the legal representatives of the grantee upon a contract for the payment of money. *Rawson v. Copland*, 2 Sandf. Ch. (N. Y.) 251; *aff'd* 3 Barb. Ch. (N. Y.) 166. But it seems that this case has been practically overruled on the ground that there was a want of mutuality of the debts. *Patterson v. Patterson*, 59 N. Y. 574; 17 Am. Rep. 384; *Jordan v. National Shoe, etc., Bank*, 12 Hun (N. Y.) 512.

Where there is Absolute Liability.—

But it seems to be otherwise where the defendant's liability becomes absolutely fixed. In *Sandwich Mfg. Co. v. Kelly*, 26 Ill. App. 394, a buyer, who had given two notes for the purchase price of a reaper, rescinded the sale for breach of warranty. The seller had assigned one of the two notes before maturity. It was held in an action on the other, that the defendant could set off his liability on the assigned note, although payment was not made until after suit brought. The court by Wall, J., said: "It is also objected that the set-off should not prevail because the money was paid upon the note assigned to Mosher after the suit was brought. It is said that the plea of set-off is in the nature of a cross-action, and that the subject-matter thereof must have existed when the principal suit was begun. Admitting this to be sound as a general proposition we think it has no application here. If the action of the appellee was warranted by the terms of the contract and by what occurred subsequently, the return or offer to return operated as a rescission of the contract so far as he was concerned, and he had a right to the immediate return of his notes. If appellant failed to make such return, appellee then had a cause of complaint. If one of the notes was then in the hands of the assignee for value, the

A defendant cannot, of course, set off a debt which has been discharged.¹ A debt, the collection of which has been enjoined,² or which has become barred by the principle of *res judicata*,³ by the statute of limitations,⁴ or other-

liability of appellee to pay it was fixed. *Lee v. Pennington*, 7 Ill. App. 247; *Pollock v. McClurken*, 42 Ill. 370. He could not escape, and there was no hardship in permitting him to recover on his plea of set-off the amount he was bound to pay when the suit was commenced, although he did not discharge the liability till afterward. By thus transferring the note appellant imposed the liability upon appellee. The act of appellant was complete before the suit was brought and the legal obligation thereby caused was perfect and unavoidable. Being absolutely bound for this amount, appellee might set it off in this action."

1. A bond which has been canceled cannot be set off. *Williams v. Crary*, 5 Cow. (N. Y.) 368.

It was held that a defendant was not entitled to plead a debt from which the plaintiff had been discharged under the insolvent debtors' act, as a set-off to an action brought by the plaintiff for a demand which had accrued since the discharge. *Francis v. Dodsworth*, 4 C. B. 202; 56 E. C. L. 201. So, as to a debt for which a prisoner was in execution, and has been discharged on a compromise, though the security taken for the amount afterwards proved to be void. *Jacques v. Withy*, 1 D. & E. 557. A debt cannot be set off which has been satisfied in law in consequence of the debtor having been taken in execution upon a judgment by which it was recovered. *Taylor v. Waters*, 5 M. & S. 103; but see *Peacock v. Jeffery*, 1 Taunt. 426; *Simpson v. Hadley*, 1 M. & S. 696; *Drake v. Mitchell*, 3 East 258.

Where an order, drawn by the plaintiff on the defendant, and accepted by the latter, was given for a debt, but not paid, and was thereupon surrendered to the maker, who gave his notes in lieu thereof, it was held that the drawee could not set off such order in an action against him by the maker. The order had not been paid by the defendant, and, on the facts, was considered to have been discharged by plaintiff. *Taylor Mfg. Co. v. Key*, 86 Ala. 212.

2. *Key v. Wilson*, 3 Humph. (Tenn.) 405.

3. *Jones v. Richardson*, 5 Met. (Mass.) 247; *Harpstrite v. Vaseh*, 3 Ill. App. 121. See *Ault v. Zehering*, 38 Ind. 429.

In accordance with the rule that a suit brought for one portion of a demand, or for one of several demands, arising out of the same transaction, is a bar to a subsequent suit for the residue of such demand or demands, if they were all due when the suit was commenced, such unrepresented claim may not be subsequently made use of by way of set-off. *Miller v. Covert*, 1 Wend. (N. Y.) 487; *Hopf v. Myers*, 42 Barb. (N. Y.) 270.

To a writ of *scire facias* directed to a defendant to show cause why money received by virtue of a judgment in the supreme court in his favor, which had been reversed in the court of appeals, should not be restored to the plaintiff, the defendant cannot set up, by way of set-off, the original cause of action upon which the judgment in the supreme court had been obtained. *Conover v. Scott*, 11 N. J. L. 400.

In an action on a restitution bond executed by a defendant in error in pursuance of the *Ohio* Code, § 522, the claim on which the original action was brought cannot, by dismissal or otherwise, be made an available set-off. *Bickett v. Garner*, 31 Ohio St. 28.

4. LIMITATION OF ACTIONS, vol. 13, p. 767; *Cranch v. Kirkman*, Peake 121; *Chapple v. Durston*, 1 C. & J. 1; *Gorham v. Bulkley*, 49 Conn. 91; *Lee v. Lee*, 31 Ga. 26; 76 Am. Dec. 681; *Finney v. Brumby*, 64 Ga. 510; *Williams v. Gilchrist*, 3 Bibb (Ky.) 49; *Gilchrist v. Williams*, 3 A. K. Marsh. (Ky.) 235; *Tyler v. Boyce*, 135 Mass. 258; *Nason v. McCulloch*, 31 Me. 158; *Nolin v. Blackwell*, 31 N. J. L. 170; 86 Am. Dec. 206; *Thompson v. Sickles*, 46 Barb. (N. Y.) 49; *Crist v. Garner*, 2 P. & W. (Pa.) 251; *Jacks v. Moore*, 1 Yeates (Pa.) 391; *Hineckley v. Walters*, 8 Watts (Pa.) 260; *Taylor v. Gould*, 57 Pa. St. 152; *Gilmore v. Reed*, 76 Pa. St. 462; *Madden v. Madden*, 2 Mill (S. Car.) 350; *Turnbull v. Strohecker*, 4 McCord (S. Car.) 210.

But, in *Indiana*, the statute (2 Rev. Stats. p. 77, § 214) provides that "a

wise,¹ cannot be set off. The rule that a defendant can set off a claim against the plaintiff only when he could bring an independent suit thereon, is well illustrated in the rule, founded upon the common-law doctrine that the sovereign cannot be sued in his own courts without his consent, that, when the government is plaintiff, a set-off cannot be allowed.²

party to an action may plead or reply a set-off or payment, to the amount of any cause of action or defense, notwithstanding such set-off or payment is barred by the statute." And this statute has been construed literally. See *LIMITATION OF ACTIONS*, vol. 13, p. 767, n. 1.

It was held in *Massachusetts*, in an action by the assignee of an insolvent debtor on a debt due to the insolvent, that debts due and payable from the insolvent more than six years before the commencement of the action, but less than six years before the commencement of the proceedings in insolvency, may be set off. *Parker v. Sanborn*, 7 Gray (Mass.) 191. In the decision of this case the court by Metcalf, J., said: "After the property of an insolvent debtor has been assigned under the insolvent laws, and thus sequestered and placed in the custody of the law in trust for his creditors, the Statute of Limitations does not run against their claims upon his estate in the hands of his assignee. *Minot v. Thatcher*, 7 Met. (Mass.) 352; 41 Am. Dec. 444; *Willard v. Clarke*, 7 Met. (Mass.) 437. The assignee, in bringing a suit upon a demand which is due to the insolvent before the commencement of proceedings in insolvency, represents the estate; and in such suit all claims of the defendant may be set off which existed at the time of the first publication of notice. *Aldrich v. Campbell*, 4 Gray (Mass.) 284. A claim against the estate of the debtor in the hands of his assignee, stands upon a different ground, in this respect, from the right of action against the debtor personally. That right is not taken away nor suspended by the proceedings in insolvency, and is therefore barred by the lapse of the usual period of limitation. *Colleston v. Hailey*, 6 Gray (Mass.) 519."

1. The statute of bankruptcy, in regulating the proof of claims before the register of bankrupts, recognized the right of set-off in all cases of mutual debts or mutual credits, and provided that only the balance should

be allowed and paid, but also provided "that no creditor, proving his debt or claim, shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt." It was held that a creditor who, in making proof of his claim before the register of bankruptcy omitted to show that the bankrupt had an unsatisfied claim against him, cannot, when sued by the assignee for such claim, plead as a set-off the amount allowed him by the register; the party defendant, in pleading a set-off, in effect, brings an action for the amount of that set-off, and, since the creditor, by presenting and proving his claim before the register, is to be deemed as waiving "all right of action or suit against the bankrupt," it would be clearly contrary to the evident intent of the statute, to allow a creditor to do that indirectly which the law precludes him from doing directly. *Russell v. Owen*, 61 Mo. 185. See *Brown v. Farmers' Bank*, 6 Bush (Ky.) 198.

2. *White v. Governor*, 18 Ala. 767; *Com. v. Rodes*, 5 T. B. Mon. (Ky.) 318; *State v. Leckie*, 14 La. Ann. 646; *State v. Bradley*, 37 La. Ann. 623; *State v. Baltimore, etc., R. Co.*, 34 Md. 344; *Com. v. Matlack*, 4 Dall. (U. S.) 303; *Battle v. Thompson*, 65 N. Car. 416; *Treasurers v. Cleary*, 3 Rich. (S. Car.) 372; *Moore v. Tate*, 87 Tenn. 725; *Borden v. Houston*, 2 Tex. 594; *Bates v. Republic*, 2 Tex. 616; *Chevalier v. State*, 10 Tex. 315. The rule stated in the text forbids the court of chancery to entertain a bill by a public creditor against the State, to compel a set-off of a demand he holds due from the State against one of independent origin, which the State holds against him. *Raymond v. State*, 54 Miss. 562; 28 Am. Rep. 382. See *BONDS*, vol. 2, p. 466 *§*.

But, in *Ohio*, it seems to be held that, although a judgment cannot be rendered against the State, yet, in an action by the State, the defendant may set off a claim against it. *State*

As no action can be brought by one partner against his co-partner upon any partnership transaction, unless there has been a settlement of the whole concern or of the claim in question, and a promise of payment, the unsettled dealings of either partner with the firm cannot be set off in an action at law by one partner against the other.¹

The claim sought to be set-off must be one which can be recovered in an action in the same court. A sum which is greater than the court's jurisdiction cannot be set off.² And the same rule which prevents a plaintiff from dividing his claim in order to give a certain court jurisdiction³ will preclude a defendant from setting off against the plaintiff's demand, part of a cross-demand,

v. Franklin Bank, 10 Ohio 91. See also *Powers v. Central Bank*, 18 Ga. 648; *State v. Dickinson*, 12 Smed. & M. (Miss.) 579; *State v. Gaillard*, 1 Bay (S. Car.) 500, virtually overruled by *Treasurers v. Cleary*, 3 Rich. (S. Car.) 372. See review of these cases in *Moore v. Tate*, 87 Tenn. 725.

Statutes Permitting Set-off Against Government.—There are statutory enactments which permit set-offs to be employed in an action by the government. See review of cases decided under such provisions in *Moore v. Tate*, 87 Tenn. 725.

A defendant must, when he desires to avail himself of such set-off, strictly comply with the statute. *Biscoe v. State*, 19 Ark. 559; *Frier v. State*, 11 Fla. 300.

1. *Randall v. Baird*, 66 Mich. 312; *Ordiorne v. Woodman*, 39 N. H. 541; *Stuges v. Swift*, 32 Miss. 239; *Tomlinson v. Nelson*, 49 Wis. 679. See *PARTNERSHIP*, vol. 17, pp. 1254, 1255. See *Weaver v. Rogers*, 44 N. H. 112. To illustrate: if plaintiff and defendant are partners in a concern, and plaintiff sues defendant for a debt separate from the concern, the defendant cannot set off a balance due to him on the partnership account; for he could not sue for such balance while the partnership lasted, and therefore cannot set it off. *Fremont v. Coupland*, 2 Bing. 170; 9 E. C. L. 366.

And setting off such claim after the partnership has been dissolved, would not, under the usual provisions for set-off, be admissible, for the reason, if none other, that it is not a liquidated claim. But under a statute providing that a set-off "must consist of matter arising out of a debt, duty, or contract, liquidated or not," it was held that an unliquidated demand growing out of unsettled copartnership accounts may,

the partnership having been dissolved, be pleaded in set-off (*Irish v. Snelson*, 16 Ind. 365), if the plea shows the balance due the defendant to be growing out of the entire partnership transaction. *Hendry v. Hendry*, 32 Ind. 349. In a suit by the executrix of one partner against the surviving partner on an open note, the defendant cannot set off an item arising from a single partnership transaction. *McKay v. Overton*, 65 Tex. 82.

Where a partner, after drawing checks upon the funds of the firm for his own personal use and charging them against himself, was succeeded by another partner, he selling out his interest to the new firm, it was held that the new firm could not sue him at law for the amount of the new checks, nor use them as offset against an action brought by him against the firm; the mutual liabilities of the old firm should be settled by an accounting. *Gardiner v. Fargo*, 58 Mich. 72.

2. *JURISDICTION*, vol. 12, p. 286, n. 1; *Cash v. Cash*, Ga. Dec. 97; *Picquet v. Cosmick*, Dudley (Ga.) 20; *Babcock v. Peck*, 4 Den. (N. Y.) 292. See *Dalby v. Murphy*, 25 Tex. 354. But see *McClain v. Kincaid*, 5 Yerg. (Tenn.) 232; *Glass v. Moss*, 1 How. (Miss.) 519. It was said to be a proper practice, where the defendant in a summary process has a set-off which exceeds the summary jurisdiction of the court, and it is alleged that the plaintiff is insolvent, for the court, on being satisfied of its merits, to order the plaintiff to declare in the higher jurisdiction, so as to enable the defendant to set up his discount; and this practice was adopted in such case. *Beckham v. Peay*, 1 Bailey (S. Car.) 121.

3. See *JURISDICTION*, vol. 12, p. 285, n. 2.

the whole of which is not within the court's jurisdiction.¹ A set-off can only be pleaded in a county in which an original proceeding for the cause of action could be brought.²

While it is not necessary that the demand which the plaintiff seeks to set off should have been due at the time when the plaintiff's cause of action accrued,³ yet, it is not properly a subject of set-off unless it existed when the plaintiff brought his action and at that time belonged to the defendant; it must at that time have been a subsisting cause of action by the defendant against the plaintiff.⁴ It is not sufficient that the defendant held an unma-

1. *Orr v. Foot*, 2 Brev. (S. Car.) 379; *Wells v. Reynolds*, 3 Brev. (S. Car.) 407; 1 *Treadw. Const.* (S. Car.) 478.

2. *Bennett v. McCrocklin*, 3 Metc. (Ky.) 322.

3. *Lee v. Lester*, 7 C. B. 1008; 62 E. C. L. 1007; 18 L. J. C. P. 312.

4. *Hutchinson v. Reed*, 3 Camp. 329; *Braithwaite v. Coleman*, 4 N. & M. 654; 30 E. C. L. 403; *Leman v. Gordon*, 8 C. & P. 392; 34 E. C. L. 444; *Gladstone's Case*, L. R., 1 Ch. 538; *Scott v. Jones*, 1 Brock. (U. S.) 244; *Deale v. Krofft*, 4 Cranch (C. C.) 448; *Cox v. Cooper*, 3 Ala. 256; *McDade v. Mead*, 18 Ala. 214; *Johnson v. King*, 20 Ala. 270; *Jones v. Blair*, 57 Ala. 457; *Wood v. Steele*, 65 Ala. 436; *Golthwaite v. National Bank*, 67 Ala. 549; *Henry v. Butler*, 32 Conn. 140; *Edwards v. Temple*, 2 Harr. (Del.) 322; *Whitaker v. Pope*, 48 Ga. 15; *Kelley v. Garrett*, 6 Ill. 649; *Ellis v. Cothran*, 117 Ill. 458; *Rumsey v. Robinson*, 58 Iowa 225; *Walker v. McKay*, 2 Metc. (Ky.) 294; *Houghton v. Houghton*, 37 Me. 72; *Robinson v. Safford*, 57 Me. 163; *Carkrew v. Canavan*, 4 How. (Miss.) 370; *Desearn v. Babers*, 62 Miss. 421; *Skaggs v. Given*, 29 Mo. App. 612; *Frazier v. Gibson*, 7 Mo. 271; *Reppy v. Reppy*, 46 Mo. 571; *Varney v. Brewster*, 14 N. H. 49; *Toppan v. Jenness*, 21 N. H. 232; *Jefferson Co. Bank v. Chapman*, 19 Johns. (N. Y.) 322; *Hackett v. Connett*, 2 Edw. Ch. (N. Y.) 73; *Chambers v. Lewis*, 11 Abb. Pr. (N. Y.) 210; *Rice v. O'Connor*, 10 Abb. Pr. (N. Y.) 362; *Holden v. Gilbert*, 7 Paige (N. Y.) 208; *Knapp v. Burnham*, 11 Paige (N. Y.) 330; *Mayo v. Davidge*, 44 Hun (N. Y.) 342; *Martin v. Kunzmuller*, 37 N. Y. 396; *Haughton v. Leary*, 3 Dev. & B. Eq. (N. Car.) 21; *Mizell v. Moore*, 7 Ired. (N. Car.) 225; *Russell v. Koonce*, 104 N. Car. 237; *Garrison v. Paul*, 1 Penny. (Pa.) 380; *Huling v. Hugg*, 1 W. & S. (Pa.) 418; *Stewart v.*

U. S. Ins. Co., 9 Watts (Pa.) 126; *Morrison v. Moreland*, 15 S. & R. (Pa.) 61; *Zouck v. Rafferty*, 39 Leg. Int. (Pa.) 12; *Smith v. Ewer*, 22 Pa. St. 116; *Speers v. Sterrett*, 29 Pa. St. 192; *Zuck v. McClure*, 98 Pa. St. 541; *Farr v. Hemmingway*, 2 Treadw. Const. (S. Car.) 753; *Shepherd v. Turner*, 3 McCord (S. Car.) 249; 15 Am. Dec. 631; *Brazelton v. Brooks*, 2 Head (Tenn.) 194; *Carpenter v. Coit*, 1 D. Chip. (Vt.) 88. See *Wolfe v. Washburn*, 6 Cow. (N. Y.) 261.

It has been said that the great purpose of the statute is to effect a liquidation of mutual debts. It looks at the balance of the debt; and therefore if one of two persons having mutual dealings will sue the other instead of exchanging discharges, the party sued is allowed to set off his debt against the other as a bar to the action. In other words, the plaintiff is made to pay the costs as a penalty for his wanton and obstinate litigation. But this is applicable only where both debts existed at the time the suit was brought. The plaintiff is culpable if he sues when there is really no debt due to him, and is justly subjected to the costs. But it is the other way when the plaintiff becomes the defendant's debtor after he has brought his own suit. *Haughton v. Leary*, 3 Dev. & B. (N. Car.) 21. In the opinion delivered by the general court of Maryland in the case of *Clarke v. Magruder*, 2 Har. & J. (Md.) 77, the court by Chase, C. J., said: "The court are of opinion that the defendant is not entitled to the set-off claimed, as his right to the plaintiff's note accrued subsequent to the commencement of this action. If this set-off was allowed, great mischief would result from it. It would burden the plaintiff with the costs of suit, although, at the time he instituted his suit, he had a good cause of action, and against which, at the time, there was no defense, and it would en-

courage and sanction a practice which ought not to receive any countenance or favor from this court—the practice of buying up claims against a plaintiff, which, instead of promoting, would be a perversion of justice.”

The doctrine stated in the text is sometimes incorporated in the statutes. In *Vermont* it is declared by statute that “any sum not due and payable before the service of the original writ in the action” shall not be allowed in set-off. *Vermont* Rev. Stats. 1863, p. 335.

So the statutes of *New Hampshire* provided that “no debt or demand shall be set off as aforesaid, unless a right of action existed thereon at the commencement of the plaintiff’s action.” *New Hampshire* Rev. Stats., ch. 187, § 10, p. 375; *New Hampshire* Gen. Stats. ch. 208, § 8.

In *Rhode Island* the demands which may be set off are limited to claims “which existed at the commencement of the action and then belonged to the defendant in his own right, and for which he might maintain a suit in his own name.” *Rhode Island* Gen. Stats., ch. 201, § 14. Under this statute, where a voluntary assignee allowed certain bank deposits to remain in the name of the assignor, and without bringing suit for them until after the maturity of notes held by the bank on which the assignor was liable as indorser, it was held that, as the right of set-off was, by the statute, determined by the state of the claims at “the commencement of the action,” the bank could retain the deposits in set-off against the notes. *Nightingale v. Chaffee*, 11 R. I. 609; 23 Am. Rep. 531.

The *Massachusetts* Gen. Statutes declared that no demand could be set off unless it existed at the commencement of the suit, and then belonged to the defendant. *Backus v. Spaulding*, 129 Mass. 236.

The plaintiff’s action of assumpsit for goods sold and delivered was commenced on the first of January, 1848. It was sought to set off an order in favor of the defendant, drawn upon and accepted by the plaintiff, the acceptance being to the effect that it should be payable when four bureaux were delivered. There was conflicting evidence as to the point whether four bureaux had been delivered at the time of the commencement of the action, and this question was submitted to the jury, and they

were properly instructed that if at the time of the commencement of the action, the order was not due and payable by the terms of the acceptance, it should not be set off. *Toppan v. Jenness*, 21 N. H. 232.

A plea which merely states that the plaintiff was indebted to the defendant “at the time of the plea pleaded” is bad. *Evans v. Prosser*, 3 T. R. 186.

A plea of set-off ought to allege the debt sought to be set off to have been owing to the defendant at the commencement of the action. *McConnell v. Morrison*, 1 Litt. (Ky.) 206.

A note made by the plaintiff which was purchased by the defendant after suit commenced cannot be set off. *Rogerson v. Ladbroke*, 1 Bing. 418; 8 E. C. L. 418; *Reynolds v. Thomas*, 28 Kan. 810; *Hardy v. Corlis*, 21 N. H. 356; *Carpenter v. Butterfield*, 3 Johns. Cas. (N. Y.) 145; *Jefferson Co. Bank v. Chapman*, 19 Johns. (N. Y.) 322; *Whitaker v. Turnbull*, 18 N. J. L. 172. *Contra*, in *Maryland*, *Clarke v. Magruder*, 2 Har. & J. (Md.) 77. See *Foley v. Mason*, 6 Md. 51; *Annan v. Houck*, 4 Gill (Md.) 330; 45 Am. Dec. 133.

A defendant who, pending the action, purchases an overdue bond of the plaintiff, cannot set off such bond against the plaintiff’s demand. *Ridick v. Moore*, 65 N. Car. 382.

It was held that a defendant who, when sued, was in possession of a sealed note drawn by the plaintiff, but not then assigned, could not use it as a discount, although, after the plaintiff brought his suit, he obtained an assignment of the note dated back before the writ was issued. *Bishop v. Tucker*, 4 Rich. (S. Car.) 178.

A judgment recovered by the defendant or assigned to him after action brought, cannot be pleaded as a set-off. *Evans v. Prosser*, 3 T. R. 186, *overruling* *Reynolds v. Beerling*, 1 Dougl. 112, n.; *Irvin v. Wright*, 2 Ill. 135; *Bibb v. Saunders*, 2 Bibb (Ky.) 86; *Hawthorne v. Roberts*, Hard. (Ky.) 75; *Andrews v. Varrell*, 46 N. H. 17; *Keith v. Smith*, 1 Swan. (Tenn.) 92; *Wilson v. Reaves*, 4 Sneed (Tenn.) 173. See *Rowe v. Langley*, 48 N. H. 391; *Weaver v. Rogers*, 44 N. H. 112.

But, where the defendant, as surety of the plaintiff, who was insolvent, had paid a certain sum on a judgment against the plaintiff and the defendant as his surety, he was permitted to set off the amount paid, although such payment was made after suit brought, the

judgment having been entered and being due before the commencement of the action. *Thompson v. McClelland*, 29 Pa. St. 478.

A loss under a policy of insurance, in order to be set off under the statute of set-off, must be adjusted before the commencement of the action; for, until adjustment, it is unliquidated damages, and not a debt due. *Cumming v. Forrester*, 1 M. & S. 494; *Wienholt v. Roberts*, 2 Camp. 586.

Where two cross-actions were referred to arbitration, and in one, which was an action of trespass, the arbitrator found for the plaintiff for 40s. damages, with costs, whilst in the other he awarded 102*l.* to the defendant, such sum to be paid at a future day, it was held that the latter could not, before that day, set off that sum against the damages and taxed costs in the action of trespass. *Young v. Gye*, 10 Moore 198; 17 E. C. L. 139.

The defendant cannot set off by a plea to the further maintenance of the action, a debt which accrued after action brought, and before plea pleaded. *Richards v. James*, 2 Exch. 471; *Houghton v. Leary*, 3 Dev. & B. (N. Car.) 24.

Whether Damages for Illegal Attachment May be Set Off in Trial of Principal Cause.—While it is admitted that, where attachment proceedings are instituted after the commencement of the action, a claim for damages sustained by reason of the wrongful suing out of the writ is not a claim held by the defendant at the commencement of the suit, as required by the *Iowa* statute, and cannot be pleaded by way of set-off in the principal suit, it was, however, held that where the affidavit and bond of attachment are filed, and the writ sued out at the commencement of the action, if the writ is wrongfully sued out, any damages sustained by the defendant therefrom, constitute "a claim held by him at the commencement of the suit," in such a sense that the same may be set off against the plaintiff's demand in the same action. *Reed v. Chubb*, 9 Iowa 178; *Zinn v. Williams*, 9 Iowa 178, n.; *Stadler v. Parmalee*, 10 Iowa 23. But this has been questioned. *Waterman on Set-off*, § 72. And in a dissenting opinion in the last-cited case the court by Wright, C. J., said: "I have never supposed that a defendant could set off, on the trial of the main action, the damages resulting to

him by reason of the wrongful suing out of the attachment. It is not, in my opinion, a claim held by him at the time the suit was commenced. The language of the law is that the attachment can issue only at the commencement or during the progress of the proceedings. Section 1846, Code. Until the attachment issues there can be no damages, no claim in favor of the party defendant. Then if it has not issued and cannot issue before the commencement of the action, how can it be a claim held, within the meaning of the statute, at the time of the commencement or institution of the suit."

In a later case the court, by Wright, J., said that the court as then organized would, perhaps, have departed from these cases, but that the question was no longer left open, since section 3238 of the revision of 1860 expressly recognizes the right of a defendant to claim such damages in the trial of the principal cause. *Branch Bank v. Morris*, 13 Iowa 136.

In a late decision, where the question was not so dependent upon the terms of the statute as in the above-cited cases, it was held that if an attachment is dissolved by the court, the damages sustained by reason of such attachment cannot be set off in that action. *Gunnis v. Cluff*, 111 Pa. St. 512.

Peculiar Statutory Provisions.—Although the text states the rule under the more common statutes of set-off, this requirement is modified by some of the statutes. Thus, in *Virginia*, it suffices if the demand was due at the time of filing the plea or notice of set-off. 4 Min. Inst. 659; *Ritchie v. Moore*, 5 Munf. (Va.) 395; 7 Am. Dec. 688; *Clopton v. Morris*, 6 Leigh (Va.) 278. But whilst a set-off may thus accrue, or be acquired, either before or after the suit is brought, and up to the time of the filing of the plea or notice, and, possibly, even up to the time of trial, yet it is with this proviso, that if acquired after suit brought, the plaintiff will be entitled to a judgment for costs, even though the set-off extinguishes the plaintiff's claim, and leaves an excess due to the defendant. 4 Min. Inst. 659; 2 Tuck. Com. 108; *Allen v. Hart*, 18 Gratt. (Va.) 729; *Barton's Law Pr.* 147.

In *Texas* the statute authorizes the defendant to plead in set-off any claim which he may have acquired before pleading, though after the institution of

tured claim against the plaintiff at the time of the institution of the suit, which has afterwards matured into a debt, it must have been a debt at that time.¹ Likewise a demand in the defendant's favor, accruing subsequent to the commencement of the suit from a conditional liability incurred before the suit brought, may not be set off.² So, a demand barred by the Statute of Limitations and revived by a new promise cannot be set off in an action

suit by the plaintiff; but if he acquires such claim after suit brought, the plaintiff recovers the costs of the action. So the defendant was permitted to set off a note assigned to him, after the commencement of the action. *Thomas v. Young*, 5 Tex. 253. And it has been held that a draft acquired after the commencement of the suit may be pleaded in set-off by an amendment. *Gaines v. Salmon*, 16 Tex. 311. And the defendant may plead by way of set-off and in reconvention a judgment assigned to him after suit brought, but the plaintiff, upon proof of his demand, will recover the costs. *Parrott v. Underwood*, 10 Tex. 48.

1. So a note of the plaintiff's given before the commencement of the suit, but not due at [the time the suit was brought, though before the plea pleaded, and at the time of the trial, cannot be set off. *Rogerson v. Ladbroke*, 1 Bing. 93; 8 E. C. L. 418; *Henry v. Butler*, 32 Conn. 140; *Edwards v. Temple*, 2 Harr. (Del.) 322. But see *Sandwich Mfg. Co. v. Kelly*, 26 Ill. App. 394.

Where the defendant makes a conditional bargain for a note against the plaintiff, but the agreement is not executed until the suit is brought, it is not such a subsisting debt as can be set off. *Shepherd v. Turner*, 3 McCord (S. Car.) 249; 15 Am. Dec. 631; *McDonald v. Harrison*, 12 Mo. 447.

So an award published after the commencement of the plaintiff's action is not a proper set-off, although the subject-matter of the submission was a claim subsisting at the date of the suit, and the agreement under which it was made had been entered into before that time. *Varney v. Brewster*, 14 N. H. 49.

R was factorized as the debtor of F. At the time of the service of the process he owed F, but had at the time a contract with F upon R's performance, of which F would become largely indebted to him. This contract was not then performed and nothing was due upon it, but it had since been fully performed by R, and he had a claim

upon it against F much larger than the debt originally owed by him to F. Held, that R could not set off his claim against F. *Parsons v. Root*, 41 Conn. 161.

But in *Tennessee*, the defendant may plead, by way of set-off, "mutual demands held by the defendant against the plaintiff at the time of action brought, and matured when offered in set-off." *Tennessee Code*, 1858, § 2918.

In *Indiana*, under a like statute, a demand may be set off if due when offered at the trial, although not due at the commencement of the action. *Shannon v. Wilson*, 19 Ind. 112. See *Goldthwait v. Bradford*, 36 Ind. 149.

In *Iowa*, under § 1740, Code of 1851, any claim which would be the subject of an action against the plaintiff, and was held by the defendant, either matured or not at the time the suit was commenced, may be set off. *Dunham v. Dennis*, 9 Iowa 543; *Campbell v. Fox*, 11 Iowa 318.

In *Massachusetts*, where, after a suit is commenced by an administrator, the estate of his intestate is represented insolvent, the defendant may set off a note against the intestate which falls due pending the suit, though not due and payable when the action was commenced. *Bigelow v. Folger*, 2 Met. (Mass.) 255.

2. Where there was only a contingency that the defendant would be compelled to pay certain claims of third persons, which would then be due him from the plaintiff, but the payment had not been made at the time of action brought, it could not be set-off. *Miller v. Rigney*, 16 Ind. 327.

In *Carpenter v. Coit*, 1 D. Chip. (Vt.) 88, it was decided that the defendant in an action on a note could not set off a liability incurred before the commencement of the action, against which the plaintiff was bound to indemnify him, unless the defendant paid the demand previous to the bringing of the action.

Where the defendant had, before the institution of the suit, entered into a

brought while the bar existed.¹ But, in order to defeat a set-off under the Statute of Limitations, it must appear that the causes of set-off did not accrue within six years next before the commencement of the suit:² that the statutory period for bringing an action on the demand has expired thereafter is no objection to allowing it in set-off.³

A demand, in order that it may be set off, must not only be due at the time when the action is brought but it must continue due until pleaded⁴ and at the time of trial.⁵ And it must continue due in the same form.⁶

recognizance for the plaintiff in a suit he then had pending, in which suit the plaintiff failed, and the defendant, after the commencement of the suit against him by the plaintiff, had been compelled to pay the sum of twenty-five dollars upon the recognizance, it was held that the defendant could not set off such sum. *Houston v. Fellows*, 27 Vt. 634.

A mere liability as surety or indorsee, existing at the time, but not discharged till after the commencement of the plaintiff's suit, cannot be allowed in set-off. *Cox v. Cooper*, 3 Ala. 256; *Goldthwaite v. National Bank*, 67 Ala. 549; *Balser v. Wood*, 69 Ind. 122; *Houghton v. Houghton*, 37 Me. 72; *Robinson v. Safford*, 57 Me. 163.

1. *Lee v. Lee*, 31 Ga. 26; 76 Am. Dec. 681.

2. The text states the rule generally prevailing. In *Alabama*, a claim barred by limitation at the time when plaintiff's right of action accrued is not available in set-off as a "legal subsisting claim." *Washington v. Timberlake*, 74 Ala. 259.

3. *Walker v. Clements*, 15 Q. B. 1046; 69 E. C. L. 1046; *Gilchrist v. Williams*, 3 A. K. Marsh. (Ky.) 235; *Bumble v. Brown*, 71 N. Car. 513; *Jacks v. Moore*, 1 Yeates (Pa.) 391; *Taylor v. Gould*, 57 Pa. St. 152; *Turnbull v. Strohecker*, 4 McCord (S. Car.) 210; *Crook v. M'Greal*, 3 Tex. 487; LIMITATION OF ACTIONS, vol. 13, p. 767. See *Stillwell v. Bertrand*, 22 Ark. 375.

In *Vermont*, *Massachusetts*, *Michigan* and *Mississippi*, the statute declares that the time of limitation of debts and contracts, alleged by way of set-off, shall be computed in like manner, as if an action had been commenced thereon at the date of the plaintiff's action. Rev. Stats. of *Vermont* (ed. of 1863), p. 446; Genl. Stats. of *Massachusetts* (ed. of 1860), p. 671; Comp. L. of *Michigan* (ed. of 1857), p.

1409; Rev. Code of *Mississippi* (ed. of 1857), p. 402.

In *Maine*, the statute (*Maine Rev. Stats.* (ed. of 1857), p. 512) provides that the time of the limitation of a debt or contract, filed by way of set-off, "shall be computed as if an action had been commenced therefor at the time when the plaintiff's action was commenced, unless the defendant is deprived of the benefit of the set-off by the non-suit or other act of the plaintiff; and when he is thus defeated of a judgment on the merits of such debt or contract, he may commence an action thereon within the time limited."

But the *Alabama* Code, § 2682, provides that "when the defendant pleads a set-off to the plaintiff's demand, to which the plaintiff replies the Statute of Limitations, the defendant is, nevertheless, entitled to his set-off where it was a legal subsisting claim at the time the right of action accrued to the plaintiff on the claim in suit."

4. 2 Pars. Contr. 742.

A plea of set-off which states that "before and at the time of the commencement of the action, the plaintiff was indebted to the defendant" without inserting the words "and still is indebted," is bad. *Dendy v. Powell*, 3 M. & W. 442; 6 D. P. C. 577. A plea of set-off ought to allege the debt sought to be set off to be owing at the time of the plea pleaded; *M'Connell v. Morrison*, 1 Litt. (Ky.) 206; if it does not, it is demurrable. *Robinson v. Mace*, 16 Ark. 97.

5. If the demand has been paid, *Eyton v. Littledale*, 4 Exch. 159, or has been assigned to another party, *New Quebrada Co. v. Carr*, L. R., 4 C. P. 651, it cannot be received in evidence. 2 Whart. Contr., § 1020.

6. The merger of a note or bond in a judgment during the pendency of the suit, will preclude the right to use it as a set-off. The original demand cannot

It has been held that the defendant, since he cannot be permitted to carry on two suits at the same time and for the same cause of action, will not be permitted to set off a demand on which he has brought an action which is still pending.¹ But other authorities are to the effect that the fact that the defendant has brought a suit on a demand and the suit is still pending, is no objection to allowing it in set-off,² even though the plaintiff has paid the money into court in such former action.³

be set off because it is gone, nor the judgment because it is subsequent to the commencement of the action. *Bibb v. Saunders*, 2 Bibb (Ky.) 86; *Mizell v. Moore*, 7 Ired. (N. Car.) 255; *Lowell v. Lane*, 33 Barb. (N. Y.) 292. To illustrate: A commenced his action against B February 26, 1862. B filed in set off a certain note, dated March 8, 1855, which had been indorsed and delivered to him for a full consideration before the commencement of this suit; he also filed a set-off of a certain judgment against the plaintiff which had been rendered March 6, 1862. The judgment was founded upon the above-mentioned note. It was held that since the note, although it was a valid claim when this suit was commenced, was then in suit and had since passed into judgment, and it was no longer a proper ground of action but became merged in the judgment and could no longer be treated as a note, either as the foundation of a suit, or in set-off. Neither could the judgment be set off in this action because it was recovered since this suit was commenced. *Andrews v. Varrell*, 46 N. H. 17.

If the items of the defendant's account, offered in evidence by way of set off in a cause, are, at the time, actually in judgment, such judgment will bar the right to give the items of the account in evidence, whether the suit on the items was brought, and the judgment recovered, after such cause was pending, or before. *Smiley v. Dewey*, 17 Ohio 156.

1. *Lock v. Miller*, 3 Stew. & P. (Ala.) 13; *Rankin v. Harper*, 4 Ind. 585; *Snodgrass v. Smith*, 13 Ind. 393.

It would seem to result from the requirement that the claim must be owned by the defendant at the commencement of the suit that a debt cannot be pleaded as a set-off, if there be at the time a suit pending against the plaintiff for the same debt in favor of one who was at the bringing of said suit the true owner of the said set-off. *Whitaker v. Pope*, 48 Ga. 15.

It is provided by *New York Code Civ. Proc.*, § 495, that a plaintiff may demur to a counterclaim on which the defendant demands affirmative judgment, where it appears on its face that there is another action pending between the same parties for the same cause. And it has been held that where such fact does not appear on the face of the counterclaim it may, under section 514, providing that where the answer contains a counterclaim, the reply may set forth new matter constituting a defense to the counterclaim, be shown by the reply thereto. *Ansorge v. Kaiser*, 3 N. Y. Supp. 785.

2. *Baskerville v. Brown*, 4 Burr. 1229; *Knibbs v. Hall*, Peake's Rep. 210; *Le Bret v. Papillon*, 4 East 507; *Lindsay v. Stewart*, 72 Cal. 540; *King v. Bradley*, 44 Ill. 342; *Gaddis v. Leeson*, 55 Ill. 523; *Clayes v. White*, 65 Ill. 357; *Gunn v. Todd*, 21 Mo. 303; *Wiltzie v. Northam*, 3 Bosw. (N. Y.) 162; *Good v. Good*, 5 Watts (Pa.) 116; *Stroh v. Ulrich*, 1 W. & S. (Pa.) 57. See *Sargent v. Southgate*, 5 Pick. (Mass.) 312; 16 Am. Dec. 409.

It was held that the defendant in an action of assumpsit might plead as a set-off a claim upon which he had already obtained a judgment against the plaintiff, from which the latter had taken an appeal which was still pending. It was considered that this could work the plaintiff's own justice, as such a plea and the offering of evidence under it would be a satisfaction of the judgment already obtained by the defendant and enable the plaintiff to enjoin its collection in the event of its affirmance in the appellate court, and that the effect of allowing the plea would be to give the plaintiff another trial in respect to the defendant's claim, the very object the plaintiff was seeking by his appeal. *Gaddis v. Leeson*, 55 Ill. 522; *King v. Bradley*, 44 Ill. 342; *contra*, *Tomlinson v. Nelson*, 49 Wis. 670.

3. 7 Wait. Act. & Def. 477, citing *Evans v. Prosser*, 3 T. R. 186; *Naylor*

A few early cases incline to the view that when the matter sought to be set off is in the form of a judgment, the fact that a writ of error is pending thereon will not defeat the right;¹ but a contrary rule has been followed in later decisions.² Yet, where the latter view was maintained, the effect of an appeal in such cases is not to extinguish, but merely to suspend the right of set-off. The remedy of a party is to obtain the stay of proceedings on the judgment against him until the appeal is disposed of.³

The defendant may set off a secured claim without surrendering security.⁴ It appears that the price of goods bargained and sold, but not delivered in consequence of the plaintiff's refusal to pay the price thereof, may be set off, notwithstanding the defendant has a lien on the goods for such price.⁵

6. The Requirement of Mutuality as to Claims in Set-off—*a*. GENERAL STATEMENT OF THE RULE.—The statutes of set-off, whether they extend the right to "debts," "claims," "demands," or other causes of action, commonly require that they should be mutual, *i. e.*, exist between the parties to the action.⁶ It would seem to result no less from the construction of the terms of the statute than the

v. Schenck, 3 E. D. Smith (N. Y.) 135; *Stroh v. Uhrich*, 1 W. & S. (Pa.) 57.

A suit having been brought upon a note, the defendant paid into court the amount of the debt and costs. The plaintiff took the money out of court, but declined accepting it in satisfaction of his claim, because he had filed the note as a set-off on a suit which the defendant had brought against him. *Held*, that the debt was paid, and the defendant could not rely on the note as a set-off. *Molineux v. Eastman*, 14 N. H. 504.

1. *Reynolds v. Beerling*, 1 Dougl. 112 n; *Evans v. Prosser*, 3 T. R. 186; but see *Curling v. Innes*, 2 H. Bl. 372.

2. *Weathered v. Mays*, 1 Tex. 472; *Willard v. Fox*, 18 Johns. (N. Y.) 497. See *King v. Bradley*, 44 Ill. 342.

A defendant cannot set off a debt before arbitrators, on which an appeal has been entered. *Good v. Good*, 5 Watts (Pa.) 116.

In *Louisiana*, a judgment from which a suspensive appeal is taken cannot be pleaded in compensation; otherwise, if the appeal is devolutive. *Sandel v. George*, 18 La. Ann. 526; *Benton v. Roberts*, 2 La. Ann. 243. See also *Weathered v. Mays*, 1 Tex. 472.

3. *Terry v. Roberts*, 15 How. Pr. (N. Y.) 65. See *Irvine v. Myers*, 6 Minn. 562.

4. *Wallace v. Finnegan*, 14 Mich. 170; 90 Am. Dec. 243. The court by *Campbell, J.*, said: "A person holding

a collateral security is not bound, unless he chooses, to resort to it before suing upon his principal claim. When that claim is satisfied, he may be compelled to release or reassign the collaterals, but his right to sue the claim itself is an absolute one, not in any way affected by his possession of the securities, and he cannot, therefore, be compelled to surrender them as a condition of enforcing his legal demand. Nothing can be set off unless it could be sued upon; and on the other hand, any claim coming within the statute can be set off if it could be sued."

5. *Dinmore v. Taylor*, Peake 41.

6. *Hurlbert v. Pacific Ins. Co.*, 2 Sumn. (U. S.) 471; *Wright v. Rogers*, 3 McLean (U. S.) 229; *Scott v. Rivers*, 1 Stew. & P. (Ala.) 19; 21 Am. Dec. 646; *Menfee v. Ball*, 7 Ark. 520; *Cash v. Cash*, Ga. Dec. 97; *Buckhanan v. Gamble*, Ga. Dec. 156; *Gregg v. James*, 1 Ill. 143; 12 Am. Dec. 151; *Hilliard v. Walker*, 11 Ill. 644; *Ryan v. Barger*, 16 Ill. 27; *Peoria, etc., R. Co. v. Neill*, 16 Ill. 269; *Walker v. Chovin*, 16 Ill. 489; *McKinney v. Bellows*, 3 Blackf. (Ind.) 31; *Blankenship v. Rogers*, 10 Ind. 333; *Banton v. Hoomes*, 1 A. K. Marsh. (Ky.) 19; *Morrison v. Furnam*, 1 A. K. Marsh. (Ky.) 41; *Cummins v. Williams*, 5 J. J. Marsh. (Ky.) 384; *Watkins v. Zane*, 4 Md. Ch. 13; *Gibbs v. Cunningham*, 4 Md. Ch. 322; *Knapp v. Lee*, 3 Pick. (Mass.) 452; *Grew v. Burditt*, 9 Pick. (Mass.) 265; *Holland v.*

fact that set-off is, in effect, a cross-action by the defendant against the plaintiff, that the matters sought to be set off must be due from all the parties plaintiff to all the parties defendant in the action, and from and to those persons only who are parties to the action.¹

(1) *Must be Due from the Plaintiff.*—The claim which the defendant seeks to set off must be due from the plaintiff in the action.² Therefore, where a holder of a check drawn in his favor by a depositor in a bank does not have a right of action thereon against

Makepeace, 8 Mass. 418; Hendricks v. Toole, 29 Mich. 340; Brown v. Warren, 43 N. H. 430; Goodwin v. Richardson, 44 N. H. 125; Coursen v. Hamlin, 2 Duer (N. Y.) 513; Wolfe v. Washburn, 6 Cow. (N. Y.) 261; Johnson v. Bridge, 6 Cow. (N. Y.) 693; Cumings v. Morris, 3 Bosw. (N. Y.) 560; Warner v. Barker, 3 Wend. (N. Y.) 400; Munger v. Albany City Nat. Bank, 85 N. Y. 580; Haughton v. Leary, 3 Dev. & B. (N. Car.) 21; Hogg v. Ashe, Cam. & N. (N. Car.) 3; Wofford v. Greenlee, Cam. & N. (N. Car.) 79; Darroch v. Hay, 2 Yeates (Pa.) 208; Waln v. Wilkins, 4 Yeates (Pa.) 461; Lovel v. Whitridge, 1 McCord (S. Car.) 7; Doyley v. Doyley, 2 McCord (S. Car.) 185; Shepherd v. Turner, 3 McCord (S. Car.) 249; 15 Am. Dec. 631; Snow v. Conant, 8 Vt. 308. See BANKS AND BANKING, vol. 2, p. 98, note.

Set-off Under Bankruptcy Laws.—The same mutuality is generally requisite to constitute a mutual credit under the bankruptcy laws which is required to make mutual debts under the ordinary statute of set-off. *Stamforth v. Felowes*, 1 Marsh. 184.

Claims Payable Into or Out of Certain "Funds" of a Municipality or State.—It has been said that in an action by one against the State for any indebtedness, as for salary or otherwise, the State may set off an indebtedness of the plaintiff to the "sinking fund," since the sinking fund was the property of the State, specially set apart to be managed by the officers of the State appointed for that purpose, as trustees, for the ultimate redemption of the bonds of the State; and, therefore, the person indebted to the sinking fund is indebted to the State. *State v. Dickinson*, 12 Smed. & M. (Miss.) 597.

It was held that a claim payable out of a special fund in the city treasury to an individual might be set off against the claim due by the individual to the

"general fund" of the city. *Eaton Rapids v. Houpt*, 63 Mich. 371. So in the case of *McBrian v. Grand Rapids*, 56 Mich. 95, where the plaintiffs had a contract with the city for building a sewer and were to be paid out of a special fund created for the purpose, the city was permitted to set off the claim against them for water used, which was, when collected, payable into the "general fund."

In an action against a county to recover for furnishing evidence relative to swamp lands, the defendant sought to set off plaintiff's indebtedness to it for the loan of school moneys. It was fairly inferable from the agreement upon which this suit was brought that plaintiff was to be paid out of the funds which should be received for swamp lands by the county from the general government. It was held that defendant's and plaintiff's demands were in favor of and against the county as trustee for the school fund, and therefore, the set-off would be allowed; a demand due a county for money borrowed of the county school fund may be set off against a demand due by the county for services rendered on behalf of the same fund, and which, by contract, are to be paid for out of it. *Smallwood v. Lafayette Co.*, 75 Mo. 450.

1. See *Trammell v. Harrell*, 4 Ark. 602.

2. *Dunlap v. Donaldson Co.*, 74 Mich. 290; *Beesley v. Crawford*, 19 Ohio 126; *Trafford v. Hall*, 7 R. I. 104; 82 Am. Dec. 589. See *Ault v. Zehering*, 38 Ind. 429.

The debt of an ancestor cannot be set off in a suit by the heir, although the latter may have come into possession of assets by descent, which might by proper measures be made answerable, or taken in execution for the ancestor's debt. *Scott v. Scott*, 17 Md. 78.

A plea of set-off which shows that the defendant drew an order on a

the bank,¹ he cannot set off such check in an action against him by the bank.² So, where the payee of a note transfers it before it is due, and afterwards, on the default of the maker, takes it up and brings an action thereon, the defendant cannot avail himself of a defense which he held against an indorsee.³ The assignment of the plaintiff's claim before trial will not prevent the defendant from entering judgment upon a verdict for a balance due in his favor, where payment and a set-off were pleaded, and the trial was between the original parties to the record.⁴

(2) *Must be Due to the Defendant.*—It is equally essential that the claim should be due the defendant; for, though the defendant were allowed to set off a claim due a third person, the plaintiff could, nevertheless, not rely upon such recovery as a defense to an action subsequently brought by the true owner upon the same claim.⁵ In an action by a purchaser against the vendor of

third person, and gave it to the plaintiff, is bad, without an averment that the plaintiff received the amount. *Shearman v. Fellows*, 5 Blackf. (Ind.) 459.

It was held that where A sues for the use of B, a set-off against B cannot be pleaded. *Orphans' Court v. Ogle, Wright* (Ohio) 281.

1. See CHECKS, vol. 3, p. 226.

2. *Case v. Henderson*, 23 La. Ann. 49; 8 Am. Rep. 590; *Case v. Marchand*, 23 La. Ann. 49; *Butterworth v. Peck*, 5 Bosw. (N. Y.) 341. See *McCagg v. Woodman*, 28 Ill. 84; *Beatty v. Scudday*, 10 La. Ann. 404.

3. *Maury v. Jeffers*, 4 Smed. & M. (Miss.) 87; *Thompson v. Harrison*, 1 Daly (N. Y.) 302.

4. *Kline v. Gundrum*, 11 Pa. St. 242.

5. *French v. Garner*, 7 Port. (Ala.) 549; *Tinsley v. Beall*, 2 Ga. 134; *Reed v. Darlington*, 19 Iowa 349; *Penniman v. Loney*, 40 Md. 705; *St. Louis Perpetual Ins. Co. v. Homer*, 9 Met. (Mass.) 39; *McGraw v. Pettibone*, 10 Mich. 530; *Stanbery v. Smythe*, 13 Ohio St. 495. See *Winton v. Winton*, 53 Hun (N. Y.) 4.

B and C agreed with A to sell a negro belonging to A, and to apply the proceeds to a debt due by A, for which B and C were sureties, and the balance to any demands held by B against A. Amongst the demands held by B against A was a sealed note, which, after the agreement, he assigned to a third person. B died, and in an action by A against C, survivor, to recover the price of the negro who had been sold, it was held that C could not set off the amount of the sealed note. *Kimberl v. Glover*, 13 Rich. (S. C.) 191.

The defendant in an action on book account, will not be allowed to offset against the plaintiff's claim, a demand which accrued in favor of a third person against the plaintiff, and in which the defendant had no legal interest, notwithstanding the defendant and such third person may both have expected that it would be so applied. *McIntyre v. Corss*, 18 Vt. 451.

A party who has neither a general nor special property in goods placed by him in the hands of a manufacturer for finishing, who refused to redeliver them on demand, cannot set off the value of such goods, in an action of assumpsit against him by the manufacturer, for work and labor bestowed upon other goods. *Collins v. Butts*, 10 Wend. (N. Y.) 399; 13 Wend. (N. Y.) 139.

To a suit for foreclosure promissory notes were pleaded as set-off; a replication denying title to the notes in defendant, and showing it to be in another, was held good. *Reilly v. Rucker*, 16 Ind. 303.

A gave a mortgage to B, who afterwards took a lease of the mortgaged premises. The premises were sold after the death of A, and B continued to occupy as tenant under the subsequent owners. In *scire facias* on the mortgage by B against the executor of A, the rents due by B to the subsequent owners were not payment on the mortgage debt and could not be used as a set-off; the rent due to the subsequent owners accrued under a different right from the mortgage, and was not a perception profits under it;

a defective title, the latter generally cannot, assuming that the statute extends the right of set-off to claims of such unliquidated nature, and in such actions, set off rents and profits, as the occupant is personally liable to the true owner.¹

Showing a plaintiff's indebtedness to a stranger of course is not sufficient; there must, also, be an assignment to the defendant.² The claim sought to be set off must be owned absolutely by the defendant; a person holding a chose in action assigned to him conditionally has no right to set it off.³ A claim which the defendant has borrowed for the occasion cannot be set off.⁴ So

in the *scire facias* it was *res inter alios acta*. *Scott v. Fritz*, 51 Pa. St. 418.

Although the right of a bank to set off its claim against the plaintiff, as drawer of a protested bill of exchange discounted by it, against his demand for the undrawn deposit arising from the discount of the paper, is suspended during its ownership by one to whom the bank has transferred it, and who has a lien thereon, it was held to revive when the bank extinguishes the lien and repossesses itself of the paper. *Robinson v. Howes*, 20 N. Y. 84.

A set-off due to the maker of a note, by one who has become beneficially interested in it, without the legal title by indorsement, cannot be enforced to defeat the right of a subsequent holder to recover on the note. *Pitts v. Shortridge*, 7 Ala. 494.

It has been said that set-off is in the nature of a cross-action, and can only be good in favor of one who could maintain an action upon it in his own name. See *Carew v. Northrup*, 5 Ala. 367.

So where a statute provided that only the payee of a note, his indorsee, or personal representative, should have a right to maintain in his own name, an action on such note, a defendant who held a note, but which was neither payable nor indorsed to him, was not allowed to use such note in set off. *Bell v. Horton*, 1 Ala. 413; *Carew v. Northrup*, 5 Ala. 367.

An order by which A requests B to pay to C \$2,000, "out of the money received on my account from the insurance office when collected," was held not to be a bill of exchange, and an indorsement of it conveys no right of action to the indorsee, and, therefore, the indorsee cannot set off such instrument in an action by the drawer against him. *Hamilton v. Myrick*, 3 Ark. 541.

So it was held that a defendant cannot set off a judgment for his use in an-

other's name. *Harrel v. Petty*, 11 Rich. (S. Car.) 373. But see *Norwood v. Norwood*, 4 Har. & J. (Md.) 112.

Under the Provision in Bankruptcy Acts for Setting Off Mutual Credits.—So there can be a set-off under the statutes which authorize a set-off against an insolvent where there existed a mutual credit, only when the credit existed between the insolvent and the person seeking the set-off.

In *Ex parte Hale*, 3 Ves. 304, the acceptor of a bill of exchange having become a bankrupt, the indorser was compelled to take it up, and being indebted to the bankrupt ninety pounds, prayed that he might be at liberty to set off that sum against the amount of the bill which he had been compelled to pay. The Lord Chancellor said: "There was no mutual credit. There was a debt created upon the estate and due at the time of the bankruptcy, but that debt was not due to you, therefore, in that respect the set-off fails." To the same effect are *Chance v. Isaacs*, 5 Paige (N. Y.) 592; *Tuscumbria, etc., R. Co. v. Rhodes*, 8 Ala. 206.

1. *Greene v. Allen*, 32 Ala. 215.

But if the occupant is not so liable, the set-off will be allowed. *Locke v. Alexander*, 1 Hawks (N. Car.) 412.

2. See *Wood v. Carr*, 2 Story (U. S.) 366.

A plea in set-off alleged that the plaintiff "was, and still is indebted" to a stranger, and "which said sum remains due and unpaid, and owing to the defendant." It was held that the plea was defective in that it did not allege specifically that the debt to the stranger had been assigned to the defendant, and that the debt was due the assignor prior to the assignment. *Dilley v. Roman*, 17 Md. 337.

3. *McDade v. Mead*, 18 Ala. 214; *Straus v. Eagle Ins. Co.*, 5 Ohio St. 59; *Shryock v. Basehore*, 82 Pa. St. 159.

4. *Gilman v. Van Slyck*, 7 Cow. (N.

where the defendant has obtained possession of the demand from a third person upon the understanding that it shall be his property, or that he shall be liable to the owner, only in the event of his being able to set it off, it cannot be so employed by the defendant.¹ While it seems to be necessary when the defendant seeks to set off an assigned claim that a consideration should have been paid by him,² the amount paid for the claim is immaterial.³ If the defendant is otherwise a *bona fide* assignee of a demand against the plaintiff, he may set it off though he has not actually paid for it, but only agreed to pay.⁴

Y.) 469. See *Turner v. Satterlee*, 7 Cow. (N. Y.) 480.

C, to whom O was indebted for a "balance of accounts on book," assigned the same to S, and authorized him to collect the same in his own name and requiring S to account to him for the amount collected, and reassign any balance which might remain uncollected. No consideration passed from S to C for the assignment, and the sole object of it was to enable S to make use of the same as a set-off against a suit of O, to whom S was indebted, should one be brought. O did bring a suit against S, but when S sought to make this set-off therein, it was held that the balance so assigned was not a subject of set-off, since S was not the "equitable and *bona fide* owner" of such balance within the meaning of *Connecticut General Statutes*, p. 417, § 6, allowing such owners to maintain suit in their own names, and the avails under the assignment not being to his own use and benefit if recovered. *Olmstead v. Scutt*, 55 Conn. 125.

1. *Adams v. McGrew*, 2 Ala. 675; *Claffin v. Dawson*, 58 Ind. 408; *McDonald v. Harrison*, 12 Mo. 447; *Miller v. Gilman*, 7 Cow. (N. Y.) 469; *McGowan v. Budlong*, 79 Pa. St. 470. See *Porter v. Davis*, 2 How. Pr. (N. Y.) 30.

A note having been assigned to enable the assignee to use it as a set-off, with the agreement that he should account for only so much as he should get the benefit of in the suit, it was held that he could not avail himself of it as a set-off in equity in case the rights of others than the maker were involved. *Tinly v. Martin*, 80 Ky. 463.

It was held that a claim against the plaintiff, which had been assigned to the defendant before suit brought and in contemplation of an action, in these words: "I assign this claim to you if

there comes any difficulty," could not be set off. It was said that although the absence of consideration might not affect the validity of the assignment, were it otherwise full in its substance, yet the conditional character of it showed that unless there was some difficulty between the defendant and plaintiff in reference to the subject-matter of this action, the assignment was not to operate. Were the condition one which imposed some duty or obligation upon the defendant, or subjected him to any personal or pecuniary disadvantage, however slight, it might have had the effect designed; but the assignment was objected to as being a conditional assignment without consideration, and intended to further litigation. *Arnold v. Johnston*, 28 How. Pr. (N. Y.) 249.

2. A, being indebted to B in the sum of \$6,000, assigned to him the note of C for \$3,000, under the agreement that, on the payment of C's note for \$3,000, the note of \$6,000 should be given up to A. D, the agent of C, took up the note of \$3,000, by substituting other securities, and also took an assignment of the note for \$6,000, which he delivered to C. A, having other claims against C, secured by mortgage, filed his bill to foreclose and C offered the note of A for \$6,000 in offset to A's debt. Held, that the note came to the hands of C without consideration, and that he could not set it up in offset in a court of equity. *Stone v. Buckner*, 12 Smed. & M. (Miss.) 73.

But in *Arnold v. Johnston*, 28 How. Pr. (N. Y.) 249, there is a *dictum* that the absence of consideration might not affect the validity of the assignment.

3. *Smith v. Warner*, 16 Mich. 390.

4. In *Everit v. Strong*, 7 Hill (N. Y.) 585, the court by Cowen, J., said: "It is insisted that a man is not a *bona fide* purchaser till he has actually paid the consideration. That is sometimes so; *Jewett v. Palmer*, 7 Johns. Ch. (N. Y.)

In the application of the requirement of mutuality by the common-law courts it has sometimes been held that only such claims as exist between the parties of record can be set off.¹ But a court of equity will look beyond the nominal to the real parties in interest, and adjudicate the rights of the parties accordingly.² And it has been considered that limiting the right of set-off to

65; 11 Am. Dec. 401; but not in the sense of the statute of set-off. An obligation to pay the consideration comes to the same thing. If a man buy an account or note, with intent to set it off, giving his own note, he must pay it, though he fail to effect the intended set-off. He must run his risk of collecting the assigned demand by action."

1. *Rule in England.*—In *England*, after some conflict of opinion, if not of decision, the strict rule of looking only to the parties of record has finally been settled on. In *Bottomley v. Brook*, cited in 1 T. R. 622, the defendant pleaded that the bond declared on was given to secure £100 lent to the defendant by one E. C., and, by her direction, was given to the plaintiff in trust for her, and that E. C., before the action brought, was indebted to the defendant in more than the amount of the bond. A demurrer to this plea was withdrawn by advice of the court. So in *Rudge v. Birch*, 3 Q. B. 822, a defendant in an action of debt on a bond, pleaded that the bond was given to plaintiff, in trust for A, for a debt due from defendant to A, and that A at the time of exhibiting plaintiff's bill, was indebted to defendant in more money. On demurrer this plea was held good, on the authority of *Bottomley v. Brook*, "where," says Ashhurst, J.: "the court suffered the defendant to set off a debt due from Mrs. C. in the same manner as if the action had been brought by her." But, in a case decided as early as 1812, the King's Bench refused to act upon these cases, where there was pleaded, as a set-off, a bond which had not been originally taken by the obligee in trust for defendant, but had merely been assignee to him; it being said by Bayley, J., that "We have nothing to do in this place with any other than legal rights." *Wake v. Tinkler*, 16 East 36. And similar language has been used by other judges. In 1833, Parke, J., said that "if the words of the statute had been looked to, *Bottomley v. Brook*, 1 T. R. 621, and *Rudge v. Birch*, 1 T. R. 622, would hardly

have been decided as they were. At all events, the doctrine of those cases is not to be extended." Likewise *Littledale, J.*, thought *Bottomley v. Brook* not properly decided, and that under the statutes of set-off, the court can only notice an interest at law. *Tucker v. Tucker*, 4 B. & Ad. 745; 24 E. C. L. 151.

In 1834 *Tindal, C. J.*, observed, in regard to *Bottomley v. Brook*, and *Rudge v. Birch*, that they "go no further than this, that the courts of law will so far take notice of the existence of a trust as to let in against a plaintiff, the trustee, that which would be a valid offense against the *cestui que trust*. But these cases have never been extended." *Bedford v. Brutton*, 1 Bing. N. Cas. 408; 27 E. C. L. 433.

The cases of *Bottomley v. Brook* and *Rudge v. Birch* are both now regarded as overruled. In the court of exchequer in 1853, they were deemed entirely overruled by *Lane v. Chandler*, 3 Smith 77; *Wake v. Tinkler*, 16 East 36, and *Tucker v. Tucker*, 4 B. & Ald. 745. *Martin, B.*, observed that "the case of *Tucker v. Tucker* goes far to show that the statute of set-off is confined to the legal debts between the parties, the sole object of the statute being to prevent cross-actions between the same parties." *Isberg v. Bowden*, 8 Exch. 852; 1 C. & R. 722; 22 L. J. Exch. 322.

2. *Hobbs v. Duff*, 23 Cal. 596. See *Ferris v. Burton*, 1 Vt. 439.

In equity, demands which are really mutual, but not nominally so, may be set off. Thus, where a note executed to a firm has become the separate property of one of the partners, a demand due to its maker by this partner, may be set off against the judgment obtained by him on the note in the firm name. *Foot v. Ketchum*, 15 Vt. 258; 40 Am. Dec. 678. It has even been held that one member of a firm will be allowed in equity to set off his own judgment against an insolvent debtor seeking to enforce a judgment against such firm. *Jeffries v. Evans*, 6 B. Mon. (Ky.) 119; 43 Am. Dec. 158.

the parties to the record in an action at law would greatly narrow down the beneficial operation of the statute. This has resulted in increased disposition, on the part of the courts and the legislature, to enlarge the right sufficiently to cover all cases where the mutuality is real, so that the rule now very generally prevails that the real parties in interest are to be looked to, and not merely the nominal plaintiff and defendant of record.¹

So, it has been held that debts nominally due between the same persons cannot be set off in equity, if, by assignment or otherwise, the real interest is different. *Cotton v. Evans*, 1 Dev. & B. Eq. (N. Car.) 284.

1. *Ward v. Martin*, 31 B. Mon. (Ky.) 18; *Frazier v. Gibson*, 7 Mo. 271; *Andrews v. Varrell*, 46 N. H. 17; *Bridge v. Johnson*, 5 Wend. (N. Y.) 351; *Driggs v. Rockwell*, 11 Wend. (N. Y.) 504; *Caines v. Brisbane*, 13 Johns. (N. Y.) 9; *Cowles v. Cowles*, 9 How. Pr. (N. Y.) 361; *Miller v. Florer*, 15 Ohio St. 148; *Masterson v. Goodlett*, 46 Tex. 407. As may be seen from the above-cited *New York* cases, the text states the present rule in that State. But, in a number of early *New York* decisions, it was held that, under the statute providing that in case of set-off a defendant should have judgment for the excess of his demand over the plaintiff, only the parties to the record should be considered, for otherwise the nominal party might get a judgment for a debt which he did not own. *Wheeler v. Raymond*, 5 Cow. (N. Y.) 231; *Johnson v. Bridge*, 6 Cow. (N. Y.) 693; *Raymond v. Wheeler*, 9 Cow. (N. Y.) 296; *Warner v. Barker*, 3 Wend. (N. Y.) 400.

In an action in the name of H. for money paid and advanced, wherein, though the debt was in equity transferred to H. & Co., it was considered that the action was maintainable in the name of H. for their benefit; and that the defendant might give in evidence any discounts which he might claim against H. & Co. *Winchester v. Hackley*, 2 Cranch (U. S.) 342.

Where, in a suit against A, B and C, on a contract, A and B answered that the contract was made with them, it was held that they might set up a counterclaim in which C had no interest. *Clegg v. Cramer*, 32 Hun (N. Y.) 162.

If the payee of a note indorse it as collateral security to A, who causes an action to be brought upon it in the name of the nominal plaintiff, and afterwards the payee settles with A,

the defendant in such action may set off a note which he holds against the payee. *Bellows v. Smith*, 9 N. H. 285.

It was held that where a defendant has been defaulted and a subsequent attaching creditor has obtained leave to appear and defend the suit, such creditor may be allowed to file a claim of the defendant in set-off against the plaintiff. *Woodbury v. Woodbury*, 47 N. H. 11; 90 Am. Dec. 555.

Under the *Massachusetts* statutes (*Massachusetts* Rev. Stats., ch. 96, § 11) the defendant may prove that the action is brought for the use of another person than the plaintiff and set off against such person. *Sheldon v. Kendall*, 7 Cush. (Mass.) 217; *Com. v. Phoenix Bank*, 11 Met. (Mass.) 129.

And it was provided by the statute of *Indiana* that "if the action is brought by one person in trust, or for the use of another, the defendant may set off any demand against the person for whose use or benefit the action is brought, in like manner as if that person were the plaintiff." *Indiana* Rev. Stats. 709, sub-sec. 7. Under this statute, where a suit was brought by A and B, and the defendant pleaded to the declaration that the suit was brought for the use and benefit of A, B having no interest therein, it was held that the defendant could plead the set-off against A alone. *Forkner v. Dinwiddie*, 3 Ind. 34. So in a suit by the assignee of a note against the maker, the latter may plead and prove that the plaintiff holds the note merely as a trustee of the payee, in order to let in as a set-off an indebtedness of the payee to the defendant. *Henry v. Scott*, 3 Ind. 412.

Where A indemnified T, a sheriff, against selling S's goods, and S afterwards recovered judgment against the sheriff for making the sale, it was held that a judgment against S, which A had purchased and taken an assignment of in the sheriff's name, could not be set off to the judgment recovered against the sheriff. While it was said that the court will look to the real

(3) *Must be Due Between Those Only Who Are Parties to the Action.*—The claims sought to be set off must be due between those only who are parties to the action.¹ Thus a defendant cannot set off a joint claim against the plaintiff or plaintiffs and others who are not parties plaintiff in the action.² Hence the defendant cannot set off a claim against a firm of which the plaintiff is a partner, in a suit brought for his individual debt.³ But, where a debt is due from the plaintiff and some other person

interest of the parties and protect the assignees of choses in action, so far as this can be done consistently with the forms of law, it was considered that the judgment against which the set-off sought to be made was no less a judgment against the sheriff, because A had chosen to indemnify him. *Turner v. Satterlee*, 7 Cow. (N. Y.) 480.

1. A set-off arising out of affairs in which not only the parties to the suit, but others, are interested, cannot be made available as a defense. *Wright v. Rogers*, 3 McLean (U. S.) 229; *Compton v. Green*, 9 Pr. (N. Y.) 228; *Howard v. Shores*, 20 Cal. 277; *Snyder v. Spurr*, 33 Conn. 407; *Burgwin v. Babcock*, 11 Ill. 28; *Durbon v. Kelley*, 22 Ind. 183; *Bridgham v. Tileston*, 5 Allen (Mass.) 371; *Adams v. Bradley*, 12 Mich. 346; *Brown v. Warren*, 43 N. H. 430; *Coursen v. Hamlin*, 2 Duer (N. Y.) 513; *Tarbeville v. Broach*, 5 Coldw. (Tenn.) 270; *Allbright v. Aldrich*, 2 Tex. 166; *Williams v. Miller*, 1 Wash. Ter. 88; *McConihe v. Hollister*, 19 Wis. 269.

2. *Arnold v. Bainbridge*, 9 Exch. 153; 24 Eng. L. & Eq. 451; *Fletcher v. Dyche*, 2 T. R. 32; *Jackson v. Robinson*, 3 Mason (U. S.) 138; *Howe v. Sheppard*, 2 Sumn. (U. S.) 409; *Howard v. Shores*, 20 Cal. 277; *Atkins v. Churchill*, 19 Conn. 394; *Ryan v. Barger*, 16 Ill. 28; *McKinney v. Bellows*, 3 Blackf. (Ind.) 31; *Blankenship v. Rogers*, 10 Ind. 333; *Bibb v. Saunders*, 2 Bibb (Ky.) 86; *Wilson v. Keedy*, 8 Gill (Md.) 195; *Bridgham v. Tileston*, 5 Allen (Mass.) 371; *Wolfe v. Washburn*, 6 Cow. (N. Y.) 262; *Byrd v. Charles*, 3 S. Car. 352; *Hamilton v. Van Hook*, 26 Tex. 702; *Casey v. Haurick*, 69 Tex. 44; *Porter v. Neker-vis*, 4 Rand. (Va.) 359.

So, a judgment in favor of the defendant against the plaintiff and another cannot be set off. *Snyder v. Spurr*, 33 Conn. 407; *Phelps v. Reeder*, 39 Ill. 172. See also *Blake v. Langdon*, 19 Vt. 485; 47 Am. Dec. 701. In a suit by an ad-

ministrator the defendant cannot set off a demand against the intestate and three other persons still living. *Adams v. Ware*, 33 Me. 228. Where a cause of action, arising from the wrongfully suing out of an attachment suit, is sought to be set off in the same action in which the attachment is sued out, but where the bond is a joint bond of several parties, the set-off cannot be availed of in the suit by one of the parties. *Stadler v. Parmalee*, 10 Iowa 23.

At law, independent of the bankrupt law of 1800 (1 Story's Laws U. S., p. 746, § 42), the defendants could not have set off against a several debt due from them to T M, a bankrupt, a joint debt due to them from the firm of H. & T. M. But upon consideration of section 42 in connection with section 6 and the proviso to section 34, the set-off was allowed against the assignees of the bankrupt, the partnership fund having passed to the bankrupt. *Tucker v. Oxley*, 5 Cranch (U. S.) 34.

It was held that, although the joint debt of the plaintiff and a third person cannot properly be set off against the plaintiff's separate debt, yet if the defendant pleads such set-off, and the plaintiff does not demur, but joins issue on the plea, it will be too late for him to object. *Bright v. Wilson*, 7 B. Mon. (Ky.) 122.

3. *Ingols v. Plimpton*, 10 Colo. 535; *West v. Kendrick*, 46 Ga. 526; *Hilliard v. Walker*, 11 Ill. 644; *Mitchell v. Sellman*, 5 Md. 376; *Reed v. Whitney*, 7 Gray (Mass.) 533; *McCulloch v. Vibbard*, 51 Hun (N. Y.) 227; *Spofford v. Rowan*, 124 N. Y. 108; *McDowell v. Tyson*, 14 S. & R. (Pa.) 300; *Jarecki Mfg. Co. v. Haymaker*, 138 Pa. St. 542; *Flint v. Tillman*, 2 Heisk. (Tenn.) 202. The rule is well expressed in the statement that a defendant cannot set up as a counterclaim allegations of such a character that if they were in the form of a complaint in a separate action, another person, not a party to the

jointly and severally, as where he and another are bound on a joint and several note or bond, the plaintiff alone might be sued thereon, and such debt may, therefore, be set off against him.¹

pending suit, would be a necessary defendant to such separate action. *McConihe v. Hollister*, 19 Wis. 269.

Where one partner is garnisheed and admits that he is individually indebted to the judgment debtor, he cannot avoid a judgment by claiming that the judgment debtor is indebted to the firm of which he is a partner. *Gray v. Badgett*, 5 Ark. 16.

The same mutuality is requisite to constitute a mutual credit under the bankrupt laws, which is required to make mutual debts under the statute of set-off. Thus, where three partners, A, B and C, delivered bills to D for a special purpose, and A and B became bankrupts, in an action by their assignees against D for the proceeds of the bills, it was held that C, not having become bankrupt, this was not a case of mutual credit within the bankrupt law, so as to entitle the defendant to set off, against the bills, a debt due to him from A, B and C. *Staniforth v. Fellowes*, 1 Marsh. 184.

A firm which owed a bank was dissolved. One of the partners continued business in the old firm's name. *Held*, that the bank, knowing the facts, could not offset the debt against a deposit made and drawn upon by this partner after the dissolution. *International Bank v. Jones*, 119 Ill. 407; 59 Am. Rep. 807.

But, in *Missouri*, a different rule is adopted. In that State a partnership debt is joint and several; and one to whom a partnership is indebted may maintain an action against an individual member thereof for the recovery of such debt. This fact was given as a reason for adopting the rule that a defendant may set off, against an individual demand sued on by the plaintiff, an indebtedness held by him against a partnership firm of which the plaintiff is a member. *Ruddle v. Horine*, 34 Mo. App. 616. Thus, in *Weiss v. Wahl*, 5 Mo. App. 408, which is to the same effect, the court by *Bakewell, J.*, said: "The question is whether a firm indebtedness can be set off against a claim by an individual member of the firm. It is quite well settled that, in an action against a member of a firm for his individual debt, he cannot set off a demand due

to the firm. *Lamb v. Brolaski*, 38 Mo. 51. But there is an obvious reason for this rule. Were it otherwise, a firm might be made to pay all the private debts of one partner, to the injury of the other partners and of the creditors of the copartnership. But we can see no reason whatever why, when a member of a firm which is indebted to B, sues B, B should not be allowed to offset against the claim the debt of the partnership to him. It is a debt of the plaintiff to defendant; he owes the whole of it, and may be sued separately, and made to pay the whole of it; and how can the right of set-off be affected by the fact that another man is also liable with him for the same debt?"

1. *Fox v. Cutts*, 6 Me. 240.

A joint and several promissory note may be set-off in an action by either maker. *Owen v. Wilkinson*, 5 C. B., N. S. 526; 94 E. C. L. 526; *Pate v. Gray*, *Hempst.* (U. S.) 155; *Clark v. McElroy*, 1 Stew. (Ala.) 147; *Carson v. Barnes*, 1 Ala. 93; *Hayden v. Alton Nat. Bank*, 39 Ill. App. 458; *White v. Rogers*, 6 Blackf. (Ind.) 436; *Dunwidie v. Kerley*, 6 J. J. Marsh. (Ky.) 501; *Ferguson v. Millikin*, 42 Mich. 441; *Standish v. Chandler*, 23 Wend. (N. Y.) 511.

So the debt on a joint and several bond may be set off in an action by either obligor. *Fletcher v. Dyche*, 2 T. R. 32; *Branch Bank v. Morris*, 13 Iowa 136; *Dunn v. West*, 5 B. Mon. (Ky.) 376; *Donelson v. Colerain*, 4 Met. (Mass.) 432.

Where the defendant has a judgment against the plaintiff and others, and the plaintiff is liable for the payment of the entire demand, the court may, if the equity of the case requires it, set off the defendant's judgment against that of the plaintiff. *Hutchins v. Riddle*, 12 N. H. 464.

So, in *Missouri*, the fact that in that State a partnership debt is joint and several, and that an action is maintainable thereon against one of the partners alone, was treated as a sufficient ground for the holding that a defendant may set off, against an individual demand sued on by the plaintiff, an indebtedness held by him against a partnership firm of which the plaintiff is a

A defendant cannot set off a claim owned by himself and some person who has not been made a defendant.¹ So, a member of a firm cannot, when sued for his individual debt, set off a claim due from the plaintiff to the firm.² Although this is the general rule, it has been held that one sued on a debt for which he is individually liable may set off a debt owing by the plaintiff to a partnership firm of which the defendant is a member if he has the assent of his copartners thereto, and the interests of third persons will not be prejudiced thereby.³ Proof of the account and of the assent of the partners to its use are all that is required; it is not necessary that the account should be assigned to the

member. *Ruddle v. Horine*, 34 Mo. App. 616; *Weiss v. Wahl*, 5 Mo. App. 408.

1. *Bowyear v. Pawson*, 6 Q. B. Div. 540; 29 Moak's Rep. 704; *Middleton v. Pollock*, 44 L. J. Ch. 584; *Howard v. Shores*, 20 Cal. 277; *Harrison v. McCormick*, 69 Cal. 616; *Ingols v. Plimpton*, 10 Colo. 535; *McGuire v. Lamb*, (Idaho, 1888), 17 Pac. Rep. 749; *Richardson v. St. Joseph Iron Co.*, 5 Blackf. (Ind.) 146; 33 Am. Dec. 460; *Proctor v. Cole*, 104 Ind. 373; *Proctor v. Cole*, 120 Ind. 102; *Milburn v. Guyther*, 8 Gill (Md.) 96; 50 Am. Dec. 681; *Reed v. Whitney*, 7 Gray (Mass.) 533; *Springfield Iron Co. v. Kelley* (Supreme Ct.), 1 N. Y. Supp. 351; *Craig v. Henderson*, 2 Pa. St. 261; 44 Am. Dec. 193; *Copeland v. Young*, 21 S. Car. 275. See *Allbright v. Aldrich*, 2 Tex. 166.

Where a bill in chancery was filed to effect a set-off of a liability on promissory notes, made by the complainant jointly with one Gaylord, against a claim due the complainant and his brother on a policy of insurance, it was held that there was a lack of mutuality even though it was true as claimed, that by the law of *Illinois*, which governed, all joint obligations were made joint and several, and therefore that the complainant was separately liable on the notes, and could be separately sued upon them. Granting this to be so, the debts would still not be mutual; if sued alone on the notes, the claim on the policies which he might seek to set off, *pro tanto*, against the notes, would be a claim not due to him alone, but to him and his brother. *Gray v. Rollo*, 18 Wall. (U. S.) 629.

But it has been held in *Pennsylvania* that, although a note jointly owned by two persons can be regularly sued upon only in a joint action, yet either of the owners of it may sever in the use of

it by way of equitable defense in a suit against himself alone, each party defending a suit against himself alone to the extent of his interest in it. *Smith v. Myler*, 22 Pa. St. 36.

2. *Taylor v. Bass*, 5 Ala. 110; *Hoyt v. Murphy*, 18 Ala. 316; *Land v. Cowan*, 19 Ala. 297; *Ross v. Pearson*, 21 Ala. 473; *Evans v. Sims*, 37 Ala. 710; *Jones v. Blair*, 57 Ala. 457; *Manning v. Maroney*, 87 Ala. 563; *Howe v. Snow*, 3 Allen (Mass.) 111; *Lamb v. Brolaski*, 38 Mo. 151; *Campbell v. Genet*, 2 Hilt. (N. Y.) 290; *Kirbs v. Provine*, 78 Tex. 353.

A, one of three partners, gave his note to B for his private debt. B afterwards became indebted to the firm in a larger sum than A owed him. B paid part of his debt to C, one of the firm, saying that he held A's note and intended to apply it on the balance of the account; to which C replied that if A owed him it was all right, and C supposed that the matter was to be arranged accordingly, and so stated to A, who agreed to it. But nothing was said on the subject to the third partner, nor was the note given up or credit given for it on account. It was held in an action by B's administrator against A on the note, that B's debt to the firm could not be set off against the note. *Dehon v. Stetson*, 9 Met. (Mass.) 341.

3. *Tustin v. Cameron*, 5 Watts (Pa.) 379; *Montz v. Morris*, 89 Pa. St. 392.

In an action at law by a legatee of the income to be derived from a fund against an executor, who, on the settlement of his accounts, retained the fund for the purposes of the will, the defendant was permitted to set off rent due to himself and another, on a lease made by them as executors of another estate to the plaintiff, the coexecutors assenting to such set-off. *Solliday v. Bissey*, 12 Pa. St. 347.

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defendant.¹ This assent may be given after action brought, and the jury may, under the direction of the court, do equity as to costs.² But there is a *dictum* to the effect that a defendant cannot set off a claim due himself and another not a defendant, even though he has the consent of such third person.³

While, as has been said, a defendant who is sued for a separate debt cannot set off a debt due from the plaintiff to himself and another jointly, it has yet been held that, if sued solely by the plaintiff for a joint debt due of himself and another, he may set off a debt due to them jointly by the plaintiff.⁴ And it has been held that where, in an action against several, there is a discontinuance as to one, the others may avail themselves of a set-off due to all the original defendants.⁵

(4) *Must be Due Between All the Parties to the Action.*—It is a generally prevailing rule that those demands only can be set off which are due from and to all the parties to the action.⁶ Where a defendant is sued by several plaintiffs, he cannot set off

1. Montz v. Morris, 89 Pa. St. 392.

2. Hart v. Porter, 5 S. & R. (Pa.) 201.

3. See Gray v. Rollo, 18 Wall. (U. S.) 629.

P and W jointly executed a note payable to J W, and J W assigned to M. Before notice of the assignment to the makers, P acquired a note made by J W payable to J P, and by him assigned to P. In a suit brought by M against W on the note, it was held that, in *Alabama*, W was entitled to set off the note against J W and held by P on producing the note at the trial with the consent of P to use it as a set-off. *Winston v. Metcalf*, 6 Ala. 756.

4. *Stackwood v. Dunn*, 3 Q. B. 822; 43 E. C. L. 990.

Where a writ was against two on a joint liability, but only one was served, the return as to the other being not found, it was held that he was entitled to any set-off that would be available for the two. *Mott v. Mott*, 5 Vt. 111.

5. *Sillivant v. Reardon*, 5 Ark. 140. In the opinion rendered in this case, the court by Paschal, J., said: "It is objected that, the action being discontinued as to Ford, there was such a severance of the action as that no offset due to Ford, Thorn and Sillivant could be pleaded by them, but that they were left to prosecute their cross-action. The argument of the defendants in error, if it proves anything, proves too much. It assumes that Ford is no longer known to the record, and that therefore the defendants below have no

right to use an offset which is jointly due to him and them. But would not this argument, if carried out, exclude the covenant from the jury on the ground of variance? It is true that the contract is joint and several; and Reardon, in the commencement of the suit, might elect to sue one or all, or any intermediate number; but this serves not the contract, but the remedy; for Reardon might, at any time, have dismissed his suit and sued all, or he might sue all separately at the same time, although he might have but one satisfaction.

"The true question, then, is not as to the mutuality of indebtedness of the parties to the action, as they remain upon the record, but of the mutuality of indebtedness as it existed between the parties at the time of the commencement of the suit. If, when Reardon commenced suit against the defendants, he really owed them six hundred dollars, as pleaded in the third plea, can he avoid the set-off by abandoning his action as to one? To admit such a rule would be to admit the worst consequences of suffering a discontinuance."

6. A set-off must be a complete cross demand; it must be such that if it were sued independently it would bring identically the same parties into court. The principal is well stated in *Kenedy v. Cunningham, Cheves* (S. Car.) 50, where the court by Butler, J., said: "The authorities are very clear that a single defendant cannot set off a demand due to himself from one of a

a claim against one or more of such plaintiffs less than all.¹ To permit such a set-off would obviously work injustice "because that would be varying the remedy of the others without their consent, and compel them to exchange one debtor for another who might not be equally good or solvent."² So in an action by

number of joint plaintiffs. It has been expressly decided in this State that, where partners sue an individual, the demand of that individual against one of the partners cannot be set off. This proceeds on the ground that the plaintiffs, as partners, had no contract with the defendant. One of the plaintiffs having made the contract, he must keep it according to its merits; for, if the plaintiffs could be defeated by such a demand, they would have to make their copartner their debtor for the debt and costs which they were compelled to pay for him.

"The same principals are equally applicable to joint defendants. If one joint defendant could set off a demand due from a single plaintiff he could defeat the plaintiff's demand by a contract which the plaintiff had never made with the parties to the record. Success would enable the defendant, who pleaded the discount, to defeat one person by making others his creditors; for he would have a right to look to his codefendants for remuneration for paying their debt if they had been jointly liable with him. But, taking another view, suppose that the defendant, setting up the discount, makes an issue which results, by failure, in costs and expenses beyond those otherwise incident to the action. Who are to pay them? Not that defendant alone, but all are subjected to the costs of the suit.

"The rule, analyzed and reduced to simplicity, is this: To an action by two persons, the defendant cannot set off a debt due to him from one of them; nor can one of several joint defendants set off a debt due to him alone from the plaintiff."

In *Massachusetts* the statute provides that, except in the case of a dormant partner: "If there are several plaintiffs, the demand set off shall be due from all of them jointly; and if there are several defendants, the demand set off shall be due to all of them jointly." *Massachusetts* Gen. Stats. (ed. of 1860), p. 670.

1. *Young v. Black*, 7 Cranch (U. S.) 565; *Howe v. Sheppard*, 2 Sumn. (U.

S.) 409; *Thatcher v. Rockwell*, 4 Colo. 375; *Palmer v. Green*, 6 Conn. 14; *Harlow v. Rosser*, 28 Ga. 219; *Ingram v. Jordan*, 55 Ga. 356; *Gregg v. James*, 1 Ill. 143; 12 Am. Dec. 151; *Ringgenberg v. Hartman*, 124 Ind. 186; *Mitchell v. Freidley* (Ind. 1891), 26 N. E. Rep. 391; *Johnson v. Kent*, 9 Ind. 252; *Booe v. Watson*, 13 Ind. 387; *Shotts v. Boyd*, 77 Ind. 223; *Milburn v. Guyther*, 8 Gill (Md.) 92; 50 Am. Dec. 681; *Tyrrell v. Tyrrell*, 54 Md. 167; *Fifield v. Edwards*, 39 Mich. 264; *Walker v. Hall*, 66 Miss. 390; *Davis v. Notware*, 13 Nev. 421; *Woods v. Carlisle*, 6 N. H. 27; *Pickney v. Keyler*, 4 E. D. Smith (N. Y.) 469; *Warner v. Barker*, 3 Wend. (N. Y.) 400; *Bunting v. Ricks*, 2 Dev. & B. Eq. (N. Car.) 130; 32 Am. Dec. 699; *Bell v. Cowgell*, 1 Ashm. (Pa.) 8; *Archer v. Dunn*, 2 W. & S. (Pa.) 327; *Watson v. Hensel*, 7 Watts (Pa.) 344; *Blake v. Langdon*, 19 Vt. 485; 47 Am. Dec. 701; *Clough v. Clough*, 55 Vt. 360. See RES JUDICATA, vol. 20, p. 115, n. 1.

Where, by a policy of insurance on a vessel, A was insured for whom it was concerned, and there was an indorsement on the policy to the effect that it should be understood that the insurance attached for the benefit of A, B, and C, each one-third, payable to A, and there was a stipulation in the policy that all sums due to the insurers from the insured should be deducted from the claim for any loss, it was held that the defendants could not set off any debt due from A in his own right against the amount claimed for the loss. *Williams v. Ocean Ins. Co.*, 2 Met. (Mass.) 303.

And it has been said that, in an action on a policy effected by the plaintiff in his own name, but in which others are interested with him, the defendant cannot set off a debt due to him from the plaintiff only, although it accrued before he had notice that the others were interested. *Grant v. Royal Exch. Assur. Co.*, 5 M. & S. 442, per Ellenborough, C. J.

2. 2 Sm. L. C. (8th Am. ed.) 360, citing *Archer v. Dunn*, 2 W. & S. (Pa.)

a firm for a partnership claim, a demand against one of the partnership individually may not be set off,¹ unless, perhaps, the other partners assent.² Nor in an action by two plaintiffs for a debt due them jointly can the defendant set off two claims, one of which is due from each of the plaintiffs individually.³

On the other hand, the rule generally prevails that where there are two or more defendants jointly sued by the plaintiff, one or more of such defendants less than all cannot set off a debt due to him or them only from the plaintiff.⁴ Likewise, in an action

327; *Johnson v. Kent*, 9 Ind. 252; see *Choen v. Guthrie*, 15 W. Va. 100; *Elder's Appeal*, 39 Mich. 474.

1. *Gordon v. Ellis*, 2 C. B. 821; 52 E. C. L. 820; *Boehm v. U. S.*, 20 Ct. of Cl. 142; *Cannon v. Lindsey*, 85 Ala. 198; *Taylor v. Bass*, 5 Ala. 110; *Ross v. Pearson*, 21 Ala. 473; *Clark v. Taylor*, 68 Ala. 453; *Watts v. Sayre*, 76 Ala. 397; *Collier v. Dyer*, 27 Ark. 478; *Meeker v. Thompson*, 43 Conn. 77; *Harlow v. Rosser*, 28 Ga. 219; *Gregg v. James*, 1 Ill. 143; 12 Am. Dec. 151; *Burgwin v. Babcock*, 11 Ill. 28; *Wasson v. Gould*, 3 Blackf. (Ind.) 18; *Rush v. Thompson*, 112 Ind. 158; *Thomas v. Elkins*, 4 Martin (La.) 376; *Howard v. Warfield*, 4 Har. & M. (Md.) 21; *Williams v. Brimhall*, 13 Gray (Mass.) 462; *Birdsall v. Fischer*, 17 Minn. 100; *Jones v. Howard*, 53 Miss. 707; *Ladue v. Hart*, 4 Wend. (N. Y.) 583; *Evernghim v. Ensworth*, 7 Wend. (N. Y.) 326; *Gram v. Caldwell*, 5 Cow. (N. Y.) 489; *Pinckney v. Keyler*, 4 E. D. Smith (N. Y.) 469; *Watson v. Hensel*, 7 Watts (Pa.) 344; *Archer v. Dunn*, 2 W. & S. (Pa.) 327; *Norcross v. Benton*, 38 Pa. St. 217; *Colwell v. Weybosset Nat. Bank*, 16 R. I. 288; *Lovel v. Whitridge*, 1 McCord (S. Car.) 7; *Powrie v. Fletcher*, 2 Bay (S. Car.) 146; *Ward v. Newell*, 37 Tex. 261; *Wells v. Mace*, 17 Vt. 503. See BANKS AND BANKING, vol. 2, p. 98, note. See *Milvin v. Mather*, 5 W. H. & G. (Exch.) 55.

So, where A and B sued the defendant for work, etc., and the defendant pleaded a set-off for money received by A before B became a member of the firm, it was held that the plea afforded no answer to the action, although A had after the commencement of the partnership, admitted the receipt of the money. *France v. White*, 8 Scott 267; 6 Bing. N. Cas. 33; 37 E. C. L. 269.

Where a note, which had been given to a member of the firm for partnership property, was transferred to a creditor of the firm, for whose benefit an ac-

tion was brought, and the defendant pleaded the individual debt of the payee of the note in set-off, it was held, upon demurrer to the replication, which alleged that the note was by fraud or mistake made payable to one of the firm for partnership property, when it should have been to the firm, that the replication was sufficient. *Bourne v. Wooldridge*, 10 B. Mon. (Ky.) 492.

But, under the provisions of a *North Carolina* statute allowing the courts to grant a defendant any affirmative relief to which he may be entitled, it was held that a defendant sued by partners upon a demand of the firm, may set up and obtain judgment upon a demand held by him against one of the firm only. *Sloan v. McDowell*, 71 N. Car. 356.

It was held in *Mississippi* that in a suit against the administrator and the former partner of a deceased person, a demand in favor of the deceased alone can be set off by the administrator. *Eyrich v. Capital State Bank*, 67 Miss. 60.

2. See *Hathaway v. Russell*, 16 Mass. 477; *Towne v. Leach*, 32 Vt. 756.

3. *Gleason v. Vermont Cent. R. Co.*, 25 Vt. 37.

4. *Jones v. Fleming*, 7 B. & C. 217; 14 E. C. L. 32; *Waters v. Bussard*, 2 Cranch (U. S.) 226; *Langley v. Bunt*, 3 Cranch (C. C.) 365; *Vose v. Philbrook*, 3 Story (U. S.) 335; *Roberts v. Donovan*, 70 Cal. 108; *Thatcher v. Rockwell*, 4 Colo. 375; *Palmer v. Green*, 6 Conn. 14; *Atkins v. Churchill*, 19 Conn. 394; *Buckhanen v. Gamble*, Ga. Dec. 156; *Ingram v. Jordan*, 55 Ga. 356; *Hinckley v. West*, 9 Ill. 136; *Ryan v. Barger*, 16 Ill. 28; *McCully v. Silverburgh*, 18 Ill. 306; *Lemon v. Stevenson*, 36 Ill. 49; *Woods v. Harris*, 5 Blackf. (Ind.) 584; *Knour v. Dick*, 14 Ind. 20; *Griffin v. Cox*, 30 Ind. 242; *Gordon v. Swift*, 46 Ind. 208; *Harris v. Rivers*, 53 Ind. 216; *Gregory v.*

against a partnership, the indebtedness of plaintiff to one of them cannot be set off.¹ This rule will prevent the setting off of their several claims against the plaintiff by each defendant.² While the foregoing states what is clearly the general rule, a different rule has been laid down by some courts; in some States it is held that, where there are two or more defendants jointly sued by one plaintiff, one of the defendants, if there be no conflicting equities, may set off a debt due him by the plaintiff, the other defendants being assumed to assent.³ And, where this rule is

Gregory, 89 Ind. 345; *Lynn v. Crim*, 96 Ind. 89; *Banks v. Pike*, 15 Me. 268; *Tyrell v. Tyrell*, 54 Md. 167; *Warren v. Wells*, 1 Met. (Mass.) 80; *Walker v. Leighton*, 11 Mass. 140; *Fuller v. Wright*, 18 Pick. (Mass.) 403; *Emerson v. Bayliss*, 19 Pick. (Mass.) 59; *Van Middlesworth v. Van Middlesworth*, 32 Mich. 183; *Robbins v. Brooke*, 42 Mich. 62; *Davis v. Notware*, 13 Nev. 421; *Ross v. Knight*, 4 N. H. 236; *Chandler v. Drew*, 6 N. H. 469; 26 Am. Dec. 704; *Concord v. Pillsbury*, 33 N. H. 310; *Woods v. Carlisle*, 6 N. H. 27; *Peabody v. Bloomer*, 3 Abb. Pr. (N. Y.) 353; 5 Duer (N. Y.) 678; *Peabody v. Beach*, 6 Duer (N. Y.) 53; *Murray v. Toland*, 3 Johns. Ch. (N. Y.) 569; *Mott v. Burnett*, 2 E. D. Smith (N. Y.) 50; *Sherman v. Crosby*, 11 Johns. (N. Y.) 70; *Vanderbilt v. Baldwin*, 15 Abb. N. Cas. (N. Y.) 312; *Coffin v. McLean*, 80 N. Y. 560; *Jones v. Gilreath*, 6 Ired. (N. Car.) 338; *State Bank v. Armstrong*, 4 Dev. (N. Car.) 519; *Walton v. McKesson*, 64 N. Car. 154; *Kenedy v. Cunningham*, Cheves (S. Car.) 50; *Allbright v. Aldrich*, 2 Tex. 166; *Gilliat v. Lynch*, 2 Leigh (Va.) 505; *Christian v. Miller*, 3 Leigh (Va.) 82; 23 Am. Dec. 251; *Ritchie v. Moore*, 5 Munf. (Va.) 388; 7 Am. Dec. 688; *Arnold v. Jackson*, 6 Munf. (Va.) 106; *Choen v. Guthrie*, 15 W. Va. 100. See *Hook v. White*, 36 Cal. 299; *Corbett v. Hughes*, 75 Iowa 281.

So there can be no set-off in a suit against A, B, and C, of a debt due from the plaintiff to a copartnership composed of A and B. *Winnipiseogee Paper Co. v. Eaton*, 65 N. H. 13.

A several demand cannot be proved where two plead joint set-off. *Henry v. Walker*, 11 Heisk. (Tenn.) 194.

Although one of several joint defendants may not set off a separate debt due him alone, it was held that the objection that a separate debt is set off to a joint debt, may be made at

the trial, and cannot avail on motion to set aside a verdict. *Sherman v. Crosby*, 11 Johns. (N. Y.) 70.

Limitations to the Rule.—In some States the above-stated rule prevails, except when the demand which one of several joint defendants seeks to set off arises out of the very transaction upon which the plaintiff's claim is founded. See *Davis v. Notware*, 13 Nev. 421.

1. *Coleman v. Elmore*, 31 Fed. Rep. 391; *Jenkins v. Barrows*, 73 Iowa 438; *Robbins v. Brooks*, 42 Mich. 62; *Bowne v. Thompson*, 1 N. J. L. 2; *Peabody v. Bloomer*, 5 Duer (N. Y.) 678; *Pinckney v. Keyler*, 4 E. D. Smith (N. Y.) 469; *Scott v. Trent*, 1 Wash. (Va.) 77; *Ritchie v. Moore*, 5 Munf. (Va.) 388; 7 Am. Dec. 688; *Wilson v. Runkel*, 38 Wis. 526. See *Sager v. Tupper*, 38 Mich. 258.

2. *Ross v. Knight*, 4 N. H. 236.

In an action against two, by the administrator of an insolvent estate, upon a joint debt, the defendants are not entitled to set off their several claims, allowed by the commissioners of insolvency, against the insolvent estate. *Fuller v. Wright*, 18 Pick. (Mass.) 403.

3. *Pitcher v. Patrick*, Minor (Ala.) 321; 12 Am. Dec. 54; *Huddleston v. Askey*, 56 Ala. 218; *Riley v. Stallworth*, 56 Ala. 481; *Locke v. Locke*, 57 Ala. 473; *Leach v. Lambeth*, 14 Ark. 668, *overruling* *Trammell v. Harrell*, 4 Ark. 602; *Burke v. Stillwell*, 23 Ark. 294; *Robinson v. Beall*, 3 Yeates (Pa.) 267; *Childerston v. Hammon*, 9 S. & R. (Pa.) 68; 14 Am. Dec. 680; *Crist v. Brindle*, 2 Rawle (Pa.) 121; *Miller v. Kreiter*, 76 Pa. St. 78; *Ashley v. Willard*, 2 Tyler (Vt.) 391.

The two above-cited *Pennsylvania* cases to the effect that in an action against two there might be set off a debt due to one of them, are not alluded to in *Henderson v. Lewis*, 9 S. & R. (Pa.) 383, decided in 1823, by

adopted, the separate debt of each defendant may of course be unitedly pleaded as a set-off to the plaintiff's joint demand.¹

Gibson, J., when he said: "If both obligors had appeared, this separate debt of one of them could not, according to the *English* statutes, have been set off against the plaintiff's joint demand; and I am not aware of anything in our act of assembly to create a difference." But in 1824, in an action against two, a debt of the plaintiff to one of them was allowed as a set-off. *Stewart v. Coulter*, 12 S. & R. (Pa.) 252; 14 Am. Dec 680. And the assertion by Gibson, J., above quoted, that the set-off would have been inadmissible even had both been parties, was retracted by him in a later case; "for," he said, "the objection might certainly have been obviated by the concurrence of him whose separate property it was proposed to apply to their common debt." *Stuart v. Com.*, 8 Watts (Pa.) 76. See *Montz v. Morris*, 89 Pa. St. 392.

The decisions of the *Pennsylvania* courts were followed in *Missouri*, and it was held, where several defendants were sued jointly, that one of them might plead in set-off a demand due him by the plaintiff. *Austin v. Feland*, 8 Mo. 309. This was affirmed in *Kent v. Rogers*, 24 Mo. 307, where an indebtedness of Kent to Dillon was set off against his claim against Dillon and Rogers.

So also in *Kentucky*, it has been held that in an action on a joint bond against several defendants by a single plaintiff, one of the defendants may set off a separate demand against the plaintiff. *Powell v. Hogue*, 8 B. Mon. (Ky.) 443. The court, by Simpson, J., in the opinion rendered in this case said that he could not see that any possible injury could arise to the plaintiff in the action by the application of a debt due by him to one of the defendants to the payment of his demand, and that there is no imaginable reasons why such a set-off should not be allowed. In the answer to the argument that it might result in an injury to the plaintiff by the payment of his debt by a claim asserted against him by an insolvent obligor, the others being solvent, he having at the same time another and separate demand against the defendant relying on the set-off which he might not be able to collect, the court said that this argument was founded on a misconception of the law governing the

right of set-off. And it was said that in the case supposed, the separate demand of the plaintiff would itself be a fair and legitimate set-off against the one admitted to be relied upon by the defendant, and the balance only, if any, due by the plaintiff, could be discounted against the debt sued for.

Since the argument advanced in this case against allowing such set-off cannot be similarly answered under those statutes which do not permit the plaintiff to plead a set-off against a defendant set-off, the adoption of this decision as authority should be accordingly limited.

And perhaps a similar view should be taken of the decisions in *Missouri*; where, in a suit against several defendants, one of them is permitted to offset the demand of plaintiff by a debt due to him separately, it was held that, by way of reply to such offset, plaintiff might set up a debt additional to the one sued on, due by this separate defendant to himself. *Mortland v. Horton*, 44 Mo. 58. The court, in this case, by Bliss, J., said: "If one defendant may so offset his individual claim, it would seem that the plaintiff ought to be permitted to set up against it any debt such defendant may be owing him. One proposition follows the other, and such offset must be permitted, unless forbidden by the statute."

Upon the adoption of the *Kentucky* Code of Practice, a set-off in favor of defendants, "or some of them," was authorized, by the express terms of the statute, to be set off. *Kentucky* Code of Prac., ch. 4, § 152; *Tinsley v. Tinsley*, 15 B. Mon. (Ky.) 454.

Set-off of Partner's Individual Debt Against the Firm Debt.—It has been said that as a partner may pay a firm debt out of his individual funds, it would seem that he may set off against a firm debt his individual debt. *McConnell Trust. Proc.*, § 313. See *Goodenow v. Buttrick*, 7 Mass. 140.

Limitation to the Rule.—According to the rule laid down in *Alabama*, while one of two or more joint defendants may plead his individual claim in set-off, a judgment over in favor of such defendant against the plaintiff for the excess cannot be rendered. *Locke v. Locke*, 57 Ala. 473.

1. *Whaley v. Cape*, 4 Mo. 233.

And, since one defendant, in an action against several on their joint liability, may plead his separate and individual demand in set-off, one of several defendants, severally, or jointly and severally liable, may of course set off a debt due himself alone from the plaintiff.¹

A set-off by one of several joint defendants may be allowed where an agreement to that effect is shown to have been made between the plaintiff and either of the defendants.² It may, however, be doubted whether this is in reality set-off; it would seem rather to be payment by one of the defendants, or it might be considered as a new agreement which has been fully executed.³

It would seem, as a matter of course, that in an action against several defendants upon a joint obligation, one of the defendants has no right to claim, as a set-off, a debt of the plaintiff to one of his co-defendants.⁴ A debt due from the plaintiff to a coobligor not sued, cannot be set off against the plaintiff's demand on the obligor who is sued.⁵

It has been held that, in an action against several defendants as partners, where there is a discontinuance as to part of them, the remaining defendants may plead a set-off due to themselves, which was not admissible as the case originally stood.⁶

b. APPLICATION OF THE RULE—(1) *Where Joint Debt or Liability Becomes Vested in or Due from One Person; Survivors.*—Where the whole interest in a debt which might originally have been demanded of several, or which was due to several, be-

1. Carson v. Barnes, 1 Ala. 93; Sledge v. Swift, 53 Ala. 110; Leach v. Lambeth, 14 Ark. 668; Dunn v. West, 5 B. Mon. (Ky.) 376.

By the New York Code of 1852, §§ 149, 150, 136 and 274, the Revised Statutes (3 New York Rev. Stats. (5th ed.), p. 635) are so far modified as to admit of a set-off or counterclaim on behalf of one or more several defendants, where a several judgment may be had in the action between the plaintiff and any one or more of the defendants, as where the action is upon a joint and several promissory note or bond. Briggs v. Briggs, 20 Barb. (N. Y.) 477; Newell v. Salmons, 22 Barb. (N. Y.) 647; Parsons v. Nash, 8 How. Pr. (N. Y.) 454.

2. Kinnerley v. Hossack, 2 Taunt. 170; Threlkeld v. Dobbins, 45 Ga. 144; Lincoln v. Huizey, 51 Ill. 435.

3. See Kinsler v. Pope, 5 Strobb. (S. Car.) 126.

So in Heckenkemper v. Dingwehrs, 32 Ill. 538, in which case it was held that where there is an express agreement to that effect, one defendant in a suit against him and others jointly, may set off his individual claim, the

court by Breese, J., said: "We do not, however, incline to consider the plea as technically a plea of set-off, but as setting up an agreement executed by one of the defendants, to the benefits of which all the defendants are entitled, as going to reduce the amount of the recovery against them. The agreement was a valid one, and founded on a valuable consideration, and of which the defendant in error has had the full benefit. The facts stated in the plea, if not available as a set-off, must be available as a payment, by one of the defendants, of the sum stated, or it must be considered as a new agreement, which has been executed fully."

4. Stone v. McConnell, 1 Duv. (Ky.) 54; Senter v. Whitaker, 66 Tex. 624.

5. Broadhead v. Jones, 39 Ala. 96; Henderson v. Lewis, 9 S. & R. (Pa.) 379; 11 Am. Dec. 733.

6. Bensley v. Brockway, 27 Ill. App. 410.

In Vermont, in an action against the two signers of a note, with non est inventus as to one, and entered only against the other, he may set off his separate demands. Snow v. Conant, 8 Vt. 309.

comes payable from or to one person the question of mutuality is to be determined upon the new relations.

On the death of one of two or more joint creditors or debtors, the legal right or liability survives and vests in law exclusively in or against the remaining creditor or debtor. As a result, there may be set off in an action by or against one, or his assignee, the joint obligation of, or claims by, persons of whom that one was the survivor.¹ And, therefore, a debt due to the defendant as surviving partner may be set off against a debt due from him in his own separate character.² On the other hand, a surviving partner sued upon a debt owing by the firm, may set off a debt due him in his individual capacity from the plaintiff.³ And so a debt due from the plaintiff as surviving partner may be set off against a debt due from the defendant to the plaintiff in his own right.⁴ So far, at least, the rights of the representatives of the deceased partner and of the partnership creditor are not affected.⁵ But it has been doubted whether, when the suit is for a debt due to the partnership, the defendant can set off a debt separately due by the plaintiff.⁶ There are, however, good authorities which go the whole length and hold that, in an action by one as surviving partner, the defendant may ordinarily offset a demand due from the plaintiff individually.⁷ By the death of the copartner the debt is considered as owing to the survivor in his own right, and

1. *Trammell v. Harrell*, 4 Ark. 602; *Robinson v. Beall*, 3 Yeates (Pa.) 267.

A judgment against two persons may be pleaded in set-off to an action by the survivor against the judgment plaintiff. *Robinson v. Burton*, 2 Houst. (Del.) 62.

A statute provided that the assignee of all such notes as are made assignable by it, shall allow all just set-offs, discounts and defenses, not only against himself, but against the assignor, before notice of such assignment shall have been given to the defendant. A suit was brought by the assignee of the payee of a promissory note, against the maker, and a note executed by the assignor and a third person, which the defendant had obtained before notice of the assignment, was sought to be set off by him. It was considered that, although the note could not, in view of the requirement of mutuality, be set off if such third person were living, yet, since he was dead, the right of action on the note was against the survivor, and it could properly be set off. *Wells v. Teall*, 5 Blackf. (Ind.) 306.

2. *Slipper v. Stinestone*, 5 T. R. 493; *Cowden v. Elliot*, 2 Mo. 60; *Johnson v. Kaiser*, 40 N. J. L. 286. See *Harris v. Pearce*, 5 Ill. App. 622.

3. *Lewis v. Culbertson*, 11 S. & R. (Pa.) 84; 14 Am. Dec. 607. See *McDowell v. Tyson*, 14 S. & R. (Pa.) 300.

4. *French v. Audrade*, 6 T. R. 582. See *Masterson v. Goodlett*, 46 Tex. 402.

5. See 5 Rob. Prac. 973; *Wain v. Hewes*, 5 S. & R. (Pa.) 471.

6. In *Wain v. Hewes*, 5 S. & R. (Pa.) 471, a case decided in 1820, the court by Gibson, J., observed, "there is no case to show that where the suit is for a debt due to the partnership, the defendant can set off a debt separately due by the plaintiff. For though a surviving partner may choose to treat a partnership debt as due to him in his own right, it does not follow that a defendant, sued for a debt separately due, has a corresponding right. And even if he had such a right at law, a court of equity, if the surviving partner were insolvent, would doubtless interfere to prevent it from being exercised; and this on the same ground that it interferes to prevent an insolvent surviving partner from disposing of the stock or getting in the outstanding debts."

7. *Holbrook v. Lackey*, 13 Met. (Mass.) 132; 46 Am. Dec. 726; *Meador v. Leslie*, 2 Vt. 569; *Meador v. Scott*, 4 Vt. 26.

so in none of these cases is the set-off open to the objection that it is a demand held in *autre droit*.¹

The same principle that applies in the case of surviving partners holds good, where, by contract, one of the members of the firm becomes the owner of, or has the exclusive right to settle and control the partnership effects.²

(2) *In Suits By and Against Assignees*—(See also ASSIGNMENTS, vol. 1, p. 842).—It is a general rule that the assignee of property may use it as a set-off to any claim against him, provided it was due and payable in the hands of his assignor, and was assigned to him before action brought.³

It is further a general rule that the assignee of property or rights of property takes it, or them, subject to all set-offs which existed at the time of the appointment of the assignee in favor of the assignor.⁴ This is true although the assignee takes the property for valuable consideration and without notice.⁵ This rule is subject to a modification in the case of negotiable instruments endorsed in good faith before due;⁶ and to the further modification that no excess can be recovered against the assignee by the defendant.⁷

(a) *By and Against Assignees of Choses in Action Not Negotiable*.—The assignee of a chose in action may use it as a set-off against any claim against him, in case it was a subsisting cause of

In the case of *Holbrook v. Lackey*, 13 Met. (Mass.) 132; 46 Am. Dec. 726, though decided in 1847, the *Pennsylvania* case, cited in the next note above, does not appear to have been noticed. In an action by plaintiff as surviving partner of *Holbrook & Houghton*, defendant was allowed to set off a claim for money lent by him to the plaintiff *Holbrook* alone, notwithstanding it was strongly pressed by plaintiff's counsel that to allow this set off would be to authorize the appropriation of partnership funds to pay the private debt of one of the partners, to the injury of partnership creditors. The court, by Shaw, C. J., said: "It was strongly pressed by the plaintiff's counsel, that to allow this set off would be to authorize the appropriation of partnership funds to pay the private debt of one of the partners, to the injury of partnership creditors. But this argument is specious rather than sound. We are not to presume, necessarily, that there are outstanding partnership debts, or that the funds are not ample to meet them."

"But how does it affect partnership creditors? If the surviving partner could recover the whole, without the deduction of the demand, which the

defendant seeks to set off, he would be liable, indeed, to pay the partnership debts, if there are any. But he would be equally liable without; and in either case, these creditors must look alone to his personal liability, and would have no means of compelling him to appropriate the specific money, so recovered, to the payment of their debts."

1. *Harris v. Pearce*, 5 Ill. App. 622; *Holbrook v. Lackey*, 13 Met. (Mass.) 132; 46 Am. Dec. 726.

2. Where A assigned all his interest in the partnership effects to his partner B, with power to settle and compromise, it was held that B might set off a debt due to the firm against a debt due by himself alone. *Craig v. Henderson*, 2 Pa. St. 261; 44 Am. Dec. 193.

3. See subdivisions of this section.

4. Abb. L. Dict.; Burrell on Assignees, § 391; *Roberts v. Corbin*, 26 Iowa 315; 96 Am. Dec. 146; 5 Rob. Pr. 975; *Pomeroy's Rem.*, § 154. See also ASSIGNMENTS, vol. 1, p. 842.

5. *Levy v. Steinbach*, 43 Md. 212.

6. See *infra*, this title, *By and Against Assignees of Negotiable Instruments*.

7. See subdivisions of this section.

action in the assignor, and was assigned before the suit against the assignee was begun;¹ but the assignee in order to set it up

1. *Martin v. Williams*, 17 Johns. (N. Y.) 330; *Tuttle v. Bebee*, 8 Johns. (N. Y.) 152; *Raymond v. Squire*, 11 Johns. (N. Y.) 48; *Ford v. Stuart*, 19 Johns. (N. Y.) 342; *Conner v. Smith*, 88 Ala. 300; *Beesley v. Crawford*, 19 Ohio 126; *Wilson v. Reaves*, 4 Sneed (Tenn.) 173; *Reppy v. Reppy*, 46 Mo. 571; *Hall v. Allen*, 80 Mo. 286; *Reynolds v. Thomas*, 28 Kan. 810; *Russell v. Lithgow*, 1 Bay (S. Car.) 437; *Clopton v. Morris*, 6 Leigh (Va.) 278. See also *Indiana Rev. Stats.*, § 348. See *Williamson v. Fox*, 30 N. J. Eq. 488; *Titus v. Hoagland*, 39 N. J. Eq. 294.

Where a claim or demand can be transferred, the transfer thereof passes an interest which the transferee may enforce by an action or special proceeding or interpose as a defense of counterclaim in his own name, as the transferor might have done, subject to any defense or counterclaims existing against the transferor before notice of the transfer, or against the transferee. *New York Code Civ. Proc.*, § 1909. See also *Taylor v. Mayor*, etc., of N. Y., 20 Hun (N. Y.) 292.

Defendant may set off a bond given by the plaintiff to a third person, and by him informally assigned to defendants. *Murray v. Williamson*, 3 Binn. (Pa.) 135.

If a claim offered as a set-off belonged to all the defendants jointly at the commencement of the suit, it is no objection that one of the defendants has derived his title by assignment from a co-defendant. *Bell v. Davis*, 8 Barb. (N. Y.) 210.

Where the set-off became due in a few days it was allowed. *Jones v. Robinson*, 26 Barb. (N. Y.) 310.

In an action by A, on a sealed bill drawn by the defendants, payable to A, as the "agent of the creditors of B," the defendants cannot set off a sealed bill drawn by B in favor of A, and assigned to them before the commencement of the suit. *Stryker v. Beekman*, 8 N. J. L. 209.

Under the *Michigan Statutes*, if the claim belonged to the party who seeks to set it off, at the time of the commencement of the suit, a sale or assignment afterwards will not bar his right. *Kinney v. Tabor*, 62 Mich. 517.

A defendant, who, when sued, is in possession of a sealed note drawn by the plaintiff, cannot use it as a dis-

count, though after he is sued he gets an assignment of the note which is dated back before the writ was issued. *Bishop v. Tucker*, 4 Rich. (S. Car.) 178.

An action was brought by A for the use of B against C. It appeared on the face of the declaration that the suit was brought for the use of B, and C acknowledged service and waived a copy of the declaration before the writ was filed. *Held*, that the acknowledgment of service and waiver of copy so charged C with notice of the equitable rights of B, that he could not afterwards, before the writ was actually filed, buy up a debt against A and plead it as an offset, unless he, in some way, affirmatively made it appear that when he did so acknowledge service he did not know the suit was for the use of B. A mere general statement that when he bought the offset he did not know of the transfer to B was insufficient. *Whitaker v. Pope*, 48 Ga. 15.

Borrowed Set-off.—While the statement of the text is true and the debtor has as good a right to purchase a cross-demand, to extinguish a claim against himself by set-off as he has to accomplish the same object by a direct payment, yet if the security offered as a set-off has been merely borrowed for the purpose, it will not be allowed. *Russell v. Spear*, 12 Phila. (Pa.) 230.

In *Reeves v. Hatkinson*, 3 N. J. L. 751, it was held that an assigned judgment could not avail the defendant by way of set-off.

A stockholder cannot set off claims purchased subsequently to the repeal of the bank charter, in an action on his note given for stock. *McLarey v. Pinnington*, 1 Paige (N. Y.) 102.

One sued as a personal representative cannot purchase a claim against a creditor of the estate subsequently to the death of the deceased, and avail himself of it as a set-off or counterclaim. *McClenahan v. Cotten*, 83 N. Car. 332.

Where a judgment against an insolvent debtor was purchased for the purpose of using it as a set-off against such debtor, but it appeared that the debt sought to be collected by this device was exempt from execution, it was held proper to reject it as a set-off. *Bauer v. Teasdale*, 25 Mo. App. 25.

must obtain such a title as would enable him to sue upon it in his own name,¹ or for his own use.²

The assignee of a chose in action takes it subject to all set-offs which might have been used against it in the hands of the assignor.³ But the set-off must be due and payable at the time

A judgment by default in favor of J. against defendant for \$245 was assigned to plaintiff in consideration of \$1. The default was opened, and plaintiff afterwards recovered a judgment against defendant for \$407, which he reassigned to J. After the default was opened and before the recovery of the judgment by plaintiff, defendant became the assignee of a judgment against plaintiff. *Held*, that defendant, having purchased the judgment against plaintiff in the belief that plaintiff owned the judgment against him for \$407, was entitled to set off his judgment against plaintiff, and his right was not affected by the fact that J assigned the judgment to plaintiff only for collection. *Cormier v. Constantine*, 5 N. Y. Supp. 177.

1. *Ayres v. McConnel*, 15 Ill. 230; *Hamilton v. Myrick*, 3 Ark. 541.

A note payable in mason work is not assignable so as to enable the assignee to plead it as a set-off in an action against him. *Ransom v. Jones*, 2 Ill. 291.

2. *Martin v. Mohr*, 56 Ala. 221; *Olmstead v. Scutt*, 55 Conn. 125.

A sealed note may be set off by the holder against a bill single, though he is not the payee, and it is transferred by mere delivery. *Hickerson v. McFaddin*, 1 Swan (Tenn.) 258. See also *Allen v. McNew*, 8 Humph. (Tenn.) 46.

A bond to A, for the use of B (without mentioning assigns), cannot be set off in an action against the assignee of such bond brought by the obligor for another bond. *Wolf v. Beales*, 6 S. & R. (Pa.) 242; 9 Am. Dec. 425.

Where one takes an assignment of a debt for the purpose of using it in set-off, the beneficial interest remaining in the assignor, it cannot be set off. *Olmstead v. Scutt*, 55 Conn. 125.

3. *Burrill on Assignments*, § 391; *Ford v. Stuart*, 19 Johns. (N. Y.) 342; *Maas v. Goodman*, 2 Hilt. (N. Y.) 275; *New Amsterdam Sav. Bank v. Tartter*, 54 How. Pr. (N. Y.) 385; *Marsh v. Oneida Cent. Bank*, 34 Barb. (N. Y.) 298; *Davidge v. Mayo* (Supreme Ct.), 5 N. Y. Supp. 475; *In re Van Allen*, 37 Barb. (N. Y.) 225; *Myers v. Davis*,

22 N. Y. 489; *Finnell v. Nesbit*, 16 B. Mon. (Ky.) 351; *Ward v. Martin*, 3 T. B. Mon. (Ky.) 18; *Hodges v. Connor*, 1 Spears (S. Car.) 113; *Bemis v. Smith*, 10 Met. (Mass.) 194; *Demmon v. Boylston Bank*, 5 Cush. (Mass.) 194; *Sanborn v. Little*, 3 N. H. 539; *Hoffman v. Zollinger*, 39 Ind. 461; *Weader v. First Nat. Bank*, 126 Ind. 111; *Wells v. Teall*, 5 Blackf. (Ind.) 306; *Hart v. Woods*, 7 Blackf. (Ind.) 568; *Fry v. Boyd*, 3 Gratt. (Va.) 70; *Ragsdale v. Hagg*, 9 Gratt. (Va.) 409; *Clopton v. Morris*, 6 Leigh (Va.) 278; *Gordon v. Rixey*, 86 Va. 853; *Simpson v. Hall*, 47 Conn. 417; *Rayburn v. Hurd*, 19 Oregon 59; *Raynolds v. Martin*, 51 Iowa 324; *Miller v. Centerville*, 57 Iowa 640; *Utica Ins. Co. v. Power*, 3 Paige (N. Y.) 365; *Ainslie v. Boynton*, 2 Barb. (N. Y.) 258; *Newburger v. Manneck Mfg. Co.*, 10 Daly (N. Y.) 275; *Robinson v. Howes*, 20 N. Y. 84; *Northampton Bank v. Balliet*, 8 W. & S. (Pa.) 311; 42 Am. Dec. 297; *Mann v. Dungan*, 11 S. & R. (Pa.) 75; *Rider v. Johnson*, 20 Pa. St. 190; *Thompson v. McClelland*, 29 Pa. St. 475; *Keagy v. Com.*, 43 Pa. St. 70; *Jordan v. Sharlock*, 84 Pa. St. 366; 24 Am. Rep. 198; *Neal v. Sullivan*, 10 Rich. Eq. (S. Car.) 276; *Jervy v. Strauss*, 11 Rich. (S. Car.) 376; *Townsend v. Quinan*, 47 Tex. 1; *Miller v. Florer*, 15 Ohio St. 148; *Archer v. Merchants', etc., Ins. Co.*, 43 Mo. 434; *Smith v. Spengler*, 83 Mo. 408; *Cleveland v. Clap*, 5 Mass. 201; *Cary v. Bancroft*, 14 Pick. (Mass.) 315; 25 Am. Dec. 393; *Levy v. Steinbach*, 43 Md. 212. See also *Code Iowa*, § 2546. See *Lundgreen v. Stratton*, 79 Wis. 227; *Lawrence v. Bank of the Republic*, 3 Robt. (N. Y.) 142.

An obligor in a bond cannot defalcate against the assignee of an assignee of a bond a claim or set-off which he holds against the first assignee. *Blair v. Mathiott*, 46 Pa. St. 262.

In a suit on a promissory note by the assignee of the payee against the maker—held that a debt due from the payee to one of the defendants, or from the payee and another person to the defendants before the assignment, was not a good matter of set-off. *Woods v. Harris*, 5 Blackf. (Ind.) 585. Compare

Hurdle v. Hanner, 5 Jones (N. Car.) 360.

A, having a separate demand against B, B and C being joint creditors of A, assigned his demand to a third person. After such assignment, B became the sole owner of the debt due by A to B and C. *Held*, that B could not maintain a bill against the assignee of A for an offset without showing that the original consideration of the debt of A to B and C proceeded from B alone. *Barber v. Spencer*, 11 Paige (N. Y.) 517.

A purchaser of personal property sold with a warranty of soundness executed his note for the purchase money to the vendor, and the latter assigned the note. Pending a suit by the assignee, the maker sued the payee for a breach of his warranty and recovered judgment; he then pleaded the judgment as a set-off. *Held*, that the judgment was a proper set-off, the note not being negotiable by the law merchant. *Herod v. Snyder*, 48 Ind. 480.

In an action to foreclose a mortgage securing promissory notes, the mortgagor cannot set off demands against an intermediate holder of the notes and mortgage, unless founded on an agreement supported by a new consideration, in pursuance of which the intermediate holder procured the notes, or which was entered into by the parties while the notes were in his hands. *Brown v. Scott*, 87 Ala. 453.

Where a person becomes indebted to an assignee or administrator by reason of a wrongful seizure and appropriation of property belonging to the estate, it is abundantly evident that, in an action brought to recover for the wrongful act, the right of set-off should not be allowed. *Van Sandt v. Dows*, 63 Iowa 594; 50 Am. Rep. 759; *Nicoll v. Mumford*, 4 Johns. Ch. (N. Y.) 522.

The plaintiff in equity sought to set off a note assigned to him by his debtor upon the plaintiff having a judgment against him, which note was assigned before judgment, on the ground of insolvency and non-residence of the plaintiff, the judgment being assigned to a third person. *Held*, that the plaintiff's equity was older and superior to that of the assignee of the judgment, though the note was assigned upon condition that the assignee should be able to procure the set-off. *Dorsey v. Reese*, 14 B. Mon. (Ky.) 127.

A claim, on which an action at law might have been sustained, cannot be

used as a set-off in equity against an assignee of another legal claim. *Hutchins v. Hope*, 7 Gill (Md.) 119.

The vendor of a lot, sold at public sale, of which an entry was made at the time by the clerk of the sale, in the sale-book, afterwards tendered a good conveyance in fee to the vendee, if he would pay the purchase money, or allow the same on a note held by him, signed by the vendor. The tender was refused. *Held*, in a suit on the note by the assignee of the vendee (the assignment having been made after the tender), that said purchase money was a legal matter of set-off. *Hart v. Woods*, 7 Blackf. (Ind.) 568.

In an action by the assignee of a bankrupt partner, a debt due to the defendant from the partnership may be set off. *Bean v. Cabbaness*, 6 Ala. 343.

A plaintiff, after bringing suit, cannot assign the demand to his attorney, so as to defeat a legal right of set-off which the defendant had when the suit began. *Norwich Printing Co. v. Kloppenberg*, 50 Conn. 295.

A bank has no lien upon the deposits of an insolvent firm for the amount of a discounted bill which has not matured as against an assignee of the firm for the benefit of creditors, and no notice is necessary to perfect the right in the assignee. *Beckwith v. Union Bank*, 9 N. Y. 211.

In a suit by the assignee of an insolvent debtor on a covenant of warranty in a deed of land made to such debtor, the defendant may set off notes and accounts due to him from such debtor; and he may also set off such notes and accounts in a suit on such covenant brought by the purchaser of the land at the assignee's sale thereof, if the purchaser, when he bought the land, had notice that the defendant claimed such set-off. *Bemis v. Smith*, 10 Met. (Mass.) 194.

Where the defendant could not have set off the demand against the assignor for lack of mutuality, it was held that he could not use such claim as a set-off against the assignee. *Walker v. Hall*, 66 Miss. 390.

A made, upon the execution, an assignment to M of A's judgment against R, and sent the same by express to be delivered to M on M's paying \$60. At M's suggestion H bought the judgment solely in his own interest, and paid the sum to the expressman, M, assigning the execution to H, who thereupon, by A's authority and in A's name, brought

of the assignment.¹ However, the burden of proof is on the plaintiff to show that the assignment was made before the demand intended to be set off was due.² The subject assigned

an action against R on the judgment. Before M's assignment to H, M was notified by R of a set-off arising from a breach of a bond which M had executed to R. *Held*, that R's demand against M could not be set off in the action on the judgment. *Avery v. Russell*, 125 Mass. 571.

Fraud.—Two persons indebted to one another, executed, each to the other, notes of hand for the full amounts of their respective indebtedness, with the understanding between them that the notes might be used to pay precedent debts, or to raise money by negotiation. One of the payees assigned one of the notes, and failed. In a suit by the assignee against the maker, the latter pleaded a note of the same date executed to him by the assignor, as a set-off. *Held*, that the set-off could not be allowed, as it would be a fraud on the plaintiff. *Barbaroux v. Barker*, 4 Metc. (Ky.) 47.

The plaintiff, as the assignee of an insolvent firm, sought to recover from the defendant's moneys held in trust for one of the partners, to the possession of which he had become entitled after the date of the assignment. The individual debts of the partners had been paid out of their private property. At the time of the assignment the firm was indebted to the defendants for trust moneys deposited with it. It was held that the defendants were entitled to set off the amount due from the firm against the amount due to the said partner. *Shipman v. Lansing*, 25 Hun (N. Y.) 290.

1. *Waterman on Set-off* (2d ed.), § 107; *Kull v. Thompson*, 38 Mich. 685; *Fuller v. Steiglitz*, 27 Ohio St. 355; 22 Am. Rep. 312; *Martine v. Willis*, 2 E. D. Smith (N. Y.) 524; *Soloman v. Holt*, 3 E. D. Smith (N. Y.) 139; *Duncan v. Stanton*, 30 Barb. (N. Y.) 533; *Wells v. Stewart*, 3 Barb. (N. Y.) 40; *Myers v. Davis*, 22 N. Y. 489; *Martin v. Kunzmuller*, 10 Bosw. (N. Y.) 16; *affirmed*, 37 N. Y. 396; *Keep v. Lord*, 2 Duer (N. Y.) 78; *Hicks v. McGroarty*, 2 Duer (N. Y.) 295; *Fort v. McCully*, 59 Barb. (N. Y.) 87; *Brown v. Coleman*, 55 Hun (N. Y.) 501; *Breen v. Seward*, 11 Gray (Mass.) 118; *Graham v. Tilford*, 1 Metc. (Ky.) 112.

In an action by the assignee of a debt, which by law is subject to all

equities existing against it, at the time of the assignment, in favor of the debtor, a plea of a claim against the assignor, in set-off, which does not show that the claim existed at the time of the assignment, is bad. *Brisban v. Caines*, 10 Johns. (N. Y.) 45.

Where the set-off consisted of a claim which was not originally a cause of action, but was made so by statute after the assignment, it was held that the defendant might set it up. *Taylor v. Mayor*, etc., of N. Y., 82 N. Y. 10.

Where a banker failed and made a general assignment of his property, including the notes of a depositor, whose deposit was not then due, and directed his assignee to pay his debts in the same order and manner in which the estate of a bankrupt is required to be used and applied for the payment of debts proved and allowed under the provisions of the bankrupt act, it was held that the depositor was entitled to his set-off, and that the assignee could only recover the balance after deducting the deposit. *Fort v. McCully*, 59 Barb. (N. Y.) 87.

A negotiable promissory note, purchased for a valuable consideration, without notice that an action had been commenced on a debt due from the purchaser to the maker, and before the first publication of notice of the issuing of a warrant in insolvency against the maker, may be set off in such action, when prosecuted by the maker's assignee in insolvency, even though not yet payable. *Aldrich v. Campbell*, 4 Gray (Mass.) 284.

Equity.—A partnership became insolvent, and made a general assignment for the benefit of creditors, including therein a note past due, and the maker of the note held the acceptance of the partnership not then due. *Held*, that the insolvency of the acceptors was not, of itself, sufficient to authorize a set-off in equity of the acceptance against the note in the hands of the assignee, in the absence of evidence that the acceptance was based upon the note, or that the maker of the note trusted to it, at the time, as a means of discharging his obligation. *Lockwood v. Beckwith*, 6 Mich. 168; 72 Am. Dec. 69.

2. *Jervey v. Strauss*, 11 Rich. (S. Car.) 376.

to the plaintiff assignee must also be due and payable to the assignor before assignment, to entitle the defendant to set off his claim against it in the hands of the assignee,¹ and the set-off must also be due the defendant at the time of the assignment, or, rather, at the time he receives notice of the assignment.² And even when the set-off was obtained by the defendant prior to the

1. *Richards v. La Tourette*, 53 Hun (N. Y.) 623; *Richards v. Union*, 48 Hun (N. Y.) 263.

The claim for which suit is brought must be due the assignee in his representative capacity. An auctioneer, in whose hands the assignee of an insolvent debtor has placed goods for sale, cannot set off, against the claim by the assignee for the proceeds, a debt due himself from the insolvent. *Henriques v. Home*, 2 Edw. Ch. (N. Y.) 120.

A bond due by the bankrupt to the defendant cannot be set off against the defendant's note to a third person assigned to the assignee of the bankrupt's effects after commission issued. *McIver v. Wilson*, 1 Cranch (C. C.) 423.

Where an assignment was made, by A, of all his property, to be sold by the assignees for the payment of his debts, held, that his creditors could not offset their demands, in payment of articles purchased by them at the public sale of the goods by the assignees; and this is true, though one of the assignees invited the creditors to purchase, telling them that they might offset their demands to their purchases, if the terms of sale, as declared at the auction, contained no such stipulation. *Bateman v. Connor*, 6 N. J. L. 104.

2. *St. Andrew v. Manchaug Mfg. Co.*, 134 Mass. 42; *Watson v. Mid Wales R. Co.*, L. R., 2 C. P. 593; *Gary v. James*, 7 Ala. 640; *Russell v. Redding*, 50 Ala. 448; *Lewis v. Faber*, 65 Ala. 460; *Robinson v. Swigart*, 13 Ark. 71; *McCabe v. Grey*, 20 Cal. 509; *Soloman v. Holt*, 3 E. D. Smith (N. Y.) 139; *Martin v. Kunzmüller*, 37 N. Y. 396; *Bradley v. Angel*, 3 N. Y. 475; *Faulkner v. Swart*, 55 Hun (N. Y.) 261; *Martine v. Willia*, 2 E. D. Smith (N. Y.) 524; *Davidge v. Mayo* (Supreme Ct.), 5 N. Y. Supp. 475; *Myers v. Davis*, 22 N. Y. 489; *Mead v. Gillett*, 19 Wend. (N. Y.) 397; *Newburger v. Manneck Mfg. Co.*, 10 Daly (N. Y.) 275; *Brown v. Coleman*, 55 Hun (N. Y.) 501; *Hegeman v. Hyslop*, Anth. (N. Y.) 197; *Chance v. Isaacs*, 2 Edw. Ch. (N. Y.) 348; *Crosbie v. Leary*, 6

Bosw. (N. Y.) 312; *Harris v. Burwell*, 65 N. Car. 584; *George v. Tate*, 102 U. S. 564; *Whitaker v. Pope*, 2 Woods (U. S.) 463; *Finnell v. Nesbit*, 16 B. Mon. (Ky.) 351; *Colyer v. Craig*, 11 B. Mon. (Ky.) 73; *Small v. Browder*, 11 B. Mon. (Ky.) 212; *Walker v. McKay*, 2 Metc. (Ky.) 294; *Adams v. Leavens*, 20 Conn. 73; *Martin v. Pillsbury*, 23 Minn. 175; *Finn v. Corbitt*, 36 Mich. 318; *Northern Bank v. Kyle*, 7 How. (Miss.) 360; *Pass v. McRea*, 36 Miss. 143; *Freeland v. Man*, 1 Smed. & M. (Miss.) 531; *Wells v. Teall*, 5 Blackf. (Ind.) 306; *Sefton v. Hargett*, 113 Ind. 592; *White v. Henley*, 54 Mo. 596; *Huse v. Ames*, 104 Mo. 91; *Newman v. Crocker*, 1 Bay (S. Car.) 246; *Jervy v. Strauss*, 11 Rich. (S. Car.) 376; *Sanborn v. Little*, 3 N. H. 539. See also *Rev. Sts. of Indiana*, § 5503.

A purchased and actually paid for a judgment against his creditor B, before B transferred his demand against A, but the written instrument was not made until afterwards. Held, that A was equitably entitled to offset such judgment against B's debt in the hands of a third person. *Barber v. Spencer*, 11 Paige (N. Y.) 517. Compare *Watson v. Mid Wales Mfg. Co.*, L. R., 2 C. P. 593.

In an action by the assignees for creditors of an insolvent banker on a note made by one partner and indorsed for partnership purposes, held that the amount of the partnership deposit with the banker was a proper equitable set-off, although the note was not due at the time of the assignment. *Smith v. Felton*, 43 N. Y. 419.

In an action by an assignee of a note, not payable in bank, the defendant may set off a joint note made by the payees of the note in suit, as principal for his individual debt, and by another as his surety, and held by the defendant as assignee thereof, before notice of the assignment of the note in suit. *Hoffman v. Zollinger*, 39 Ind. 461.

A failed and made an assignment. At the time of his failure, he had money on deposit in a bank, where a bill of exchange, on which he was in-

assignment, yet if he obtained it with the knowledge of the approaching insolvency of the assignor, he will not be allowed to set it up.¹ Where the set-off consists of negotiable paper, it must have been due the defendant at the time he received notice of the assignment.² But the defendant, even though his demand

dorser, had been discounted for him. This bill matured a few days after the assignment, but before the bank had notice of it, and was protested for non-payment. In an action by A's assignee against the bank for the money on deposit, held that the bank could not, either at common law or by the Code of 1849, § 112, set off the amount of the bill against the deposit. *Beckwith v. Union Bank*, 9 N. Y. 211.

J, being solvent, assigned his property to trustees, on the 16th of January, 1793, for the benefit of his creditors; a debt due from B was included in the assignment, and in an action brought by the assignees against B, he offered as a set-off a note of J, which he stated to have been purchased in the year 1793, after it was due; and it was held that the note was to be presumed to have been purchased after the assignment, and could not be set off against the debt due to the insolvent. Every presumption is to be made against the purchaser of a note after it is due. *Johnson v. Bloodgood*, 1 Johns. Cas. (N. Y.) 51; 1 Am. Dec. 93.

The maker of a note not negotiable transferred to the payee an account, to be applied, when collected, to the payment of the note. After the note was assigned, the payee collected the account. Held, in *Alabama*, that the account could not be offset by the maker in an action by the assignee of the note. *Chilton v. Comstock*, 4 Ala. 58.

It is provided by statute in *Massachusetts* that a claim obtained after notice of the assignment will not be allowed as a set-off against the assignee. Pub. St. *Massachusetts*, ch. 168, § 10.

In an action on a judgment by the judgment creditor, for the use of his assignee, testimony that the attorney for defendants in the action in which the judgment was recovered was notified of the assignment, at a time when he was assuming to act for them in settling the amount to be paid in satisfaction of the judgment, is sufficient to warrant a finding that they had notice of the assignment, so as to preclude them from setting off a judgment thereafter recovered by them against plaintiff, and no-

tice of the assignment to one of the defendants is notice to his co-defendant; they being liable as joint contractors. *Smith v. Brown*, 151 Mass. 338.

The assignees of A, an insolvent, brought an action against B on a note given to A. B pleaded as a set-off a sum paid by him, after the assignment, on a note given by A, and protested before the assignment, on which B was indorser. Held, that the set-off should be allowed. *Morrow v. Bright*, 20 Mo. 298.

In a suit in favor of the estate of an insolvent debtor, in *Pennsylvania*, the defendant cannot set-off a debt against the insolvent, purchased by him after the insolvency. *Long v. Penn. Ins. Co.*, 6 Pa. St. 421.

1. *Smith v. Hill*, 8 Gray (Mass.) 572; *Ogden v. Cowley*, 2 Johns. (N. Y.) 274; *Smith v. Brinckerhoff*, 8 Barb. (N. Y.) 519; *Richter v. Selin*, 8 S. & R. (Pa.) 425; *Finney v. Bennett*, 27 Gratt. (Va.) 365; *McClenahan v. Cotten*, 83 N. Car. 332; 2 Sm. L. Cas. (8th Am. ed.) 352.

If, after a creditor has filed his petition in bankruptcy, his debtor, with full knowledge of the fact, purchases a claim against him, he cannot set it off in an action brought by the assignee in bankruptcy to recover the original indebtedness. *Smith v. Brinckerhoff*, 8 Barb. (N. Y.) 519; *Smith v. Brinckerhoff*, 6 N. Y. 305.

A debtor cannot set up, in compensation of a debt, a claim acquired against the creditor, with knowledge of the creditor's notorious insolvency, and to obtain an undue preference, even though the insolvency had not been judicially declared. *Kennedy v. New Orleans Sav. Inst.*, 36 La. Ann. 1.

If a bankrupt on the eve of his bankruptcy, fraudulently deliver goods to one of his creditors, the assignee may disaffirm the contract and recover the value of the goods in trover; but if he brings assumpsit, he affirms the contract, and then the creditor may set off his debt. *Benoist v. Darby*, 12 Mo. 196.

2. *Northampton Bank v. Balliet*, 8 W. & S. (Pa.) 311; 42 Am. Dec. 297; *Aldrich v. Campbell*, 4 Gray (Mass.)

exceed that of the plaintiff, cannot recover the excess above the assignee's demand.¹ The fact that the assignor has removed from the State,² or is insolvent,³ will not be a ground for setting off a demand against the assignee which could not otherwise have been set off. The defendant may, by his conduct upon receiving notice of the assignment, waive his right to a set-off against the assignee.⁴

(b) *By and Against Assignees of Negotiable Paper.*—It is a general rule that the assignee of negotiable paper may set it off against any claim which the plaintiff in an action against him may have against him.⁵ And this rule applies as well to an instrument indorsed overdue, as to one indorsed before due.⁶

284; *Ogden v. Cowley*, 2 Johns. (N. Y.) 274; *Ritchie v. Moore*, 5 Munf. (Va.) 388; 7 Am. Dec. 688; *Weeks v. Hunt*, 6 Vt. 15.

A debtor may set off against the assignee a draft drawn by the assignor in his favor before he received notice of the assignment, although the liability of the assignor did not become complete until after he received notice of the assignment. *Northampton Bank v. Balliet*, 8 W. & S. (Pa.) 311; 42 Am. Dec. 297.

1. *Johnson v. Collins*, 1 Blackf. (Ind.) 166; *Kast v. Kathern*, 3 Den. (N. Y.) 344; *Driggs v. Rockwell*, 11 Wend. (N. Y.) 504.

See *Russell v. Lithgow*, 1 Bay (S. Car.) 437.

2. *Talbot v. Warfield*, 3 J. J. Marsh. (Ky.) 83; *Davis v. Milburn*, 3 Iowa 163.

3. *Watham v. Chamberlin*, 8 Dana (Ky.) 164.

The insolvency of an assignor, at the date of the assignment of a note, is a good ground in equity to authorize the obligor in the note to set off demands which he held on the assignor, due by note before the assignment, acquired by purchase. *Colyer v. Craig*, 11 B. Mon. (Ky.) 73.

The surety on an administrator's official bond, being indebted to his principal by promissory note, on which a judgment at law has been rendered in favor of an assignee, may come into equity to enjoin the judgment and to establish an equitable set-off against it, on account of moneys which he had been compelled to pay as surety since its rendition, on averment and proof that the administrator is insolvent, and that the note was transferred with intent to defraud his creditors. *Wood v. Steele*, 65 Ala. 436.

4. *Waiver.*—Where, on receiving notice from the assignee of a bond of the assignment, the obligor paid to the as-

signee \$100, and promised to pay the balance without mentioning any demand or set-off against the assignor, in an action afterwards brought on the bond, it was held that the defendant could not set off any demand against the assignor existing prior to the bond, but that it was to be presumed from the promise of the defendant and his silence on the subject of the set-off, that his claim against the obligee had been previously settled. *Henry v. Brown*, 19 Johns. (N. Y.) 49. See also *Gould v. Chase*, 16 Johns. (N. Y.) 226; *Eels v. Finch*, 5 Johns. (N. Y.) 193; *Wiggin v. Damrell*, 4 N. H. 69; *Albee v. Little*, 5 N. H. 277.

A owed B for work; B assigned the debt to C; C gave notice to A, and A promised to pay it, though it did not appear to whom. Held, that A could not set off a note of B to a third person which was held by A when notified of the assignment, but of which he then gave no notice. *Trow v. Braley*, 56 Vt. 560.

5. *Farr v. Hemmingway*, 3 Brev. (S. Car.) 549; *Hurd v. Earl*, 4 Blackf. (Ind.) 184; *Johnson v. Comstock*, 6 Hill (N. Y.) 10; *Whitaker v. Turnbull*, 18 N. J. L. 172; *Lyon v. Petty*, 65 Cal. 322.

In order to entitle the defendant in an action of assumpsit to plead in off-set a promissory note executed by the plaintiff to a third person, it is rendered essential by statute that the note should have been transferred to the defendant and notice thereof given to the plaintiff previous to the commencement of the suit. *Bragg v. Fletcher*, 20 Vt. 351. See *Call v. Chapman*, 25 Me. 128.

A defendant in an action for labor done, may set off notes of the plaintiff purchased by the defendant, without a written assignment of such notes by the payee to such defendant. *Allen v. McNew*, 8 Humph. (Tenn.) 46.

6. *Cook v. Mills*, 5 Allen (Mass.) 36.

Where a negotiable instrument is assigned before due without notice of fraud or other matter of defense, the assignee takes it free from any set-off,¹ but when he takes it overdue, a different rule prevails. The fact that the note is overdue should put the indorsee on his inquiry, and any set-off may be used against the holder which could be allowed against the payee.² But a set-off

In *California*, it was held that where promissory notes were signed after maturity, they were taken by the assignee subject to existing equities between the maker and payees, and under those circumstances could not be pleaded as a counterclaim. *Lyon v. Petty*, 65 Cal. 322.

1. In *Fisher v. Leland*, 4 Cush. (Mass.) 456; 50 Am. Dec. 805, the court by Shaw, C. J., said: "When an indorsee takes a bill or note by indorsement before it is due and without notice of fraud or other matter of defense, he takes it on an independent title by the indorsement, and will not be affected by any payment, set-off, fraudulent consideration, or other matter of defense which the acceptor or promisor might have had against any previous holder or prior party. And in order to give the highest credit and freest circulation of negotiable securities transferred by indorsement in favor of commerce, this principle is held with great firmness and strictness, and, by a series of recent decisions the rule upon the subject, instead of being relaxed, is held with greater strictness than formerly." *Citing O'Keefe v. Dunn*, 6 Taunt. 305; *Dunn v. O'Keefe*, 5 M. & S. 282; *Gill v. Cubitt*, 3 B. & C. 466; 10 E. C. L. 154; *Goodman v. Harvey*, 4 A. & E. 870; 31 E. C. L. 212; *Foster v. Pearson*, 1 C. M. & R. 849; *Arbouin v. Anderson*, 1 Q. B. 498; 41 E. C. L. 642. See also *Hendricks v. Judah*, 1 Johns. (N. Y.) 319; *Sanford v. Mickles*, 4 Johns. (N. Y.) 224; *Richards v. Union*, 48 Hun (N. Y.) 263; *Wheeler v. Hughes*, 1 Dall. (U. S.) 23; *Pettee v. Prout*, 3 Gray (Mass.) 502; 63 Am. Dec. 778; *St. Louis Perpetual Ins. Co. v. Homer*, 9 Met. (Mass.) 39; *Smith v. Van Loan*, 16 Wend. (N. Y.) 659; *Prior v. Jacocks*, 1 Johns. Cas. (N. Y.) 169; *Spence v. Whitaker*, 3 Port. (Ala.) 297; *Leavit v. Peabody*, 62 N. H. 185; *Wiggin v. Damrell*, 4 N. H. 69; *Drexler v. Smith*, 30 Fed. Rep. 754; *Mandeville v. Union Bank*, 9 Cranch (U. S.) 9; *Hooper v. Spicer*, 2 Swan (Tenn.) 494.

Vermont.—In *Vermont* it was held under the statute of 1797 that the mak-

er of a promissory note had a right to the same set-off against the indorsee that he would have against the payee. *Martin v. Trobridge*, 1 Vt. 477. But that statute was repealed, and it was held that after such repeal, the defendant in an action on a negotiable promissory note, which was sued in the name of the indorsee, could not plead in offset a claim in his favor against the payee of the note, notwithstanding it appeared that the indorsee held the note in trust for the payees, and that the suit was for their benefit for the purposes of collection only. *Adams v. Bliss*, 16 Vt. 39; *Phelps v. Bulkely*, 20 Vt. 17; *Leavenworth v. Lapham*, 5 Vt. 204.

The statute of *New Jersey* entitling the maker of a promissory note to be allowed all its offsets and discounts as well against indorsees as the payee, and whether indorsed before maturity or not, unless made payable "without defalcation or discount," leaves a note containing these words subject to be governed and regulated by the same rules as a note in the ordinary form before the statute. *Youngs v. Little*, 15 N. J. L. 1.

Notice.—In an action on a bill of exchange by the assignee, the court properly charged, as to set-off, that unless the defendant owned the note sought to be set off before the indorsement of the bill to plaintiff, and that at or before the transfer plaintiff knew the same, defendant would not be entitled to set it off against the bill. *Manning v. Maroney*, 87 Ala. 563.

Note Negotiable at a Bank.—If a note is made negotiable at a bank, the bank is authorized by the maker to advance on his credit to the owner of the note the sum expressed on its face. It would, therefore, be a fraud upon the bank to set up offsets against this note, in consequence of any transactions between the parties. *Mandeville v. Union Bank*, 9 Cranch (U. S.) 9.

2. *Gatewood v. Denton*, 3 Head (Tenn.) 380; *Bigelow v. Lawrence*, 16 Conn. 207; *Driggs v. Rockwell*, 11 Wend. (N. Y.) 504; *Furman v. Has- kin*, 2 Cai. (N. Y.) 369; *Sargent v.*

which exists against an intermediate assignee cannot be set up against the holder.¹ The *English* rule, however, which is fol-

Southgate, 5 Pick. (Mass.) 312; 16 Am. Dec. 409; Stockbridge, v. Damon, 5 Pick. (Mass.) 223; Ranger v. Cary, 1 Met. (Mass.) 369; Ayer v. Hutchins, 4 Mass. 371; Armstrong v. Chadwick, 127 Mass. 156; Peabody v. Peters, 5 Pick. (Mass.) 1; Braynard v. Fisher, 6 Pick. (Mass.) 355; McDonald v. Mackenzie (Oregon, 1887), 14 Pac. Rep. 866; Shirely v. Todd, 9 Me. 83; Robinson v. Perry, 73 Me. 168; Barney v. Norton, 11 Me. 350; Burnham v. Tucker, 18 Me. 179; Wood v. Warren, 19 Me. 23; Nixon v. English, 3 McCord (S. Car.) 549; McDuffir v. Dame, 11 N. H. 244; Foot v. Ketchum, 15 Vt. 258; 40 Am. Dec. 678; Harrington v. Wilcox, 8 Jones (N. Car.) 349; Norton v. Foster, 12 Kan. 44. See 22 Cent. L. J. 177.

In Fisher v. Leland, 4 Cush. (Mass.) 456; 50 Am. Dec. 805, the court by Shaw, C. J., said: "It seems, therefore, that the indorsement of a note after it is due, is, *per se*, such as to render the note void, or to defeat the right of the plaintiff. But if there are anterior circumstances, such as fraud in obtaining the note, the fact that the indorsee takes it when overdue is a circumstance of suspicion which should put him on inquiry, and leads to a presumption that he knew or by inquiry might know of such fraud, and is deemed constructive notice of it."

Under the *Alabama* statute of set-off where A and B make a note jointly to C, which he assigns to D, who brings an action upon it against A alone, a note made by C and assigned to B before notice of the assignment of the former note, can be used in set-off. Winston v. Metcalf, 7 Ala. 837.

Damages sustained by the makers of a promissory note, in consequence of the breach of an agreement by the payees to apply the proceeds of a consignment of wheat to the payment of such note, cannot be set off nor made the subject of a counterclaim, in an action brought upon a subsequent note, given by the same makers, to the payees of the first, and transferred to the plaintiff after maturity; the first note having been collected, and the second being a new and independent security and resting on a distinct consideration. Titus v. Himrod, 39 Barb. (N. Y.) 581.

The maker of a note transferred after maturity, cannot set off against it a claim against the payee obtained before

the transfer, when he was indebted to the payee at the time of such transfer, on other demands exceeding the amount of this claim against the payee. Collins v. Allin, 12 Wend. (N. Y.) 356; 27 Am. Dec. 130.

In a suit against the maker of a promissory note, brought by an indorsee who received it from the payee after maturity, to secure a debt of the payee to him, and with the obligation to account to the payee for the balance of the note after the discharge of the debt, the defendant cannot set off a claim against the payee. Trafford v. Hall, 7 R. I. 104; 82 Am. Dec. 589.

In *New Hampshire* it is held that no set-off will be allowed against an indorsee of a negotiable instrument even though he takes it overdue. Chandler v. Drew, 6 N. H. 469; 26 Am. Dec. 704.

A set-off, *bona fide* acquired by the maker against the payee of a note before notice of its assignment to a third person, is not defeated by the subsequent discharge of the payee as a bankrupt. Harwell v. Steel, 17 Ala. 372.

1. Hooper v. Spicer, 2 Swan (Tenn.) 494; Kennedy v. Manship, 1 Ala. 43; Stocking v. Toulmin, 3 Stew. & P. (Ala.) 35; McKenzie v. Hunt, 32 Ala. 494; Nixon v. English, 3 McCord (S. Car.) 549; Perry v. Mays, 2 Bailey (S. Car.) 354; Savage v. Laclede Bank, 62 Miss. 586; Favorite v. Lord, 35 Ill. 142; Chandler v. Drew, 6 N. H. 469; 26 Am. Dec. 704.

In an action on a promissory note by a certain indorsee or transferee against the maker, a promissory note made by the plaintiff's immediate indorsee and another person payable to a stranger, is not available to the defendant as a set-off. Bostick v. Scruggs, 50 Ala. 10.

In an action to foreclose a mortgage securing promissory notes, the mortgagor cannot set off demands against an intermediate holder of the notes and mortgage unless founded on an agreement supported by a new consideration in pursuance of which the intermediate holder procured the notes, or which was entered into by the parties while the notes were in his hands. Brown v. Scott, 87 Ala. 453; Goldthwaite v. National Bank, 67 Ala. 549.

In a suit by an indorsee against the maker, a note given by the indorser to the defendant not mentioned in the defendant's statement cannot be allowed

lowed in many of these States, is that the indorsee of an overdue note takes it subject only to those set-offs which arise out of the note transaction itself.¹ Only such claims against the indorser can be allowed against the indorsee of an overdue bill as were due the defendant at the time of the indorsement.² And

in set-off. *Hopkins v. Megguire*, 35 Me. 78.

In an action by indorsee, the maker may set off a note of plaintiff's indorser indorsed to defendant with notice to plaintiff before his suit brought. *Snow v. Conant*, 8 Vt. 301. See *Bliss v. Houghton*, 13 N. H. 126.

In *Massachusetts* the indorsee of a promissory note overdue takes it subject to any payments made to any prior holder and to any right of set-off which the maker had against it in the hands of any prior holder. *Bond v. Fitzpatrick*, 4 Gray (Mass.) 89; *Baxter v. Little*, 6 Met. (Mass.) 10; 39 Am. Dec. 707; *Sargent v. Southgate*, 5 Pick. (Mass.) 312; 16 Am. Dec. 409.

It has been held that in a suit against the maker of a promissory note, who took it overdue as collateral security for a smaller debt, evidence that the plaintiff's assignor, while holding the note, received money towards its payment, the amount of which is not exactly proved, and after assigning the note to the plaintiff, declared that it was paid, is competent to prevent a recovery of a greater amount than the plaintiff's own debt, and any payments specifically proved to have been made to such assignor while he held the note, are admissible in further reduction of the amount to be recovered. *Bond v. Fitzpatrick*, 8 Gray (Mass.) 536.

In *Missouri*, the defendant may, under *Wagner's Statutes*, 1274, § 2, set off any claim which he may have had against a prior holder. *Munday v. Clements*, 58 Mo. 577.

But this case was overruled in part in *Cutler v. Cook*, 77 Mo. 388, and the defendant's right of set-off was limited to claims connected with the note itself.

The defendant may, in an action by the assignee of a negotiable note, transferred after it was due, under *Iowa Code*, § 2546, set up as a counterclaim a note executed by the assignor of the note sued on, and assigned to the defendant before he had notice of the transfer of his note to the plaintiff. *Downing v. Gibson*, 53 Iowa 517.

1. *Borough v. Moss*, 10 B. & C.

558; 21 E. C. L. 128; *Sturtevant v. Ford*, 4 M. & G. 101; 43 E. C. L. 61; *Whitehead v. Walker*, 10 M. & W. 698.

A similar doctrine prevails in *Pennsylvania*. *Hughes v. Large*, 2 Pa. St. 103; *Clay v. Cottrell*, 18 Pa. St. 408; *Long v. Rhawn*, 75 Pa. St. 128; and in *Vermont*, *Britton v. Bishop*, 11 Vt. 70; *Armstrong v. Noble*, 55 Vt. 428; *Haley v. Congdon*, 56 Vt. 65; and in *Missouri*, *Cutler v. Cook*, 77 Mo. 388; *Wheeler v. Barret*, 20 Mo. 573; *Gullett v. Hoy*, 15 Mo. 399; *Unsel v. Stephenson*, 33 Mo. 161; *Mattoon v. McDaniel*, 34 Mo. 138; *Arnot v. Woodburn*, 35 Mo. 99; *Haeussler v. Greene*, 8 Mo. App. 451; *Grier v. Hinman*, 9 Mo. App. 213; and in *Connecticut*, *Robinson v. Lyman*, 10 Conn. 30; 25 Am. Dec. 52; *Fairchild v. Brown*, 11 Conn. 26; *Culver v. Parish*, 21 Conn. 408; *Goodrich v. Stanley*, 23 Conn. 79; *Simpson v. Hall*, 47 Conn. 417; and in *Iowa*, *Shipman v. Robbins*, 10 Iowa 208; *Whittaker v. Kuhn*, 52 Iowa 315; and in *Maryland*, *Annan v. Houck*, 4 Gill (Md.) 325; 45 Am. Dec. 133; *Eversole v. Maull*, 50 Md. 95.

2. 5 Rob. Pr. 975; *Davis v. Miller*, 14 Gratt. (Va.) 9; *Ritchie v. Moore*, 5 Munf. (Va.) 388; 7 Am. Dec. 688; *Robinson v. Perry*, 73 Me. 168; *Robinson v. Lyman*, 10 Conn. 30; 25 Am. Dec. 52; *Baxter v. Little*, 6 Met. (Mass.) 7; 39 Am. Dec. 707; *Proctor v. Cole*, 115 Ind. 15; *Goldthwaite v. Bradford*, 36 Ind. 149; *Wood v. Brush*, 72 Cal. 224; *McAlpin v. Wingard*, 2 Rich. (S. Car.) 547; *Gatewood v. Denton*, 3 Head (Tenn.) 380.

Upon a suit in equity to redeem land from a mortgage given to secure negotiable promissory notes brought against one to whom the notes were indorsed and mortgage delivered before the notes became due, but to whom the mortgage was not assigned until afterwards, the plaintiff cannot set off against the defendant claims upon the mortgage acquired by the plaintiff after such indorsement and delivery and before maturity of the notes or assignment of the mortgage. *Breen v. Seward*, 11 Gray (Mass.) 118.

Where the maker of a promissory

in such case no recovery can be had against him of any excesses above the amount of the instrument upon which he sues.¹ When a bill or note is obtained by the indorsee without valuable consideration, any set-off may be used against it in his hands which would have been available against the payee.² The rule as to negotiable paper assigned without indorsement is that it stands upon the same footing as paper not negotiable.³

(3) *In Suits By and Against Receivers*—(See also RECEIVERS, vol. 20, p. 135; NATIONAL BANKS, vol. 16, p. 197).—The general principle governing set-off against receivers seems to be that the receiver takes the property over which he is appointed receiver, subject to any set-offs which the defendant

note is sued by the indorsee, after maturity, he cannot set off the payee's note which he purchased before the indorsement of his own note, unless the latter note were due when he received notice of such indorsement. *Chambliss v. Matthews*, 57 Miss. 306.

The insolvency of the principal at the time he assigned a note held by him against the surety does not entitle the latter to an equity against the note in the hands of the assignee, he not having paid the debt for which he was surety until after he had notice of the assignment. *Walker v. McKay*, 2 Metc. (Ky.) 295.

In an action upon a note brought by the payee for the use of his assignee against the maker, the note having been assigned but not indorsed after due, and it not appearing that the payee was insolvent when he made the assignment, the maker cannot set off money paid by him as surety for the payee after he received notice of the assignment, although the money paid was upon a liability entered into before the assignment, but which had not been reduced into judgment against the surety before notice of the assignment was given. The maker had no demands upon the payee when he received such notice, but was only contingently liable for him. *Follett v. Buyer*, 4 Ohio St. 586.

The maker of a sealed promissory note before notice to him of the assignment thereof, acquired by assignment an interest in a bond given by the payee of the note to a third person. It was held in a suit by the assignee of the note against the maker, that the latter might set off his interest in the bond. *Rider v. Johnson*, 20 Pa. St. 190.

In *Baxter v. Little*, 6 Met. (Mass.) 7; 39 Am. Dec. 707, it was held that the defendant would not be allowed to set off a claim acquired after the assignment, even though he acquired it before he had notice of the assignment. But compare *Anderson v. Van Alen*, 12 Johns. (N. Y.) 343.

The defendant pleaded that the note in suit was given for a debt due a third person, and for his benefit, and prayed that a claim since acquired against him might be set off. *Held* bad, for not alleging that the property of the note was not in the plaintiff, but the third person, either at or after the defendant's purchase of the claim set off. *Bullock v. Dunbar*, 17 Tex. 243.

1. *Norton v. Foster*, 12 Kan. 44.

2. *Bone v. Tharp*, 63 Iowa 223; *Ryan v. Chew*, 13 Iowa 589.

Plaintiff sued defendant on a note made by him to her husband and indorsed by the latter to her; defendant alleged that the transfer was fraudulently made to enable the husband to avoid paying money owed by him to defendant, and asked to set off his claim against the note; plaintiff demurred. *Held*, that the demurrer confessing the truth of the answer, plaintiff would be regarded as holding the note in trust for her husband, and defendant would be allowed to make the set-off. *Hillhouse v. Adams*, 57 Conn. 152.

Where the indorser of a promissory note has only a lien upon a part of the amount as collateral security for money due from the promisor, a debt due from the promisor to the maker of the note may set off against the residue upon motion, though such debt consists of a judgment recovered in another court. *Moody v. Towle*, 5 Me. 415.

3. *Simpson v. Hall*, 47 Conn. 417.

might have set up against the original owner.¹ But the set-off

1. *Colt v. Brown*, 12 Gray (Mass.) 233; *Com. v. Phoenix Bank*, 11 Met. (Mass.) 129; *Com. v. Shoe, etc., Ins. Co.*, 112 Mass. 131; *Cook v. Cole*, 55 Iowa 70; *Berry v. Brett*, 6 Bosw. (N. Y.) 627; *In re Middle Dist. Bank*, 1 Paige (N. Y.) 585; *Miller v. Franklin Bank*, 1 Paige (N. Y.) 444; *Van Wagoner v. Paterson Gas Light Co.*, 23 N. J. L. 283; *Kinsler v. Pope*, 5 Strobb. (S. Car.) 126; *Cox v. Volkert*, 86 Mo. 505; *Penn Bank v. Farmers' Deposit Nat. Bank* (Pa. 1889), 20 Atl. Rep. 150; *Clarke v. Hawkins*, 5 R. I. 219; *Naglee v. Palmer*, 7 Cal. 543.

The assignment to the receivers passes the rights and property of the corporation precisely in the same plight and condition, and subject to the same equities, as they were held by the corporation. *Van Wagoner v. Paterson Gas Light Co.*, 23 N. J. L. 283.

In an action by an assignee for benefit of creditors of a bank to recover a balance due from another bank, a check drawn on the insolvent bank, which came into the hands of defendant prior to the assignment, and to which no defense is set up, should be allowed as a set-off, though defendant is not the owner of the check, but holds it for collection. *Penn Bank v. Farmers' Deposit Nat. Bank* (Pa. 1889), 20 Atl. Rep. 150.

In adjusting the concerns of a bank, by receivers of its assets appointed pursuant to the provisions of *Massachusetts Stats.* 1838, ch. 14, the bank tax imposed by *Rev. Stats.*, ch. 9, § 1, and ch. 36, § 45, and due from the bank, may be set off against money due from the commonwealth to the bank on loan; so of money deposited in the bank by the agent of Charles River Bridge, in his capacity as such agent. *Com. v. Phoenix Bank*, 11 Met. (Mass.) 129.

Where a bank becomes insolvent and a receiver is appointed or its assets are placed in the hands of commissioners for liquidation, the depositor may still set off his deposit against his indebtedness. *New Amsterdam Sav. Bank v. Tartter*, 54 How. Pr. (N. Y.) 385; *Clarke v. Hawkins*, 5 R. I. 219; *Finnell v. Nesbit*, 16 B. Mon. (Ky.) 351; *Platt v. Bentley*, 11 Am. L. Reg. 171.

And where a depositor is indebted to a bank on a note, and before the note is due, the banker makes an assignment for the benefit of creditors, the depositor may insist that the note be paid out

of the deposit. *McCagg v. Woodman*, 28 Ill. 84.

A debtor to a bank, whose charter is repealed, has an equitable right to offset every demand which he had against the bank at the time of the repeal of its charter, but not demands which he afterwards purchased. *McLarm v. Pennington*, 1 Paige (N. Y.) 102.

An assignee for the benefit of creditors, who sells the assigned stock on credit, cannot create an offset or payment in reduction of the price by incurring liabilities to his vendee, who knew of the trust, for articles knowingly furnished for his personal use and not on account of the trust fund. *Paige v. Stephens*, 23 Mich. 357.

It is said by Mr. High in his work on Receivers, that where the receiver is appointed in behalf of the creditors, a debtor cannot set off a claim against the receiver because this would give him a preference over the other creditors. *High on Receivers*, § 252. But although the above doctrine is upheld by Mr. High, in which he seems to be countenanced by the opinion in *Clark v. Brockway*, 3 Keyes (N. Y.) 13, 1 Abb. App. Dec. (N. Y.) 351, yet it is doubtful whether it is the true doctrine, because there does not seem to be any such distinction in the functions of receivers. See *RECEIVERS*, vol. 20, p. 13. And it seems to be discountenanced by the case of *Jordan v. Sharlock*, 84 Pa. St. 366. It would seem that where the claim which the defendant sets up was due and payable before the receiver was appointed it would be a vested right which the appointment of the receiver could not take away. The case of common funds such as savings bank deposits, constitutes an exception to this rule, for then the defendant is entitled to a *pro rata* share of the fund after all claims against it are satisfied; and as he is entitled to this, even though it exceeds the amount originally deposited by him, so he is only entitled to this, though it should fall below the amount originally invested. But see *Eastern Bank v. Capron*, 22 Conn. 639; *Haxtun v. Bishop*, 3 Wend. (N. Y.) 13. A receiver of an insolvent corporation, suing on a cause of action, on which the company itself could not have sued — *e. g.*, to set aside a transfer or recover back payments made by the corporation in fraud of creditors — represents the creditors, not the corporation; and the

must have accrued in favor of the defendant before the proceedings for the appointment of a receiver were begun.¹ The fact however, that the claim for which suit is brought has not become due at the time that the receiver is appointed, will not prevent the defendant from using his set-off;² though the claim must be one in favor of the original owner.³ When the claim against which the set-off is attempted to be made is in the nature of a common or trust fund—as, for example, a deposit in a savings bank, or the capital stock of a stockholder—no set-off can be used against it in the hands of a receiver.⁴

defendants cannot interpose as a set-off a claim against the corporation. *Osgood v. Ogden*, 3 Abb. App. Dec. (N. Y.) 425.

1. *In re* Middle Dist. Bank, 1 Paige (N. Y.) 585; *Van Dyck v. McQuade*, 85 N. Y. 616; *Diven v. Phelps*, 34 Barb. (N. Y.) 224; *U. S. Trust Co. v. Harris*, 2 Bosw. (N. Y.) 75; *Singerly v. Fox*, 75 Pa. St. 112; *Chipman v. Ninth Nat. Bank*, 120 Pa. St. 86; *Nettles v. Huggins*, 8 Rich. (S. Car.) 273; *Holmes v. Bullock*, 4 Ala. 228; *Colt v. Brown*, 12 Gray (Mass.) 233; *Case v. Cannon*, 23 La. Ann. 112; *Clarke v. Hawkins*, 5 R. I. 219. See *Clark v. Brockway*, 3 Keyes (N. Y.) 13; 1 Abb. App. Dec. (N. Y.) 351. In this case the defendant became the owner of a set-off after the insolvent had made an assignment but before the receiver was appointed. *Held*, that in an action by the receiver, the defendant could not set it up.

In an action by an assignee for the benefit of creditors to recover from the bank a balance to the credit and subject to the check of the assignor at the date of the assignment, the bank cannot set off notes or drafts indorsed by and discounted for the assignor before, but maturing after the assignment. *Chipman v. Ninth Nat. Bank*, 120 Pa. St. 86.

The debtor of an insurance company cannot, after the insolvency of the company, purchase a claim against the company and set it off to the full amount against his debt to the company, but only to the amount to which he would be entitled in dividends from the assets of the company. *Long v. Penn. Ins. Co.*, 6 Pa. St. 421.

A made an assignment for the benefit of his creditors and among the assets assigned was a note by B to himself. B had paid a debt after the assignment, for which they were equally bound before the assignment. *Held*, that in an action by A's receiver, B

might plead A's aliquot part of said debt as an offset against his individual note to A in the hands of his assignee. *Chenault v. Bush*, 84 Ky. 528.

One who rendered legal services to a corporation upon an employment by its officers during the pendency of an action for the appointment of a receiver for its property, and before the property passed under the control of the receiver, was held to be entitled to set off the value of such services against an account due by him to the corporation and which also accrued prior to the receivership, but not against a further account which accrued during the administration of the receiver. *Cook v. Cole*, 55 Iowa 70.

2. *Berry v. Britt*, 6 Bosw. (N. Y.) 627.

3. A creditor who purchases goods from an assignee for the benefit of creditors, cannot set up, in the way of counterclaim, in an action for the price, any matters which accrued against the debt or before its assignment. *Otis v. Shantz*, 55 Hun (N. Y.) 603. See also *James v. McPhee*, 9 Colo. 486; *Beeler v. Turnpike Co.*, 14 Pa. St. 162.

4. *Stockton v. Mechanics', etc., Sav. Bank*, 32 N. J. Eq. 163; *Vanatta v. New Jersey Mut. L. Ins. Co.*, 31 N. J. Eq. 15; *Hannon v. Williams*, 34 N. J. Eq. 255; *Williams v. Traphagen*, 38 N. J. Eq. 57; *Sawyer v. Hoag*, 17 Wall. (U. S.) 610; *Lawrence v. Nelson*, 21 N. Y. 158; *In re* Empire City Bank, 18 N. Y. 190; *Wood v. Dummer*, 3 Mason (U. S.) 308; *Hobart v. Gould*, 8 Fed. Rep. 57; *Osborn v. Byrne*, 43 Conn. 155; 21 Am. Rep. 641; *Hillier v. Allegheny Ins. Co.*, 3 Pa. St. 470; *Grissel's Case*, L. R., 1 Ch. 528; *Black & Co's Case*, L. R., 8 Ch. App. 254.

It seems that if a deposit in a savings bank were made for the purpose of applying the same in payment of

(4) *In Suits By and Against Trustees*—(See TRUSTEES).—The defendant in an action by a trustee, in his capacity as such, has the same rights, as regards set-off, that he would have against the *cestui que trust*.¹ A claim which the defendant has against the plaintiff individually cannot be set off against a claim due to the plaintiff as trustee.² Neither can a claim held by the defendant as trustee be set off against his individual debt;³ but he may set off a claim due him, individually, against a claim due by him as trustee.⁴ The trustee, when called upon to account for the property intrusted to him, cannot set off an independent debt due him from the *cestui que trust*.⁵

the depositor's indebtedness to that amount and the officers of the bank had knowledge of such purpose, then set-off may be allowed. *Osborn v. Byrne*, 43 Conn. 155; 21 Am. Rep. 641.

Where a stockholder in an insolvent corporation, who was indebted to the corporation in the sum of \$1,000, for unpaid installments, and at the same time held a claim against the corporation for \$1,150, presented his whole claim and received a dividend thereon from the effects of the corporation—held, that he could not, in a suit by the receivers of the corporation against him to recover the unpaid installments, set off the balance of his claim. *Hall v. U. S. Ins. Co.*, 5 Gill (Md.) 484.

1. *Caines v. Brisbane*, 13 Johns. (N. Y.) 9; *Hamilton v. Gunther*, 32 N. Y. 22; *Litterer v. Berry*, 4 Lea (Tenn.) 193; *Krause v. Beitel*, 3 Rawle (Pa.) 199; 23 Am. Dec. 113; *Campbell v. Hamilton*, 4 Wash. (U. S.) 93; *Waddle v. Harbeck*, 33 Ind. 231; *Jones v. Hawkins*, 17 Ind. 550; *Forkner v. Dinwiddie*, 3 Ind. 34; *Bedford v. Bruton*, 1 Bing. N. Cas. 399; 27 E. C. L. 433. See *Wheeler v. Raymond*, 5 Cow. (N. Y.) 231.

To an action brought by or against a trustee, a set-off may be made of money due to or from the *cestui que trust*. *Bac. Abr.*, tit. Set-off (C), citing *Bottimley v. Brooke*, M. 22 G. 3, C. B.; *Rudge v. Birch*, M. 25 G. 3, B. R.; 1 T. R. 621. See 1 M. & S. 555; *Canby v. Ridgway*, 1 Binn. (Pa.) 496; *Ruggles v. Keeler*, 3 Johns. (N. Y.) 263; 3 Am. Dec. 482.

The bank notes of the Pennsylvania Bank of the United States cannot be set off to a note sued upon by the trustees of the bank, to whom it had been assigned for the payment of its creditors. *Gee v. Bacon*, 9 Ala. 699.

It was formerly held in *New York*

that in a court of law, in an action by one, in his own name, for a debt due to him in trust for another, the defendant could not set off a demand against the *cestui que trust*. Thus, in an action on a judgment, in the name of the judgment creditor, for the benefit of an assignee of the judgment, the defendant could not set off a debt due to him from the assignee. *Wheeler v. Raymond*, 5 Cow. (N. Y.) 231; 9 Cow. (N. Y.) 295.

Where land is conveyed in trust for the benefit of creditors, and the deed includes rents already due, the tenant, as to such rents, has the same right of set-off against the demand of the trustee that he would have had against the grantor. *Litterer v. Berry*, 4 Lea (Tenn.) 193.

Where a person purchases property held in trust for the payment of the debt of the mortgagor, with notice of the trust, he is not entitled to set off debts of the trustee against the *cestui que trust*. *Wolfe v. Bate*, 9 B. Mon. (Ky.) 208.

2. *McPherson v. Ross*, 1 Md. 181; *Flournoy v. Jeffersonville*, 17 Ind. 169; 79 Am. Dec. 468; *Falkland v. St. Nicholas Nat. Bank*, 84 N. Y. 145; *Paige v. Stephens*, 23 Mich. 357; *Daniel v. Wall*, 80 Ga. 218; *Vason v. Beall*, 58 Ga. 500; *Wolfe v. Bate*, 9 B. Mon. (Ky.) 208.

3. *Wolf v. Beales*, 6 S. & R. (Pa.) 242; 9 Am. Dec. 425.

4. *Pendergast v. Greenfield*, 40 Hun (N. Y.) 494.

5. *Tagg v. Bowman*, 99 Pa. St. 376; *Peters v. Nashville Sav. Bank*, 86 Tenn. 224.

Where money was placed by a corporation in the hands of its general manager, as trustee, for safekeeping and to be disbursed in its business, such trustee cannot offset a debt due to him by the corporation against the moneys

(5) *In Suits By and Against Executors and Administrators*—(See also EXECUTORS AND ADMINISTRATORS, vol. 7, pp. 372, 388).—In an action against an executor or administrator in his official capacity, the defendant may set off all claims against the plaintiff which his testator, or intestate, might have set off against him.¹ Therefore, the claim to be set off must have been due the testator or intestate.²

In an action by an executor or administrator, in his capacity as such, the defendant may set off all claims which he might have used against the testator or intestate;³ but the claim must have existed in favor of the defendant against the testator or intestate

in his hands, after a voluntary assignment by the corporation for the benefit of creditors. *First Nat. Bank v. Barnum Wire, etc., Works*, 58 Mich. 124; 55 Am. Rep. 660.

1. *Bordman v. Smith*, 4 Pick. (Mass.) 212; *Stickney v. Clement*, 7 Gray (Mass.) 170; *Bosler v. Exchange Bank*, 4 Pa. St. 32; *Eyrich v. Capital State Bank*, 67 Miss. 60; *Percy v. Clury*, 32 Md. 245; *Hale v. Brown*, 11 Ala. 87; *Nehbe v. Price*, 2 Nott & M. (S. Car.) 328.

In an action against the executor of his deceased partner, he may set off a debt due from the plaintiff to the partnership. *Burke v. Stillwell*, 23 Ark. 294.

An executrix cannot set off damages for harassment and attorney's fees paid, against a claim prosecuted against the estate she represents. *House v. Collins*, 42 Tex. 487.

2. *Schofield v. Corbett*, 11 Q. B. 779; 63 E. C. L. 778; *Watts v. Rees*, 9 Exch. 696; *Lamberton v. Freeman*, 16 N. H. 547; *Mead v. Merritt*, 2 Paige (N. Y.) 402.

3. *Executors*.—*Conway v. Conway*, 3 Sandf. (N. Y.) 650.

In an action between executors, the contracts of their testators may be set off. *Young v. Hays*, 2 Yeates (Pa.) 217.

Administrators.—*Knapp v. Lee*, 3 Pick. (Mass.) 452; *Bordman v. Smith*, 4 Pick. (Mass.) 212; *Adams v. Butts*, 16 Pick. (Mass.) 343; *M'Donald v. Webster*, 2 Mass. 499; *Jarvis v. Rogers*, 15 Mass. 389; *McGinnis v. Allen*, 2 Swan (Tenn.) 645; *Richardson v. Parker*, 2 Swan (Tenn.) 529; *Granger v. Granger*, 6 Ohio 35; *Traders' Nat. Bank v. Cresson*, 75 Tex. 298; *Smalley v. Trammel*, 11 Tex. 10; *Hosmer v. Merriam*, 1 Root (Conn.) 427; *Morrison v. Jewell*, 34 Me. 146; *Vincent v. Watson*, 40 Pa. St. 306; *Mayhew v. Flake*, 2 Nott & M. (S. Car.) 398; *Mathewson*

v. Strafford Bank, 45 N. H. 104; *Ray v. Dennis*, 5 Ga. 357; *Schoonover v. Quick*, 17 Ind. 196.

Where land was conveyed subject to a mortgage which the grantee by the terms of the deed was to pay, it was held that the mortgage constituted a demand against the grantee in favor of the grantor which might be set off in an action by the personal representatives of the grantee, after his decease, against the grantor, on a contract for the payment of money. *Rawson v. Copland*, 2 Sandf. Ch. (N. Y.) 251.

Where a judgment was rendered against an intestate in his lifetime, as principal and his security, which judgment was paid by the security, after the death of the intestate, it was held that such security could set off such judgment in a suit against him by the administrator on a demand due the intestate. *Ray v. Dennis*, 5 Ga. 357.

The defendant in an action by an administrator may use his set-off though the action is brought within the time during which the administrator is protected by statute from suits. *Cunningham v. Baker*, 2 Nott & M. (S. Car.) 399.

The right of set-off as provided in *Vermont Gen. Stat.*, § 17, ch. 53, applies only to cases where the administrator brings suit before the commissioners appointed to adjust claims have acted. *Ewing v. Griswold*, 43 Vt. 400.

Against Heir.—No principle or practice in equity will enable a respondent to set off a debt due from the complainant's deceased ancestor on the ground that the complainant is in possession of lands of the ancestor which may be sold to satisfy the ancestor's debts, although a proceeding is pending against the estate to ascertain all claims against it, and to subject the decedent's lands to payment thereof. *Scott v. Scott*, 17 Md. 78.

in his lifetime, and not merely have accrued against his estate after his death.¹ When this is the case, the fact that the testator or intestate was insolvent will not deprive the defendant of his right to the set-off;² neither is it necessary for the defendant to

1. *Richardson v. Parker*, 2 Swan (Tenn.) 529; *Mitchell v. Rucker*, 22 Tex. 66; *Smith v. Edwards*, 1 Houst. (Del.) 427; *Dale v. Cooke*, 4 Johns. Ch. (N. Y.) 11; *Jordan v. National, etc., Bank*, 12 Hun (N. Y.) 512; *Bradley v. Angel*, 3 N. Y. 475; *Jordan v. National Shoe, etc., Bank*, 74 N. Y. 467; 30 Am. Rep. 319; *Root v. Taylor*, 20 Johns. (N. Y.) 137; *Mercein v. Smith*, 2 Hill (N. Y.) 210; *Kimball v. Bellows*, 13 N. H. 58; *Stuart v. Com.*, 8 Watts (Pa.) 74; *Cramond v. Bank of U. S.*, 1 Binn. (Pa.) 64; *Irons v. Irons*, 5 R. I. 264; *Armstrong v. Pratt*, 2 Wis. 299; *Mercer v. Lobit*, 10 La. Ann. 47; *Convery v. Langdon*, 66 Ind. 311.

In *Alabama*, in an action by the executor against the legatee in a will to recover a debt due the estate, the legacy cannot be set off before it is demandable of the executor, or has been assented to by him. *Sorrelle v. Sorrelle*, 5 Ala. 245.

Insolvency.—Where, after a suit is commenced by an administrator, the estate of his intestate is represented insolvent, the defendant may set off a note against the intestate which falls due pending the suit, though not due and payable when the action was commenced. *Bigelow v. Folger*, 2 Met. (Mass.) 255; *Boyden v. Massachusetts Mut. L. Ins. Co.* (Mass. 1891), 27 N. E. Rep. 669; *contra*, *Whitehead v. Cade*, 1 How. (Miss.) 95; *Bosler v. Exchange Bank*, 4 Pa. St. 32.

A person in debt to an insolvent succession cannot plead, in compensation, judgments which he subsequently acquired against it. His claim must be paid in the same proportion with those of the other creditors and according to its rank. *Dwight v. Carson*, 2 La. Ann. 459.

A debtor to an insolvent estate cannot set off, against the claim on him, a note of the intestate's transferred to him after the intestate's death, for the full amount due on the note, but only for the percentage on that amount which the creditors of the estate would receive. *Happoldt v. Jones*, Harp. (S. Car.) 109.

A claim for funeral expenses may be pleaded as a set-off in a suit brought by the personal representative for a

debt due the intestate. *Barbee v. Green*, 86 N. Car. 158.

A defendant in a suit by an administrator, in his capacity as such, cannot set off a demand of his against the intestate for money paid after his death by the defendant upon an obligation entered into in his lifetime as security for him. Such claims look to the general assets for satisfaction. *Granger v. Granger*, 6 Ohio 35.

Under the *New Hampshire* statute of set-off, where A gave a note payable to B and C, and B, having died, C received the amount of the note, in an action by B's administrator against C to recover one-half of the money, it was held that C could not set off a claim which he had against B's estate. *Woodman v. Barker*, 2 N. H. 479.

A purchaser of land at an administrator's sale, who, after his purchase, bought a claim due from the testator in his lifetime, which had been allowed against the estate, the amount payable on which was not then determinable by reason of the unsettled condition of the estate, was held not entitled to set off the claim in a suit for the purchase price of the land. *Harding v. Shepard*, 107 Ill. 264.

But it has been held that to entitle a defendant to a set-off against an executor or administrator, it is not necessary that the defendant's debt should have been actually due or really liquidated, at the death of the testator or intestate, provided it has become due and payable at the time the suit is brought against him by the executor or administrator, so that, if the decedent had lived, and had brought the suit himself at the time, the demand would have been a proper subject of offset. *Rawson v. Copland*, 3 Barb. Ch. (N. Y.) 166. See also *Bosler v. Exchange Bank*, 4 Pa. St. 32.

Where the defendant had gone security for the plaintiff's intestate and had paid about twenty dollars for him since his death, he may set off such payments when sued on a debt he owed the estate of the principal. *Burtley v. Hollenback*, Wright (Ohio) 168.

2. *Richardson v. Parker*, 2 Swan (Tenn.) 529; *Light v. Leininger*, 8 Pa.

present his claim to the personal representative and have it refused before pleading it as a set-off.¹ Conversely to the proposition that the set-off must have existed against the testator or intestate in his lifetime, in order to enable the defendant to set it up, the claim for which suit is brought must have been due the testator or intestate in his lifetime.²

Where a person is sued for a claim due by him personally, he cannot set off a debt due him in his representative capacity;³ nor

St. 403; *Palmer v. Steiner*, 68 Ala. 400; *Walker v. Wigginton*, 50 Ala. 579.

In *Richardson v. Parker*, 2 Swan (Tenn.) 529, the court by Caruthers, J., said: "The objection taken to it (the set-off) is that the debt against the defendant was a part of the assets to be distributed *pro rata* among all the creditors, and that the defendant's account must be filed and be subject to a ratable deduction if the estate turned out to be insufficient to pay all the debts. That if he is allowed to plead his account as a set-off, he will, in that way, get the whole of it to the prejudice of other creditors. Though this reasoning is plausible, it is not sound. The notes and accounts of the deceased are not assets if they have been discharged by payment, the creation of adverse accounts or otherwise. It is only what remains, after all just settlements with the debtors of the estate, which goes into the fund for distribution."

1. *Smalley v. Trammel*, 11 Tex. 10; *Mitchell v. Rucker*, 22 Tex. 66; *Matheson v. Strafford Bank*, 45 N. H. 104.

The maker of a promissory note, the payee having died insolvent, is entitled, in a suit upon the note brought by the administrator of the insolvent estate, to set off demands against the estate arising out of a breach of covenant in a conveyance in consideration whereof the note was given; even though he has not filed his claim before the commissioners of insolvency. *Morrison v. Jewell*, 34 Me. 146.

An agreement by executors or administrators to allow a set-off will be enforced against them. *Dickinson v. McDermott*, 13 Tex. 248. See also *Nims v. Rood*, 11 Vt. 96; 34 Am. Dec. 669.

A demand against an intestate not exhibited to the administrator within two years, as provided by *New Hampshire Laws* 1822, 338, § 18, cannot be set off to an action by the administrator. *Jones v. Jones*, 21 N. H. 219.

2. **Executors.**—*Patterson v. Patter-*

son, 59 N. Y. 574; 17 Am. Rep. 384; *Merritt v. Seaman*, 6 Barb. (N. Y.) 330; *Steel v. Steel*, 12 Pa. St. 64.

Administrators.—In a suit by an administrator for a debt due the estate of the decedent, which accrued after the death of the intestate, the defendant cannot set off a debt due him by the intestate before his decease. The principle of mutuality, in such cases, requires that the debts should not only be due to and from the same person, but in the same capacity. *Dayhuff v. Dayhuff*, 27 Ind. 158; *Welborn v. Coon*, 57 Ind. 270; *Harte v. Houchin*, 50 Ind. 327; *Bizzell v. Stone*, 12 Ark. 378; *Mills v. Lumpkin*, 1 Ga. 511; 44 Am. Dec. 677; *Crawford v. Beal*, *Dudley* (Ga.) 204; *Cook v. Lovell*, 11 Iowa 81; *Colby v. Colby*, 2 N. H. 419; *Wolfersberger v. Bucher*, 10 S. & R. (Pa.) 10; *Newhall v. Turney*, 14 Ill. 338; *Aiken v. Bridgman*, 37 Vt. 249; *Brown v. Garland*, 1 Wash. (Va.) 217; *Rapier v. Holland*, *Minor* (Ala.) 176; *Burton v. Chinn*, *Hard* (Ky.) 260; *Shaw v. Gookin*, 7 N. H. 16; *Foy v. Evans*, 8 Wend. (N. Y.) 530. But see *Anthony v. Miller*, Ga. Dec. 30.

A judgment against an administrator, on a debt contracted by his intestate, is a good set-off, in a suit instituted by him on a note payable to himself for the hire of a slave belonging to the estate. *Crabtree v. Cliatt*, 22 Ala. 181.

Where an administrator sells land subject to a vendor's lien, and agrees to accept the outstanding note of his intestate as a set-off to the price, this set-off must be allowed in a suit by the administrator on a note given in payment for the lands. *McDaniel v. Hooks*, 30 Ga. 981.

Where an executor, on a note given to him as executor, for a debt due to his testator, brings a suit in his own name, a debt due from the testator cannot be set off. *Merritt v. Seaman*, 6 N. Y. 168.

3. *Thomas v. Hopper*, 5 Ala. 442; *White v. Word*, 22 Ala. 442; *Wood v. Hardy*, 11 La. Ann. 760; *Doyley v.*

can his personal debt be set off against him in an action by him in his representative capacity.¹ Claims which a personal representative, as such, has against the plaintiff who sues the personal representative for a claim due from him in his representative character, may be set off against the plaintiff.² The personal representative cannot, in an action against him in his representative capacity, set off a debt due him personally.³ One sued on a personal debt cannot set off a debt due from the plaintiff as administrator.⁴

Heirs and distributees cannot, in a suit by the administrator, set off the share of the property they will be entitled to on final settlement,⁵ unless the amount has been ascertained and ordered to be paid.⁶ But in an action by an heir for his share decreed to be paid him, the administrator may set off a debt due from such heir to the ancestor's estate.⁷

(6) *In Suits By and Against Husband, Wife, and Husband and Wife*.—In an action against the husband for his own debt, he is not allowed to set off a debt due to him in the right of his wife.⁸

Doyley, 2 McCord (S. Car.) 185; Scholfield v. Corbett, 6 N. & M. 527; 36 E. C. L. 443; Blood v. Kane, 52 Hun (N. Y.) 225.

Where an administrator has settled his final account and charged himself with a note, such note becomes his own, and in an action against him by the maker he may set off the amount. Hall v. Chenault, 13 Ala. 710.

1. Harbin v. Levi, 6 Ala. 399; Menifee v. Ball, 7 Ark. 520; McCully v. Silverburgh, 18 Ill. 306; Wisdom v. Becker, 52 Ill. 342; M'Chesney v. Rogers, 8 N. J. L. 272.

An action instituted by L upon a single bill payable to "L, executor of B," is an action in his own right to which a debt due from him may be set off, and he cannot go into evidence of the consideration of the bill to show that it was given for a debt due B in order to exclude the set-off. Turner v. Plowden, 2 Gill & J. (Md.) 455.

In an action by A B upon a note payable to "A B, administrator," the individual debts of A B may be set off. Lacompte v. Seargent, 7 Mo. 351.

2. Pearson v. Darrington, 32 Ala. 227; Harris v. White, 5 N. J. L. 422.

3. Stickney v. Clement, 7 Gray (Mass.) 170.

A debt due to an administrator, in his private capacity, cannot be set off against the share of a distributee of the estate. Richbourg v. Richbourg, 1 Harp. Eq. (S. Car.) 168; Bradshaw's Appeal, 3 Grant (Pa.) Cas. 109.

4. Gourley v. Walker, 69 Iowa 80.

5. Guthrie v. Guthrie, 17 Tex. 541; Irving v. DeKay, 10 Paige (N. Y.) 319.

6. Irving v. DeKay, 10 Paige (N. Y.) 541.

Where the administrator has been ordered by the court to pay over the distributory shares, the defendant may set them up. Whaley v. Cape, 4 Mo. 233.

7. Procter v. Newhall, 17 Mass. 81; Brown v. Mattingly (Ky. 1891), 15 S. W. Rep. 353. See also Wilson v. Edmonds, 24 N. H. 517; Galloney's Appeal, 6 Pa. St. 37; *In re* Bogart, 28 Hun (N. Y.) 466.

In an action by grandchildren to recover their share of the estate, the administrator may set off a debt due by their father on account of money advanced by the testator. Earnest v. Earnest, 5 Rawle (Pa.) 213.

When a certain share of an estate is to be invested, the interest to be paid to an individual during his lifetime, and at his death the whole share to be paid to his children, a debt due to the testator by such individual cannot be set off against such share; the whole must be invested and the children are entitled to receive it without reduction. Voorhees v. Voorhees, 18 N. J. Eq. 223.

In a suit by husband and wife to recover a legacy bequeathed to the wife during coverture, it was held that a debt due from the husband to the testator in his lifetime could not be set off. Wingate v. Parsons, 4 Del. Ch. 117.

8. 2 Chit. Contr. 1280; Paynter v. Walker, Bull. N. P. 179; and Cooke v.

Much less can the husband in an action against him set off a demand which remains the separate property of his wife.¹

And, in an action by him alone, there cannot be set off a debt due by her before marriage.² Nor will the requirement of mutuality permit a set-off of a claim for damages (the statute permitting such matter to be set off) resulting from the tortious act of the plaintiff's wife, but for which the husband is not liable.³

The wife's choses in action do not by marriage become the property of the husband. While the husband may make them his by reducing them to possession, until this is done they remain the property of the wife. So with regard to the right of set-off, it seems that in an action by the husband and wife for a debt due to the wife before marriage, the defendant might, at common law, set off debts due the wife while single.⁴ But, as long as such debt is not reduced to possession by the husband, there cannot, in an action thereon by the husband and wife, be set off a debt due from the husband.⁵ If the husband should

Dixon, Bull. N. P. 179; *Ex parte Blagden*, 2 Rose 249.

It has been held that in an action against the husband, he cannot set off a judgment recovered against the plaintiff by himself and wife for slander of the wife. *Sutton v. Mandeville*, 1 Cranch (C. C.) 2.

1. *Dolph v. Rice*, 21 Wis. 590. See *Dickinson v. Owen*, 11 Cal. 71.

A promissory note given to a *feme covert* for money belonging to her before her marriage, and remaining her separate property afterwards under the laws of *Indiana*, cannot be pleaded as a set-off in a suit against the husband. *McCarty v. Mewhinney*, 8 Ind. 513.

2. 5 Rob. Prac. 969; 2 Chit. Contr. 1280. See *Wood v. Akers*, 2 Esp. 594. In this case Eyre, C. J., said: "For a debt of the wife *dum sola*, the action must be against husband and wife, and therefore cannot be set off against a claim made by the husband alone, and for which the action was brought." But, it appearing, in this particular case, that the husband, after the marriage, had ordered the debt to be paid, and thereby made it his own, the set-off was allowed. Eyre, C. J., continued: "But if it appeared that the husband, after the marriage, had ordered the debt to be paid; he thereby made it his own, and it could be set off."

It has, therefore, been laid down, as a general rule, that if the husband has, on some new consideration, made the debt due from his wife, *dum sola*, his own, so that the wife would not be a necessary party to an action for the recovery

thereof, it may be set off in an action by the husband alone. 2 Chit. Contr. 1280; *Wood v. Akers*, 2 Esp. N. P. 594. See *Norris v. Booth*, 8 Ala. 907. See also, *Mitchinson v. Hewson*, 7 T. R. 348.

3. In a suit at law on a note given for the purchase-money of slaves sold and delivered to the defendant, damages in respect to them, resulting from the tortious act of the vendor's wife committed in his absence, cannot be allowed as a discount or set-off, it not appearing that the husband consented to the tort, or gave it his subsequent sanction. *Yaught v. Wellborn*, 16 Ala. 377.

4. Where a suit was brought against a husband and wife on a note executed by the wife, while sole, it was held that the husband might set off one half the amount paid by him on a judgment which was recovered against the wife and the plaintiff on a note executed by them jointly. *Johnson v. King*, 20 Ala. 270.

5. *Tillett v. Com.*, 9 B. Mon. (Ky.) 438.

In an action by husband and wife on a note to the wife while single, there cannot be set off a sale of goods to husband and wife, which is the husband's separate liability. *Smith v. Johnson*, 5 Harr. (Del.) 40; *Green v. Carson*, 4 Metc. (Ky.) 76; *Glasebrook v. Ragland*, 8 Gratt. (Va.) 332.

In Actions by Husband and Wife for Legacy to Debtor's Wife.—At common law a legacy to a debtor's wife was regarded as a legacy to her husband.

die before reducing the wife's choses in action to possession, such choses remain the property of the wife. Accordingly, in an action by the widow upon such choses, the defendant cannot set off a debt due from the deceased husband of the plaintiff.¹

In an action on a note made payable to a married woman after coverture, the right to set off may depend on whether the husband treats it as joint property or as several. If he chooses to treat it as several, he may deal with it as his own, and the consequence of his so treating it will be to let in by way of set-off to

But in equity it was held that the wife was entitled to a support for herself and her children out of such legacy before the husband's debt could be applied in extinguishment thereof, and therefore the executor could not set off the debt against the legacy except subordinate to this right of the wife to her own and her children's support. *Elibank v. Montolieu*, 5 Ves. 737; *Carr v. Taylor*, 10 Ves. 574. But if the wife's equity was discharged, as by her death, the legacy became the absolute property of the husband subject to his debt. *Ranking v. Barnard*, 5 Madd. 32. But at the present time, under statutes which have been enacted in most of the United States, a bequest to a married woman becomes her own separate property, and, therefore, these questions do not ordinarily arise. *Crosswell on Ex. & Adm.*, § 484.

Where, in an action by the husband and wife to recover a legacy bequeathed to the wife, a judgment was rendered in their favor jointly, this was held not to be such reduction to possession by the husband as to authorize the set off of another judgment recovered by the defendant against the husband alone. *Crittenden v. Alexander*, 15 Gray (Mass.) 432. The court by Merrick, J., said: "The amount recovered by the plaintiffs was upon a claim on a legacy bequeathed to the wife; and although her husband had such interest in and right to it, that he might by reducing it to possession make it his own, yet, until he did that, her right to it was not extinguished. In fact, he never did reduce it to possession; for a suit in the name of himself and wife, and a judgment thereon jointly in their behalf, will not have such an effect. If the husband should in such case die before collecting the money or enforcing the judgment, the wife would as survivor take the whole benefit of it, and hold it to her own sole use; for her interest and right remain until the

husband has, by some competent and sufficient act, reduced the demand to his own possession.

"A legacy to the wife may indeed, under our statutes, be taken by an attachment in a suit against the husband, and transferred by virtue of it in payment of his debts. But even in that case it is held to be a chose in action, which survives to the wife if the husband die pending the suit or before levy of the execution. Upon his decease, the lien created by the attachment is necessarily dissolved; and the wife will then, as survivor, hold and recover the legacy to her own use. If there be no collection of the money due, and no legal assignment or transfer of the legacy, nothing short of a judgment in a suit by the husband in his own name for its recovery, which he might undoubtedly successfully prosecute, will amount to such a reduction to possession as will bar the wife's right of survivorship." But see *Tillett v. Com.*, 9 B. Mon. (Ky.) 438.

In a proceeding by a husband to recover a legacy to his wife, it was held that the executor might set off a bond given by the husband to the testator in his lifetime. *Lowman's Appeal*, 3 W. & S. (Pa.) 349.

On *scire facias* by husband and wife, on a recognizance, to recover the wife's distributive share of an estate, it was held that money lent to her husband before the recognizance might be set off. *Wishart v. Downey*, 15 S. & R. (Pa.) 77.

1. In an action by a widow for her distributive share of an estate, the administrators cannot set off a debt due from the husband of the plaintiff, he never having reduced her distributive share into possession during his life. *Flory v. Becker*, 2 Pa. St. 470.

The debt of a husband, during coverture, cannot be set off, after divorce, against the wife's distributive share in

his claim any debts due from him.¹ As a result of such election, a debt due from the wife before marriage cannot be set off against his claim.² But if, on the other hand, he elects to treat it as joint property of himself and his wife in her right, debts due her in her own right will be let in.³ But both classes of debts cannot be set off. There cannot, where the wife is joined with the husband in an action on a promissory note made to her, be set off a debt due by the husband.⁴ Nor can there at common law be set off a debt due by the husband and wife jointly.⁵

Where the action is to recover claims owned by the wife, there can be no set-off of claims due by the husband, although he is nominally a party plaintiff with his wife.⁶ The husband's liability cannot be set off against the claim of husband and wife in her

her father's estate, though the decree of divorce is subsequent to the intestate's death. *Fink v. Hake*, 6 Watts (Pa.) 131.

1. See *Norris v. Booth*, 8 Ala. 907.

2. *Burrough v. Moss*, 5 M. & R. 296; 10 B. & C. 558; 21 E. C. L. 128. See *Norris v. Booth*, 8 Ala. 907.

3. 5 Rob. Prac. 970.

And it was held that, in an action brought by the original obligees of a bond to the use of a *feme* plaintiff and her husband, an account may be set off for medical services rendered her before her marriage. *Gary v. Johnson*, 72 N. Car. 68.

4. If, under the general rule that a wife may join her husband in a suit when the cause of action will survive to her, the wife is joined with the husband in an action on a promissory note made to her, there cannot in such action, be set off a debt by the husband; for the reason why a husband may join his wife with him in the action is, that if he dies before judgment, the right of action will survive to her, and this right might be defeated if a set-off against a husband alone could be pleaded. *Norris v. Booth*, 8 Ala. 907.

But in the opinion delivered in this case, the court by Ormond, J., said: "He [the husband] might, if he had so elected, have brought the suit in his own name, and if he had done so, a set-off against him would have been good, but a set-off against his wife, when sole, could not have been received, because, by bringing the suit in his own name, he had elected to treat it as his separate property, and therefore a set-off not due in the same right would be inadmissible."

5. *Norris v. Booth*, 8 Ala. 907. The

court by Ormond, J., said: "It is difficult to conceive of a joint debt due from husband and wife, which could be enforced at common law. A joint promise by them would in any conceivable case be void at law as it regards the wife, and would, in effect, be the promise of the husband, . . . which, we have seen, would be inadmissible as a set-off."

6. *Hubby v. Camplin*, 22 Tex. 582.

Where the wife's legacy paid to the husband was overpaid, the excess cannot be set off against a claim by husband and wife for the profits of her real estate descended from the testator. *Mollan v. Griffith*, 3 Paige (N. Y.) 402.

A debt due to a decedent from the husband cannot be set off in *Pennsylvania* in an action by husband and wife for money bequeathed by decedent to the wife for her own use, which in that State is considered as for her separate use. *Jamison v. Brady*, 6 S. & R. (Pa.) 466; 9 Am. Dec. 460. It is likewise in *New Hampshire*. *Pierce v. Dustin*, 24 N. H. 417.

In an action by husband and wife to recover money to which she was entitled for personal services, it was held, under the *Connecticut* act of 1860, providing that money or other property acquired by a married woman during coverture, by her personal services, shall be held by her to her sole and separate use, that a claim against the husband could not be set off by the defendant. *Whiting v. Beckwith*, 31 Conn. 596.

It was held that a bond for purchases made at an estate sale cannot be set off against the distributive share of the purchaser's wife in the estate. *Farrow v. Farrow*, 12 S. Car. 168.

right as executrix or administratrix.¹ And where the husband is joined as a technical party, but the cause of action is only against the separate property of the wife, debts due from the plaintiff to the husband cannot be set off.² So where the action is against husband and wife for the husband's individual debt, there cannot be set off a claim of the wife against the plaintiff.³ And where an action in the name of both husband and wife is really to recover a claim due the wife, there can be no set-off of the husband's indebtedness.⁴

Where a suit is brought by husband and wife for a debt due them jointly, a claim against one of them cannot be set off.⁵ So in an action by husband and wife on a note executed by the defendant to them as joint payees, a defendant cannot set off a debt due to him by the husband.⁶

In a suit by a wife alone to enforce a demand due her as her separate property, there can, of course, be no set-off of a debt due from the husband.⁷

1. Field v. Allen, 9 M. & W. 694. See also Warn v. Bickford, 7 Price 550.

2. Carpenter v. Leonard, 5 Minn. 155.

Under the statute of Iowa, a husband has no common or joint interest in a right of action accruing to the wife on account of a tort inflicted against her. Hence, in an action against husband and wife jointly, they cannot set up by way of set-off or cross-demand, a claim against the plaintiff for a malicious prosecution of the wife, nor a claim for damages accruing to the husband for a malicious prosecution of his minor children or himself by the plaintiff. Musselman v. Galligher, 32 Iowa 383.

But where A, an unmarried woman, boarded with B, a married woman, and loaned her money to assist her in improving her separate estate, and, subsequently marrying, together with her husband, filed a bill against B and her husband for the payment of a note given by B, praying that this note might be paid out of her separate estate, it was held that a judgment of the husband of B against the complainants recovered for the board of A, might be set off. Lane v. Fallen, 16 Md. 352.

3. It was held that the defendant, who was sued for money borrowed from an insurance company, could not set off the equitable value of a policy on his life belonging to his wife. Ewing v. Coffman, 12 Lea (Tenn.) 79.

4. See Alexander v. Meroney (S. Car.), 9 S. E. Rep. 266.

5. And a joint interest in husband and wife cannot be set off by a debt due from the husband. Glasebrook v. Ragland, 8 Gratt. (Va.) 332.

In New York in 1836, although husband and wife sued jointly on the covenant with them in a lease, a claim against the husband was allowed as a set-off, on the ground that he had a right to the rent, and might have sued therefor alone. Ferguson v. Lothrop, 15 Wend. (N. Y.) 626.

6. Bentz v. Bentz, 95 Pa. St. 216; Wulschner v. Sells, 87 Ind. 71.

7. Parker v. Cochrane, 11 Colo. 363; Challiss v. Wylie, 35 Kan. 506; Paine v. Hunt, 40 Barb. (N. Y.) 75; Sloteman v. Thomas, etc., Mfg. Co., 69 Wis. 499.

So, in a suit to recover rent due to the separate estate of a wife, a demand against her husband cannot be set off although he had been authorized by her to receive the rent without accounting, and although he has offered to allow a part of the claim against him toward the debt for rent. Naglee v. Ingersoll, 7 Pa. St. 185. And see Ferguson v. Lothrop, 15 Wend. (N. Y.) 625.

As a married woman may have money separate or distinct from all right or control on her husband's part, a writing which acknowledges that a certain sum was borrowed from her, imports, prima facie, that the money was hers, and when her interest is not disaffirmed by the husband nor the presumption in her favor otherwise repelled, there cannot, in an action

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(7) *In Suits By, Against, and Between Principal and Agent.*—Where a person deals with one whom he knows is acting as a mere agent in the transaction, he cannot, in an action by the principal, set off a claim due him by the agent in his personal capacity.¹ Where, therefore, a factor sells goods as factor, whether he discloses the name of his principal or not, the purchaser cannot, in an action by the principal, set off a debt due to him from the factor.² And this is so, although it is clear that the defendant made the purchase *bona fide*.³ *A fortiori*, such set-off will not be allowed if there are circumstances showing collusion between the factor and buyer.⁴ In the case of sale of goods, it is sufficient if notice of agency is given the purchaser before delivery and acceptance thereof.⁵ A person, who buys goods of an agent, and, under a misapprehension that the goods belong to the agent, gives the agent credit in his individual capacity, will, nevertheless, not be permitted to make such set-off, if the misapprehension is not induced by the principal.⁶ So, it was held that where an agent has authority to sell personal property, but having neither possession nor the *indicia* of ownership, sells in his own name without disclosing his principal, the purchaser may not set off a debt due him from the agent in an action by the principal for the

brought by her after her husband's death, be set off a debt due from him. *May v. Boisseau*, 12 Leigh (Va.) 512; *Perkins v. Clements*, 1 Pat. & H. (Va.) 149.

In an action brought by the woman after her husband's death for her distributive share of her father's estate, it was held that a debt due to the defendant from the husband cannot be set off. *Fink v. Hake*, 6 Watts (Pa.) 131.

1. *Wilson v. Codman*, 3 Cranch (U. S.) 193; *Reutchler v. Huckle*, 3 Ill. App. 144; *Braden v. Louisiana State Ins. Co.*, 1 La. 220; 20 Am. Dec. 277; *Atkinson v. Teasdale*, 1 Bay (S. Car.) 299; *Foster v. Hoyt*, 2 Johns. Cas. (N. Y.) 327; *Dunn v. Wright*, 51 Barb. (N. Y.) 244; *Gordon v. Church*, 2 Cai. (N. Y.) 299; *Bliss v. Bliss*, 7 Bosw. (N. Y.) 339; *Godfrey v. Forrest*, 1 Bay (S. Car.) 300.

If the insurer knows that an insurance, effected in a broker's name, is in reality for a third person, the insurer cannot set off a debt due him by the broker. *Gordon v. Church*, 2 Cai. (N. Y.) 299.

2. *Baring v. Corrie*, 2 B. & Ald. 137; *Fish v. Kempton*, 7 C. B. 687; 18 L. J. C. P. 206; 62 E. C. L. 687; *Dresser v. Norwood*, 17 C. B. N. S. 466; 112 E. C. L. 466; *Turner v. Thomas*, L. R., 6 C. P. 610.

A planter cannot offset against ad-

vances, made by his factors through an agent, a claim against the agent. *White v. Tucker*, 10 La. Ann. 654.

The defendant was a person whose business it was to receive money, for cattle sold in Smithfield, from the purchaser. To an action brought by the owner of the cattle sold, for the money so received by the defendant, the latter claimed to set off a debt due from the salesman to himself. Evidence was offered to prove that, by the universal custom of the market, the defendant was considered as the debtor of the salesman, and not of the owner, with whom he had no connection. But Lord Kenyon refused the evidence, remarking, that no custom could deprive the plaintiff of that which, by the law of the land, he was entitled to receive; and he dwelt upon the defendant's knowledge that he received the money for the use of another; which, he said, distinguished the case from that of a banker receiving money from a factor whose principal he had never heard of. *Goode v. Jones*, Peake's N. P. Cas. 177.

3. *Fish v. Kempton*, 7 C. B. 687; 62 E. C. L. 687.

4. *Escot v. Milward*, 7 T. R. 361. (b).

5. *McLachlin v. Brett*, 105 N. Y. 391; 8 Bac. Abr. 652.

6. *Brown v. Morris*, 83 N. Car. 251. See, to the same effect, *Stewart v.*

contract price.¹ It has been stated, as a general rule, that if the buyer has such opportunities of knowing that the seller is but an agent as to put him, the buyer, on his inquiry, then he is precluded from making any set-off against the agent personally.²

If a person knows that he is dealing with a mere agent, it is no matter that he does not know whose agent he is; a person who contracts with an agent, knowing him to be only an agent, but not knowing whose agent he is, cannot, in an action brought by the principal, avail himself of a set-off good against the agent.³

Because of these considerations, if a broker sells goods in his own name, the purchaser cannot, except under extraordinary cir-

Woodward, 50 Vt. 78; 23 Am. Rep. 488.

1. Bernshouse v. Abbott, 45 N. J. L. 531; 46 Am. Rep. 789.

2. Whart. Ag., § 406.

Where goods are sold by a known factor of a house, a set-off cannot be made against them by the purchaser, for a debt due from the factor, in his own right, if the goods be actually those of his principal, though the factor do carry on business for himself, and nothing be said at the time of sale respecting the ownership of the goods. On a sale by the known factor of a house, the principal may immediately maintain an action against the vendee. Browne v. Robinson, 2 Cal. Cas. (N. Y.) 341.

So, in Baring v. Corrie, 2 B. & Ald. 137, Coles & Co., who were brokers and also merchants, sold to Corrie & Co., in their own names, sugar belonging to Baring Bro. & Co., who brought this action for the price. The true nature of the contract was entered by Coles & Co., in their broker's book, which the defendants might, if they pleased, have seen; nor had Coles & Co. possession of the goods, which were lying in dock, whence, by usage of the docks, they could not have been taken without the order of the plaintiffs, whose principal clerk signed the delivery order. Under these circumstances, the court held that the defendants had no right to set off against the plaintiff's demand for the price of the goods, a debt due from them to Coles & Co. "It is to be observed," said Bayley, J., "that the plaintiffs did not trust the brokers with either the muni-ments of title or the possession of the goods. There is another circumstance by which the defendants might easily have ascertained whether Corrie & Co. acted as brokers or not. According to

the usual course of dealing, a broker is bound to put down in his book an account of the sales made by him in that capacity, so that if the defendants had asked to see the book, they would instantly have discovered whether Coles & Co. acted as brokers or not. I therefore think that the plaintiffs did not, by their conduct, enable Corrie & Co. to hold themselves out as the proprietors of these goods, so as to impose on the defendants; that defendants were not imposed on; and even supposing that they were, they must have been guilty of gross negligence."

3. Whart. Ag., § 405; Miller v. Lea, 35 Md. 396; 6 Am. Rep. 417; Ilsley v. Merriam, 7 Cush. (Mass.) 242; 54 Am. Dec. 721; Bliss v. Bliss, 7 Bosw. (N. Y.) 339.

So a plea by the defendants that they did not know, and had not the means of knowing, that the person of whom they bought the goods was agent for the plaintiffs, was held a bad plea for not averring that the defendants did not know, and had not the means of knowing, that such person sold the goods to them as a mere agent. The court, by Willes, J., said: "Upon the true construction of this plea, taking all the averments together, it is quite consistent that the seller, Moll, was a factor, and sold the goods in his own name, as is usual with factors, and yet that the defendants may have bought the goods, well knowing that Moll was not the owner, but that he had a principal, though they did not know who that principal was. This would satisfy all the averments in the plea. Indeed, the plea studiously avoids averring that which is the gist of a defense of this sort, viz., that the defendant knew nothing of any principal." Semenza v. Brinsley, 18 C. B. N. S. 478; 34 L. T. C. P. 161; 114 E. C. L. 467.

cumstances, set off the broker's debt in a suit on the contract by the undisclosed principal.¹

As a person dealing with one as agent cannot set off claims against such agent in a suit by the principal, so, on the other hand, where the principal is sued by such person, he cannot avail himself of a claim by the plaintiff to the agent who transacted the business.²

Even though suit is brought by a factor, instead of the principal, for the price of goods ostensibly sold by him as agent, the purchaser, if he has a set-off against the principal, may generally employ it in such suit with the same effect as if it were brought by the principal.³ Thus, if a sale of goods is made by an auctioneer, who sues for the price of goods sold by him as such, the defendant may set off a debt due him from the principal vendor.⁴ It may be stated, as a general rule, that an agent, if he sues in his own name for a claim due the principal, sues as trustee for the principal, and is therefore subjected to those set-offs that apply against the principal.⁵ But where the agent conducting the dealings is not merely the representative of the principal, but has

1. 8 Bac. Abr. 652; 2 Pars. Contr. 743; Whart. Ag., § 723; Paley Ag., 340; De Bonchout v. Goldsmid, 5 Ves. 211; Boyson v. Coles, 6 M. & S. 14; Saladin v. Mitchell, 45 Ill. 79; Dunn v. Wright, 51 Barb. (N. Y.) 244; BROKERS, vol. 2, p. 574, n. 2. See Moore v. Clementson, 2 Campb. 22; Graham v. Duckwall, 8 Bush. (Ky.) 12.

The distinction between a factor and a broker is noticed by Abbott, C. J., and Bayley, J., in Baring v. Corrie, 2 B. & Ald. 137. Abbott, C. J., says: "The distinction between a broker and a factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal; the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation; he is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker, has a right to expect that he will not sell in his own name." And referring to the cases cited in which set-off had been allowed, the chief-justice said that "in all the cases cited, the factor was in actual possession of the goods,

and the purchaser could not know whether they belonged to him or not, and at all events, they knew that he had a right to sell the goods." Bayley, J., said: "It is besides to be observed that the plaintiffs did not trust the brokers with either the muniments of their title, or the possession of the goods, as was done both in the case of Rabone v. Williams (reported in a note to George v. Claggett, 7 T. R. 339), and that of George v. Claggett, 7 T. R. 339."

2. Thus, the maker of a note, who put it into the hands of a broker for sale or advances, when sued by one who has advanced money upon it, cannot set off a debt due from the plaintiff to the broker. Carman v. Garrison, 13 Pa. St. 158.

3. Whart. Ag., § 755, citing Atkyns v. Amber, 2 Esp. 493; Coppin v. Walker, 7 Taunt. 237; Leeds v. Marine Ins. Co., 6 Wheat. (U. S.) 565.

4. Jarvis v. Chapple, 2 Chit. 387; 18 E. C. L. 373.

5. Whart. Ag., § 447; Story Ag., § 404; Coppin v. Walker, 7 Taunt. 237; Coppin v. Craig, 7 Taunt. 243; Stewart v. Aberdeen, 4 M. & W. 218.

Where an insurance was effected by an agent, for the benefit of whom it concerned, and the agent brought an action on the policy, in his own name, against the underwriters, for the benefit of the owners of the ship, it was held that the underwriters could not

acquired some interest, or lien, or other claim in virtue of his agency, he is entitled to protection to the extent thereof against both the principal and the other contracting party. Thus, for example, a factor, or other agent, has a lien for his commissions and advances upon the goods intrusted to him for sale, and when he has sold the goods, this lien will attach upon the price in the hands of the purchaser. In such case, the purchaser cannot set off against the principal so as to defeat the agent's claim.¹ But the rule is otherwise where the purchaser had no notice of the agent's claim, and made the purchase in reference to his claim against the principal; to entitle the factor, or other agent, in such case, to this privilege, he must give notice of his claim to the purchaser before the right of set-off attaches.²

Where a person who, as agent for another, has had dealings with the defendant, sues for a claim due him in his own right and not as the representative of a principal, the defendant cannot set off his claims against the principal.³ And where such person is himself sued for a claim against him in his own person, he cannot set off a debt due his principal.⁴

After having stated the application of the rule of mutuality respecting set-off where a person has dealt with an agent as such, the right of set-off where a person has dealt with an agent supposing him to be the sole principal, may be considered. In general, if the agent is the supposed principal, the person dealing with him has a right to consider him to all intents and purposes the principal, and is entitled to the same right of set-off as if the agent were the true and only principal.⁵ It is immaterial whether the suit be brought in the name of the principal or of the factor or agent.⁶ Where a factor dealing for a principal conceals that fact and sells and delivers goods in his own name, it is now a well-established rule that, though the real principal may bring an action upon such contract against the purchaser, the latter may

set off debts or demands due from the agent, in his own right, against the amount claimed for the loss. *Hurlbert v. Pacific Ins. Co.*, 2 Sumn. (U. S.) 471.

1. Story Ag., § 407; *Drinkwater v. Goodwin*, Cowp. 256; *Hudson v. Granger*, 5. B. & Ald. 27; 7 E. C. L. 10.

In a recent case, the principal, a manufacturing company, was in debt to the defendants, which debt the latter endeavored to set off against the agent in a suit by him for goods sold. It appeared that the plaintiff made advances to the company on the goods, and was to be reimbursed out of the proceeds of sale; "he was consequently," said the court, "not simply the agent of the company, but he had an interest of his own in the proceeds of

the sale, and there would be no equity in allowing his vendees to retain out of the proceeds of the goods thus consigned to and sold by him, and upon which he had a right to rely for the reimbursement of his advance independent of claims which his vendees might have against his consignors." *Young v. Thurber*, 91 N. Y. 388.

2. Story Ag., § 407, citing *Drinkwater v. Goodwin*, Cowp. 251; *Coppin v. Walker*, 7 Taunt. 237; *Coppin v. Craig*, 7 Taunt. 243; *Atkins v. Amber*, 2 Esp. 493.

3. *Miller v. Mickel*, 9 Colo. 331; *Granger v. Hathaway*, 17 Mich. 500.

4. *Wood v. Davis*, 15 N. Y. Supp. 554.

5. Whart. Ag., p. 276.

6. Story Ag., §§ 404, 419, 444.

set off any claim he may have against the factor, in answer to the demand of the principal.¹ This rule is to prevent the hardship under which a purchaser would labor, if, after being induced by peculiar considerations, such, for instance, as the consciousness of possessing a set-off, to deal with one man, he could be turned over and made liable to another, to whom those considerations would not apply, and with whom he would not, perhaps, willingly have contracted. As may be seen from what has been above stated, this right of set-off has been restricted to those cases where this reason will apply. It has been enunciated as a general rule by good authority, that, in order to entitle the defendant to the benefits of the above rule, the defendant's plea, if special, must show that the contract was made by a person whom the plaintiff had intrusted with the possession of the goods; that that person sold them as his own goods in his own name as principal, with the authority of the plaintiff; that the defendant dealt with him as and believed him to be the principal in the transaction, and that before the defendant was undeceived in that respect the set-off accrued.²

In explanation of the statement that the agent must have made the sale in his own name with the authority of the plaintiff, it may be said that constructive authority is sufficient; if the goods are intrusted to a factor, who has by custom an implied authority to sell in his own name, the right to set off is not affected by the fact that the factor, in selling in his own name without

1. The rule given in the text was stated by Lord Mansfield as early as the year 1738. *Rabone v. Williams*, 7 T. R. 360, n. After having been frequently acted upon at Nisi Prius, this principle was at length, in the year 1797, confirmed by the full Court of King's Bench in a case where it was decided that if the factor sells goods as his own and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal. *George v. Claggett*, 7 T. R. 359; *Peake's Add. Cas.* 131; 2 Sm. L. C. (8th Am. ed.) 118. The principle stated in this decision has since been frequently applied both in *England* and the *United States*. *Carr v. Hinchliff*, 4 B. & C. 551; 10 E. C. L. 408; *Blackburn v. Scholes*, 2 Campb. 343; *Pigeon v. Osborn*, 12 A. & E. 715; 40 E. C. L. 166; *Taylor v. Kymer*, 3 B. & Ad. 334; 23 E. C. L. 81; *Bastable v. Poole*, 5 Tyr. 111; *Purchell v. Salter*, 9 Dow. 520; 1 Q. B. 197; 41 E. C. L. 501; *Dresser v. Norwood*, 14 C. B. N. S. 574; 108 E. C. L. 572; *Ex parte Dixon*, 4 Ch. Div. 133; *In re Henley, Borries v. Imperial Ottoman Bank*, L. R., 9

C. P. 38; 7 Moak's Rep. 138; *Oulds v. Harrison*, 10 Exch. 572; *Gardner v. Allen*, 6 Ala. 187; 41 Am. Dec. 45; *Ruan v. Gunn*, 77 Ga. 53; *Stinson v. Gould*, 74 Ill. 80; *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Greene v. Chickering*, 10 Mo. 109; *Pratt v. Collins*, 20 Hun (N. Y.) 126; *Hogan v. Shorb*, 24 Wend. (N. Y.) 458; *Bannerman v. Quackenbush*, 11 Daly (N. Y.) 529; *Frame v. William Penn Coal Co.*, 97 Pa. St. 309; *Conyers v. Magrath*, 4 McCord (S. Car.) 392.

So it was held that, if an agent employed to collect money and remit it to his principal, should lend it to a person to whom he is indebted in a larger amount, the latter, if he has no knowledge that the money does not belong to the agent, may retain it as a set-off, and may resist a suit therefor by the principal, although notice of the claim of the principal is given to him before the suit is brought. *Lime Rock Bank v. Plimpton*, 17 Pick. (Mass.) 159; 28 Am. Dec. 286.

2. See 5 Rob. Prac. 983; *Ev. Ag.* 397; *Isberg v. Bowden*, 8 Exch. 859; *Semenza v. Brinsley*, 18 C. B. N. S. 467; 34 L. T. C. P. 161; 114 E. C. L. 467.

disclosing the agency, is acting in contravention of the express directions of his principal.¹

It seems to be sufficient if the plea states that the defendant did not know that the person with whom they dealt acted as a mere agent: it is not necessary, in such plea, to state that the defendant had no means of knowing that he acted in such capacity.²

Where an agent does not disclose his agency, and thereby becomes liable on a contract made for the benefit of a third person, he cannot, in a suit on such liability, set off a debt due by the plaintiff to the undisclosed principal.³ But it has been said by good authority that, as a result of his liability, he has the right to set off, in such action, his own claim against the plaintiff's.⁴ It has been said that if a factor is employed to sell goods, and he sells them in his own name, not disclosing the fact of the agency, he may set off the price of the goods against a debt personally

Borries v. Imperial Ottoman Bank, L. R., 9 C. P. 38; 43 L. J. C. P. 3; 7 Moak's Rep. 38.

1. Where no limitation of an agent's authority was disclosed to the buyer a set-off of a debt due from the agent was held a good defense to a claim by the principal against the buyer, even though the agent was under an agreement with his principal not to sell in his own name. *Ex parte Dixon, In re Henley*, 4 Ch. Div. 133; 46 L. J. Bank. 20; 35 L. T. N. S. 644; *Borries v. Imperial Ottoman Bank*, L. R., 9 C. P. 38.

2. *Borries v. Imperial Ottoman Bank*, L. R., 9 C. P. 38; 43 L. J. C. P. 3; 7 Moak's Rep. 138. In this case there was an account for goods sold and delivered. To this the defendants pleaded that the goods were sold and delivered to them by Scheitlin & Co., then being the agents of the plaintiffs, and that Scheitlin & Co. sold the goods in their own name, and as their own goods, with the consent of the plaintiffs; that, at the time of the sale, the defendants believed Scheitlin & Co. to be the owners of the goods, and did not know that the plaintiffs were the owners of or interested therein or that Scheitlin & Co. were their agents; and that before the defendants knew that the plaintiffs were the owners of the goods, or Scheitlin & Co. were agents in the sale thereof, Scheitlin & Co. became indebted to the defendants, who claimed a set-off. The plaintiffs replied that before the sale the defendants had the means of knowing that Scheitlin & Co. were merely apparent owners of the goods,

and that the same were indorsed to Scheitlin & Co. merely as agents, and that Scheitlin & Co. were agents, and as such, sold the goods to the defendants. The court held that the plea was good, and the replication no answer to it. Coleridge, C. J., said: "The essence of the defense is, the real state of the defendants' minds when they bought the goods of Scheitlin & Co. They assert that it was this, that they believed the goods to be the goods of Scheitlin & Co., and did not know or believe that the plaintiffs were the owners of or interested in them. That brings the case distinctly within the rule in *George v. Claggett*, 7 T. R. 359; and that is the form of plea which has been commonly in use to raise a defense of this kind. I observe that in two cases—*Purchell v. Salter*, 1 Q. B. 197; 41 E. C. L. 501; and *Semenza v. Brinsley*, 18 C. B. N. S. 467; 34 L. J. C. P. 161; 114 E. C. L. 778,—where the plea contained an averment that the defendant had no means of knowledge, no notice is taken of that allegation in the judgment. If it be necessary to aver that the defendants had not notice that the plaintiffs were the owners of the goods, I think that is substantially averred in this plea by the statement that Scheitlin & Co., with the consent of the plaintiffs, sold the goods as their own, and that the defendants believed them to be the owners of them, and did not know that the plaintiffs were the owners."

3. *Forney v. Shipp*, 4 Jones (N. Car.) 527.

4. *Story Ag.*, § 411.

due from himself to the purchaser, at least if the principal does not interpose against it.¹

Where an undisclosed principal in a certain transaction, is sued on another matter by the person who had dealt with the agent as principal, the defendant can probably not set off a claim arising out of such dealings.²

It has been held that there is nothing in the doctrine of agency which forbids an attorney, when sued for money collected by him for the plaintiff, to set off a note held by him, executed by the plaintiff.³

(8) *In Suits By and Against Partnerships; Ostensible and Dormant Partners.*—Set-off in suits by or against partnerships or partners has been treated elsewhere.⁴ With regard to set-off in the case of dealings with an ostensible partner in ignorance of the existence of a dormant one, which is also treated elsewhere,⁵ it may be pointed out that it is in the main governed by the same principles that are applied in the case of agency.⁶

(9) *In Suits By and Against Principal, Surety, and Principal and Surety.*⁷—While it is a rule, under the requirement that a set-off must be between all the parties to the action, that a matter can be set off only when it is due to all the defendants, yet, when there are several defendants, one or more of whom are the principal debtors and the rest merely sureties, this does not prevent a debt due to those of the defendants only who are principals from being set off against the plaintiff's demand against the principals and sureties together. Though the right has been denied,⁸ that this may be done, is clearly established by the weight of authority and principle.⁹ The principle upon which such a set-off is

1. *Ew. Ev. Ag.* 91, citing *Lee v. Bullen*, 27 L. J. Q. B. 161; *Story Ag.*, § 411, citing *Morris v. Cleasby*, 1 M. & S. 576. See *Young v. White*, 7 Beav. 506.

2. A, a manufacturer, had two mills, one of which was run under his own name, and the other under the name of B. He consigned goods from both mills to C, a commission merchant. C had no knowledge that the mill run in B's name was A's. The accounts of each mill were kept separate. C sued A for balances arising from transactions with the mill run in A's name. It was held that A could not set off a balance due from C to the other mill. *Talcott v. Smith*, 142 Mass. 542.

3. *Noble v. Leary*, 37 Ind. 186.

4. See *supra*, this title, note 3, p. 287; note 1, p. 289; note 1, p. 290; notes 1-2, p. 292; note 1, p. 293; *PARTNERSHIP*, vol. 17, pp. 1307-1308.

5. See *PARTNERSHIP*, vol. 17, pp. 1308, 1309.

6. 2 Whart. Contr., § 1028. See *Wat. Set-off*, §§ 258, 235, 237, 238, 239.

7. See *SURETYSHIP*.

8. *Woodruff v. State*, 7 Ark. 333; *Peine v. Lewis*, 64 Miss. 96. See *Dart v. Sherwood*, 7 Wis. 523; 76 Am. Dec. 228.

In *Massachusetts*, the remedy for one of several defendants, who has a demand against the plaintiff, is, under *Massachusetts Rev. Stat.*, ch. 90, § 50, by cross-action and set-off of judgments, by allowance of the court. *Warren v. Wells*, 1 Met. (Mass.) 80.

9. *Himrod v. Baugh*, 85 Ill. 435; *Engs v. Matson*, 11 Ill. App. 639; *Hayes v. Cooper*, 14 Ill. App. 490; *Reeves v. Chambers*, 67 Iowa 81; *Robbins v. Brooks*, 42 Mich. 62; *Raymond v. Green*, 12 Neb. 215; *Springer v. Dwyer*, 50 N. Y. 19; 41 Am. Rep. 763; *Wagner v. Stocking*, 22 Ohio St. 297; *Downer v. Dana*, 17 Vt. 518; *Wartman v. Yost*, 22 Gratt. (Va.) 595. In an action upon a promissory note

allowed is said to apply equally where one is sued for an individual debt and claims a set-off of a demand held against

against a principal and surety, a demand due from the plaintiff to the principal may be set off. *Harrison v. Henderson*, 4 Ga. 198; *Woods v. Carlisle*, 6 N. H. 27; *Mahurin v. Pearson*, 8 N. H. 539; *Boardman v. Cushing*, 12 N. H. 119; *Newell v. Salmons*, 22 Barb. (N. Y.) 647; *Guggenheim v. Rosenfeld*, 9 Baxt. (Tenn.) 533. So, in an action on a bond against the principal and surety, a demand against the plaintiff by the principal alone may be set off. *Ex parte Hanson*, 12 Ves. 346; 15 Ves. 132; *Concord v. Pillsbury*, 33 N. H. 310; *Brundridge v. Whitcomb*, 1 D. Chip. (Vt.) 180.

If in an action to foreclose a mortgage given as a security for a joint bond executed by the mortgagor and another as his surety, in which action both obligors are made defendants, a judgment is prayed against them for any deficiency, a debt due the mortgagor from the plaintiff may be set off by way of counterclaim. *Bathgate v. Haskin*, 59 N. Y. 533.

So, where A sought to foreclose a mortgage made by B and his wife upon the land of the wife, B was allowed to show that in fact he was the principal debtor, his wife being but a surety, and that therefore he should be allowed to set off a debt due him from A. *Spencer v. Almonney*, 56 Md. 551.

In an action upon a promissory note given by a principal and surety on a contract of the principal, it is competent to recoup the damages of the principal growing out of the contract, to the same extent as if the note had been given by the principal, and he alone were sued. *Waterman v. Clark*, 76 Ill. 428.

It was held that where a plaintiff in a judgment against two defendants—against one as principal and the other as surety—is a non-resident of the State, a debt due from him to the principal may, in equity, be set off against the judgment. *Livingston v. Marshall* (Ga. 1889), 11 S. E. Rep. 542. And in *Downer v. Dana*, 17 Vt. 518, the court by Redfield, J., said: "Although a court of equity will not, any more than a court of law, allow a set-off of joint debts against separate debts, yet there are many exceptions. One important exception is where the debts are in reality mutual, as where one of the joint debtors is a mere

surety." To the same effect in *Brewer v. Norcross*, 17 N. J. Eq. 219. See also *Wagner v. Stocking*, 22 Ohio St. 297.

In *Indiana*, the rule as stated in the text is, in substance, declared by statute. *Indiana Code*, 1852, § 58; Ind. Rev. Stat. 1888, § 349. See *Larrimore v. Heron*, 16 Ind. 350. In an action on contract against two or more defendants, a claim in favor of one of the defendants may be pleaded by him as a set-off, if he alleges that he is the principal in the contract, and that his co-defendants are sureties therein, but not otherwise. *Harris v. Rivers*, 53 Ind. 216. So in an action upon a promissory note against a maker and surety, a claim in favor of the maker may be set off. *Slayback v. Jones*, 9 Ind. 470. *Indiana Rev. Stat.*, 1881, also has a provision relating to this matter. Under the provision of section 349 of this statute, which allows a debt due the principal defendant from the plaintiff to be pleaded as a set-off against a note sued on, the "principal defendant" means the person who, according to the relations existing between the makers of the note at the time of the commencement of the suit, sustains the character of principal debtor, or the one then primarily liable for the debt. *Sefton v. Hargett*, 113 Ind. 592.

In *Virginia*, the Code provides that, although the claim of the plaintiff be jointly against several persons, and the set-off is of a debt not to all, but only to a part of them, the set-off shall be allowed, if it appear that the persons, against whom such claim is, stand in the relation of principal and surety, and the person entitled to the set-off is the principal. *Virginia Code*, 1849, p. 654. So, it has been held under the *Virginia Code*, in an action of debt on a bond against the principal and two sureties, that the principal may set off a judgment recovered by a third party against the plaintiff and assigned to the principal. *Wartman v. Yost*, 22 Gratt. (Va.) 595.

In *Iowa*, "a comaker or surety when sued alone, may, with the consent of his comaker or principal, avail himself by way of set-off of a debt or liquidated demand due from the plaintiff at the commencement of the suit to such comaker or principal; but the plaintiff may meet such set-off in the same way as if made by the comaker or principal

the plaintiff, for which a third person, not a party to the suit, is surety.¹

Where, in an action against principal and surety, the principal's claim is allowed to be set off, it seems that if the set-off exceeds the plaintiff's claim, judgment should be rendered in favor of the defendant only by whom it was pleaded; it was held to be error to render judgment for any amount against the plaintiff in favor of the principal and his surety jointly.²

A cause of action in favor of the surety alone cannot be set off in an action against a principal and surety.³

himself." *Iowa Rev. Stats.*, 1860, p. 524.

1. See *Hoffman v. Zollinger*, 39 Ind. 461. There are cases which in effect hold that the debt of the principal, although there are sureties thereupon, may, for the purpose of set-off, be regarded as the sole debt of the principal. It is regarded as the debt of the plaintiff alone, since he is bound to reimburse his surety, and may therefore be set off against a demand claimed by him. In *Ex parte Hanson*, 18 Ves. 232, it was said that "the joint debt was nothing more than a security for the separate debt; and upon equitable considerations a creditor, who has a joint security for a separate debt, cannot resort to that security without allowing what he has received on the separate account, for which the other was the security."

Under a statute providing that "in all actions upon a note or other contract against several defendants, any one of whom is principal and the others sureties therein, any claim upon contract in favor of the principal defendant, and against the plaintiff, or any former holder of the note or other contract, may be pleaded as a set-off by the principal or any other defendant," it was held that in an action by the assignee of a note, not payable in bank, the defendant may set off a joint note made by the payee of the note sued on, as principal, for his individual debt, and by another as his surety, and held by the defendant as assignee thereof, before notice of the assignment of the note sued on. While it was admitted that this case was not within the letter of the statute above set out, it was considered to be clearly within its spirit and should be governed by it. *Hoffman v. Zollinger*, 39 Ind. 461.

It has been held that, against a note executed to a husband, a note executed by him and by his wife as surety may

be set off. *Abshire v. Corey*, 113 Ind. 484. In another case, it was held that, as a note signed by a principal and surety may be set off against a note due to such principal alone, so a judgment against two, while it is admitted or proved that one is principal and the other surety, would stand on the same ground as an offset, as a note against the same person in the same capacity. *Andrews v. Varrell*, 46 N. H. 17.

2. G brought suit on an appeal bond against C and his surety S, and C, the principal on the bond, pleaded a set-off consisting of money claimed to have been paid by C for the benefit of plaintiff. And at his request a judgment was entered against the plaintiff for one cent damages and for costs, from which judgment the plaintiff appealed. The court, upon appeal, by Pleasants, J., said: "The judgment is technically erroneous in being for damages in favor of both defendants, upon a cross-demand of one only. The case of *Himrod v. Baugh*, 85 Ill. 435, seems to establish the right in this State to set off a claim of the principal debtor alone in a joint action against him and his surety. We can feel the force of the position that the surety has an interest in such claim to the extent necessary for his own complete protection, and in such application of it to that extent, but are unable to perceive any reason for allowing him to participate in a judgment against the plaintiff for any excess. Such a practice would seem to be in violation of principle, and therefore such a judgment, though for only a nominal amount, is not within the protection of the rule *de minimis*." *Gillian v. Coon*, 10 Ill. App. 43.

3. *Corbett v. Hughes*, 75 Iowa 281. This decision was under a statute which limited the right of set-off to matter "constituting a cause of action in favor of the defendant, or all the defendants if more than one,

The rule allowing the principal's demand to be set off in an action against both principal and surety, by no means establishes that the surety on a joint and several obligation can, when he alone is sued thereon, plead as a set-off any demand due from the plaintiff to a person not a party to the suit, even though that person stands in the relation of principal to the defendant as a surety.¹ It has been denied that a surety, when so sued, is entitled to set off a claim due from the creditor to the principal; for the principal is interested in such claim to as great, and possibly to a greater extent than the defendant, and it cannot be disposed of without bringing him before the court, so that his rights, as well as those of the defendant, may be protected.² But a contrary view has been taken, and it has been held that a person who is sued on his

against the plaintiff, or all of the plaintiffs, if more than one." *Iowa Code*, § 2659, sub-div. 3. The court by Reed, J., after quoting this provision of the statute, said: "There is no room for argument as to the effect of that provision. Under it a cause of action which arises out of matters independent of the contract sued on must be in favor of all the defendants and against all of the plaintiffs, or the parties must seek their remedy thereon in a separate action. It cannot be pleaded as a counterclaim. True, we held in *Reeves v. Chambers*, 67 *Iowa* 81, when a principal and surety were sued jointly on the contract, that they were entitled to plead as a counterclaim a cause of action arising in favor of the principal alone, out of matters independent of the contract sued on.

"But the grounds of that holding are clearly set forth in the opinion. Under the law the surety has the right to have the property of the principal first appropriated to the satisfaction of the debt, and the courts will enforce that right. The application of the debts due from the plaintiff to the principal to the satisfaction of the secured debt is but a mode of enforcing it. And that right creates in favor of the surety an exception to the rule prescribed by the statute quoted. But when the cause of action is in favor of the surety alone, the case is not within the exception, but is governed by the rule."

1. See *Graff v. Kahn*, 18 *Ill. App.* 485; *Baltimore, etc., R. Co. v. Bitner*, 15 *W. Va.* 455; 36 *Am. Rep.* 820.

2. *Thalheimer v. Crow*, 13 *Colo.* 397; *Lasher v. Williamson*, 55 *N. Y.* 619; *Morgan v. Smith*, 7 *Hun (N. Y.)* 244; 70 *N. Y.* 537; *Lewis v. McMillen*, 41

Barb. (N. Y.) 420; *Henry v. Daley*, 17 *Hun (N. Y.)* 210; *Baltimore, etc., R. Co. v. Bitner*, 15 *W. Va.* 455; 36 *Am. Rep.* 820.

Where an action is brought against the sureties on an administration bond, after the death of their principal, to recover the amount due the estate, the sureties cannot plead as a set-off, an indebtedness of the intestate to the principal on the bond; nor a debt paid by the widow of the principal for which the intestate's estate was liable. *Vastine v. Dinan*, 42 *Mo.* 269.

This question was considered by the court of appeals of *New York* in the case of *Gillespie v. Torrance*, 25 *N. Y.* 306; 82 *Am. Dec.* 355. There an accommodation indorser sought to avail himself, in a suit upon the note, of a breach of warranty as to the quality of the goods for which the note was given. The court, by Selden, J., after showing that the defense was not failure of consideration for the note, but setting up a counterclaim of the principal maker against the payee of the note, says: "In the case which was shown on the trial there would seem to be a strong equity in favor of the defendant to have the note canceled or reduced by applying toward its satisfaction the damages which appear to be due to Van Pelt (the principal in the note) for the breach of warranty. It is, however, an equity in which Van Pelt is interested to as great, and possibly to a greater extent than the defendant, and cannot be disposed of without having him before the court, so that his rights, as well as those of the defendant, may be protected." The claim sought to be set up by the surety in that case was more strictly in the nature of a recoupment than of a set-off.

obligation as surety is entitled to set off any claim of the principal against the creditor which would have been available to his principal had the action been against him.¹ And, even in those jurisdictions where the surety's general right when sued alone, to set off his principal's claim against the creditor is denied, such set-off will, in certain cases, be allowed in equity; where the principal has a valid claim against the creditor and is insolvent, the surety will not be compelled to pay the claim and seek a doubtful remedy against his insolvent principal, but on being sued on his contract will be allowed in equity to prove the insolvency of his principal and set off the claim against the creditor.² But this set-off is only for the protection of the defendant, and is allowed only for the purpose of reducing the plaintiff's claim.³

Of course, if the debt sought to be set off by a surety who is sued alone on his liability, has been properly assigned by the principal to the defendant before the commencement of the action, it will be allowed in set-off.⁴ This is not a debt due the principal, but is due to the defendant himself, and one who is sued on his obligation as surety may, of course, set off a debt due himself by the creditor in reduction of the principal indebtedness.⁵

It would seem to go more toward a reduction of the liability on the note, by showing a failure to perform the undertaking which was the consideration of the note. Such a defense by the surety presents a stronger basis than does an attempt to use a distinct claim of his principal as a set-off.

In the case of *La Farge v. Halsey*, 1 Bosw. (N. Y.) 171, where the sureties on a lease claimed the benefit in and sought to set off in a suit against them for rent due a claim of the lessee against a lessor for damages, the court, by Woodruff, J., said: "If by reason of any fact stated as part of this defense, Laura Keene (the principal in the lease) might have set up a counterclaim or recoupment, these defendants cannot. She has assigned no such claim to them, and without that they have no right to use what is in her a distinct cause of action, nor to use any part of it for their own benefit. If they are compelled to pay the rent they must seek reimbursement from her, and she will have her recourse to the plaintiff for any damages she has sustained. That claim for damages these defendants have no right to diminish nor impair; and if she were to prosecute such claim, nothing done or proved by these defendants could be permitted to diminish her recovery."

1. *Jarratt v. Martin*, 70 N. Car. 459.
In *Indiana* it seems that this was

expressly authorized by section 58 of the Code, 2 G. & H. 89. It was held, thereunder, that the sureties on the bond of a guardian, in a suit upon the bond, might plead by way of set-off an indebtedness of the relator to the guardian. *Myers v. State*, 45 Ind. 160.

A bond was executed to E by S as principal, and with H as surety. E owed a partnership, consisting of S and N, on an account, and N assigned his interest in the debt to S. E became bankrupt, and S proved the account in the register in bankruptcy and afterwards became bankrupt. The assignee in bankruptcy of E sued H on the bond, and H pleaded the account as a set-off. It was held that, under the *Virginia* Code, ch. 168, par. 4, the account was a valid set-off for H, in an action against him on the bond. *Edmunds v. Harper*, 31 Gratt. (Va.) 637.

And a surety cannot set off a demand which his principal would not be entitled to set off. *Gentry v. Jones*, 6 J. Marsh. (Ky.) 148.

2. *Baylie's Sur. & Guar.* 409, citing *Gillespie v. Torrance*, 25 N. Y. 306; 85 Am. Dec. 355. See *Becker v. Northway*, 44 Minn. 61.

3. *Morgan v. Smith*, 7 Hun (N. Y.) 244; 70 N. Y. 537.

4. *Graff v. Kahn*, 18 Ill. App. 485; *Wieland v. Oberne*, 20 Ill. App. 118.

See *Thalheimer v. Crow*, 13 Colo. 397.
5. *Ex parte Stephens*, 11 Ves. 24.

It has even been held sufficient to authorize this set-off, that the plea of set-off alleged that it was with the concurrence and assent of the principal, and the note which constituted the set-off, was in the plea offered to be produced in court.¹ But it is probable that such concurrence and assent may be evidenced in such manner as to bind the principal.²

The principal debtor may sometimes intervene for the purpose of making a set-off of this kind.³

(10) *In Garnishment Proceedings*.—The garnishee may, in general, set off any claim which would have been a valid set-off against the defendant.⁴

(11) *In Proceedings Under Mechanics' Lien Laws*.⁵

(12) *In Foreclosure Proceedings*⁶ and *Suits to Redeem*.⁷

See *Dart v. Sherwood*, 7 Wis. 523; 76 Am. Dec. 228.

1. *Winston v. Metcalf*, 6 Ala. 756. See *Lynch v. Bragg*, 13 Ala. 773.

2. See *Graff v. Kahn*, 18 Ill. App. 485.

3. That a principal debtor might intervene for the purpose of defeating the recovery by the creditor against the surety, by means of a set-off consisting of a claim by such principal against the plaintiff, was established by the construction of the *Minnesota* statute which allows "any person who has an interest in the matter in litigation, in the success of either of the parties, or against either or both," to intervene and either prosecute or defend. *Minnesota Gen. Stat.* 1878, ch. 66, § 131. The construction placed upon this statute is that the interest must be of such a direct and immediate character that the intervenor will either gain or lose by the legal operation and effect of the judgment. The court by Gilfillan, C. J., said: "If, in the action as originally brought, judgment had gone against the defendant and had been enforced against him, the intervenor might have to reimburse him; but, had it discharged the defendant of liability to the creditor, it would have terminated the intervenor's obligation as indemnitor. Indeed, we can hardly conceive a case more within the spirit and intent of the statute than one in which the intervenor stands in the relation of indemnitor to one of the parties." *Becker v. Northway*, 44 Minn. 61.

4. See *GARNISHMENT*, vol. 8, p. 12, 13, *et seq.*

5. See *MECHANICS' LIENS* vol. 15, p. 100.

6. See *FORECLOSURE OF MORTGAGES*, vol. 8, p. 231, n. 1.

It has been held that on foreclosure of a mortgage the mortgagor may set off a demand due him for money advanced to the complainant. *Chapman v. Robertson*, 6 Paige (N. Y.) 627; 31 Am. Dec. 264. But on foreclosure of a mortgage by an assignee thereof, the mortgagor cannot set off the amount of payments made by him for the benefit of the mortgagee prior to the assignment, under a general understanding that such payments were to be credited on the mortgage debt, when they were not so credited in fact. *Post v. Carmalt*, 2 W. & S. (Pa.) 70; 37 Am. Dec. 484. Compare *Lofland v. Maull*, 1 Del. Ch. 359; 12 Am. Dec. 106.

7. It has been held that in a suit to redeem land sold under a power in a mortgage, the plaintiff may make use of a set-off which exists in his favor; the plaintiff's right of set-off not being defeated by the fact that the mortgagee sold under the power instead of filing a bill to foreclose, and thus forcing the mortgagor to take the initiative. *Conner v. Smith*, 88 Ala. 300.

Upon a suit in equity to redeem land from a mortgage given to secure negotiable promissory notes, brought against one to whom the notes were indorsed and the mortgage delivered before the notes became due, but to whom the mortgage was not assigned until afterwards, it was held the plaintiff cannot set off against the defendant claims upon the mortgagee, acquired by the plaintiff after such indorsements and delivery, and before maturity of the notes or assignment of the mortgage. *Breen v. Seward*, 11 Gray (Mass.) 118.

(13) *In Actions Against Stockholders of Corporations.*¹

(14) *In Suits By and Against Public Officers.*²—In a suit by a public officer in his official character, the defendant cannot set off a claim against him personally.³ It would seem to follow that in a suit by one who is a public officer, in his private character, a claim which the defendant could recover against him as the representative of the public, cannot be set off.⁴

(15) *In Suits By and Against Guardian.*⁵—The courts will not allow, much less aid, a guardian to apply the estate of his ward to the discharge of his individual indebtedness. Therefore, the debt due a defendant as guardian cannot be set off against a demand owing from him individually.⁶ This rule is also supportable by the application of the requirement of mutuality. So, claims due the defendant from the plaintiff as guardian cannot be set off against a claim of the plaintiff in his own right.⁷

7. *Pleading and Practice*—*a. IN GENERAL.*—It was provided by the statute of 2 Geo. II, ch. 22, § 13, that the debts which could be set off under the statute, might be given in evidence on the general issue, or pleaded in bar, as the nature of the case should require. It was, in decisions under this statute, said that if, at the time of action brought, a larger sum was due from the plaintiff to the defendant, it was more proper to plead the set-off, but that where the sum intended to be set off was less than that for which the action was brought, a notice of set-off should be given,⁸ but an eminent authority has said that these statutes did not seem to warrant this distinction.⁹

1. See STOCKHOLDERS

2. See PUBLIC OFFICERS, vol. 19, pp. 562u*, 562v*.

3. In an action by a constable to recover the price of property sold by him, the defendant cannot set off the individual debt of the plaintiff. *Coffman v. Hampton*, 2 W. & S. (Pa.) 377; 37 Am. Dec. 511.

Property attached by an officer was replevied from him. In the replevin he recovered judgment for a return of the property, and, no return being made, he brought an action on the replevin bond. It was held that damages against the officer personally for a false return on the writ in the original action, could not be recouped or set off against the damages recoverable by him in the action on the bond. *Wright v. Quirk*, 105 Mass. 44.

In an action to recover a penalty for violating the excise law, it was held that defendant could not set off a claim for money loaned plaintiff, who was an overseer of the poor and had no authority to borrow money. *Denniston v. Trimmer*, 27 Hun (N. Y.) 393.

4. In a suit upon a note given by the committee of a school district for the erection of a school-house, damages sustained by the district, by a failure to perform the contract, cannot be set off against the note, where they are held personally liable thereon. *Bayliss v. Pearson*, 15 Iowa 279.

5. *In Suit Against Ward.*—It was held, that a garnishee might set off against the amount that he owed, notes taken by and payable to his guardian, a *feme covert*, for money belonging to him, the notes having come into his possession upon his coming of age. *Merriman v. Cannovan*, 9 Baxt. (Tenn.) 93.

6. *Ganser v. Franks*, 75 Mo. 64; *Dobyns v. Rawley*, 76 Va. 537.

7. *Gibbs v. Cunningham*, 4 Md. Ch. 322.

8. Bull. N. P. 179; Tidd Pr. (9th ed.) 667; Mont. on Set-off 41; *contra*, Lawes on Assumpsit 538.

9. 1 Chitt. Pl. 600; 5 Rob. Prac. 986. With reference to the use of plea and notice, Mr. Chitty says: "In general a notice of set-off was less expensive

When the set-off is not pleaded, this statute (2 Geo. II, ch. 22, § 13) provided that the defendant's demand might be given in evidence under the general issue, so as, at the time of pleading such plea, notice should be given of the particular debt intended to be insisted upon by the defendant, and upon what account it became due. But as there is no general issue in an action on a specialty, and a plea of *non est factum* to an action of covenant on an indenture for non-payment of money only puts in issue the deed, such plea is not a general issue within the meaning of this act, and therefore it was required that, in an action of covenant or debt on a deed, though no penalty be proceeded for, a debt should be specially pleaded.¹

The above-mentioned statute was supplemented by that of 8 Geo. II, ch. 24, § 5, which provided that in all cases where either the debt for which the action was brought, or the debt intended to be set off against the same, accrued by reason of a penalty contained in any bond or specialty, the debt intended to be set off should be pleaded in bar; that in the plea should be shown how much was truly and justly due on either side.² But by the *English* statutes at present in force, set-off must, in all cases, be specially pleaded.³

The provisions respecting pleading in the statutes of set-off generally adopted in the *United States* show a considerable similarity to the provisions in the *English* statutes. Common to a number of States is the provision that the defendant may plead a set-off or give notice thereof with the general issue; in yet other States a notice under the general issue is the prescribed mode; and in a few States notice of set-off may be given under the plea of payment; in others the provisions are peculiar to their particular State, though they bear a general resemblance to the above-mentioned enactments.⁴

than a plea; but where the plaintiff in his replication must necessarily have admitted a part of the defendant's case, a plea was preferable, and a set-off was usually pleaded in country causes, to save the trouble and expense of proving the service of notice. 1 Chitt. Plead. 600, citing Tidd's Pr. (9th ed.) 667.

1. 1 Chitt. Pl. 601, citing Oldershaw v. Thompson, 1 Stark. 311; 5 M. & S. 164; 2 Chit. 38; Selw. N. P. (6th ed.) 535; but see Bull. N. P. 181; Barnes 191.

2. In Attwooll v. Attwooll, 2 E. & B. 23; 75 E. C. L. 23, it was said that the plea, in that case, could not be supported under the statute of 8 Geo. II, ch. 24, § 5, requiring such plea to show "how much is truly and justly due on either side."

3. Reg. Gen. H. T. 1853, v. 8; Gra-

ham v. Partridge, 1 M. & W. 395; and see 15 & 16 Vict., ch. 76, Sched. n. 41.

4. **Statutory Provisions Governing the Pleading of Set-off.**—A setting forth of the provisions of some of the statutes will, perhaps, best serve to elucidate the subject.

In *New Hampshire*, the statute (*New Hampshire Gen. Stat.*, ed. 1867, p. 426) provides that the defendant may plead a set-off or give notice thereof with the general issue.

In *North Carolina* "one debt may be set off against the other, either by being pleaded in bar, or given in evidence on the general issue, on notice given of the particular sum intended to be set off, and on what account the same is due." *North Carolina Rev. Code* (ed. 1855), p. 176.

In *New York*, by the Revised Laws of 1813, which were in force in that

Unless the set-off be pleaded or notice given, either of these modes of setting it out being prescribed by the statute, the

State at the time of the adoption of the Revised Statutes, a set-off could not be pleaded. It could only be taken advantage of by notice, with the general issue. 1 *New York Rev. Laws* 315; *Alsop v. Caines*, 10 Johns. (N. Y.) 399; 13 Johns. (N. Y.) 24; *Wheeler v. Raymond*, 5 Cow. (N. Y.) 231; *Williams v. Crary*, 5 Cow. (N. Y.) 368. But the Revised Statutes provide that "to entitle a defendant to a set-off he must plead or give notice of the same."

In *Mississippi* the statute requires that the set-off shall be filed at the time of pleading, or be set out in the plea with so much particularity as to apprise the opposite party of the nature of it. See *Smith v. Winston*, 2 How. (Miss.) 601.

In *Virginia*, "in a suit for any debt, the defendant may at the trial prove and have allowed, against such debt, any payment or set-off which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise." *Virginia Code* 1849, p. 655.

In *Georgia* and *Florida* the statutes (Cobb's Dig. *Georgia Laws* (ed. 1851), p. 487; *Florida Dig. Stats.* (ed. 1847), p. 348) provide that "in all actions to which the defendant or defendants may intend to plead a set-off, he, she, or they shall, at the time of filing the plea, file therewith a true copy or copies of the subject-matter of such set-off."

In *Michigan*, the statute (*Michigan Comp. L.* (ed. 1857), p. 1152) provides that "to entitle a defendant to a set-off, he must annex a notice thereof to his plea of the general issue." That notice of set-off must be given with the plea. See 2 *Michigan C. L.*, 1871, § 5797; 2 How. Ann. Stat.; *Brennan v. Tiersort*, 49 Mich. 397.

In *Rhode Island*, the defendant may plead the general issue and file the account in set-off with the plea. *Rhode Island Rev. Stat.*, ch. 185, § 11.

In *Illinois*, under the twenty-ninth section of the practice act, in actions *ex contractu*, the defendant having claims against the plaintiff "may plead the same, or give notice thereof, under the general issue, or under the plea of payment."

In *Colorado*, "Where the defendant has a demand against the plaintiff, he may plead it specially, or give notice under the general issue, or prove his

demand under the plea of payment." *Colorado Stat.* 1867, p. 507.

In *New Jersey*, a plea of payment with notice of set-off seems to be authorized by the statute. "If the defendant or defendants cannot gainsay the deed, bargain, contract, or assumption upon which he, she, or they is or are sued, it shall be lawful for such defendant or defendants to plead payment of all or any part of the debt or sum demanded, giving notice in writing with the said plea, of what he, she, or they will insist upon at the trial for his, her, or their discharge, and to give any bond, bill, receipt, account, bargain, or contract, so given notice of, in evidence." *Elmers New Jersey Dig.* (ed. 1855), p. 747.

Under the early statutes of *Indiana*, it was necessary that a plea of set-off should be in the form of a plea of payment, setting out, in the conclusion, the special matter of set-off. *Indiana Stat.* 1817, p. 38; *Indiana Stat.* 1823, p. 294. *Hamilton v. Noble*, 1 Blackf. (Ind.) 187; *Coe v. Givan*, 1 Blackf. (Ind.) 366; *Young v. Harry*, 4 Blackf. (Ind.) 167. See *Indiana Rev. Stat.* 1852, p. 39.

By the terms of the *Pennsylvania* Defalcation act of 1705, matter may be set off under the plea of payment. No other plea than payment is necessary to let in a set-off. *Balsbaugh v. Frazer*, 19 Pa. St. 95; *Calvin v. McClure*, 17 S. & R. (Pa.) 385. It has been said that the defendant may at his election either plead a set-off specially or give it in evidence on notice, under the plea of payment. *Henderson v. Lewis*, 9 S. & R. (Pa.) 382; 11 Am. Dec. 733. But there must be one or the other. The positive words of the act of February 14 1729-'30, § 10, have prevented the court from admitting in evidence a set-off of which there was no plea or notice. *Boyd v. Thompson*, 2 Yeates (Pa.) 217.

The plea of "set-off," is improper, under the *Pennsylvania* statute, and is only warranted by long practice. *Coulter v. Repplier*, 15 Pa. St. 211. And there is this difference between the plea of payment with notice of defalcation, and that of payment with leave to give an equitable defense in evidence, that under the former, the defendant may recover a balance against the plaintiff, whilst under the latter he can only have a general verdict. *King v. Diehl*,

defendant will not be permitted to prove his claim upon the trial.¹

It has been held that a set-off is not a defense to an action, and it is not to be confounded with the defense, but should be pleaded separately.²

*b. CONTENTS OF PLEA AND NOTICE OF SET-OFF.*³—Since a set-off is, in effect, as has been often said, in the nature of a cross-action, a plea of set-off must state facts which would constitute a good cause of action if the party pleading were the plaintiff in the prosecution of the suit therefor.⁴ So, likewise, when it is necessary to file a notice of set-off, such notice takes the place and performs the office of a declaration in an independent action, and should be in fact and substance, if not in form, as full and clear and definite as a declaration, in order that the plaintiff may have the same opportunity of knowing precisely what claim is made against him, that he would have if it were made by an original action.⁵ The plea or notice must describe the debt intended to be set off with the same certainty as in a declaration for the like demand.⁶ And it must do more; not only must it contain

9 S. & R. (Pa.) 409; *Anderson v. Long*, 10 S. & R. (Pa.) 62.

1. *Patterson v. Steele*, 36 Ill. 272; *Estep v. Morton*, 6 Ind. 489; *Lord v. Ellis*, 9 Iowa 301; *Wood v. Warren*, 19 Me. 23; *Wilson v. Russ*, 20 Me. 421; *Burch v. State*, 4 Gill & J. (Md.) 444; *Sangston v. Maitland*, 11 Gill & J. (Md.) 286; *Braynard v. Fisher*, 6 Pick. (Mass.) 355; *Clark v. Leach*, 10 Mass. 51; *Sargent v. Southgate*, 5 Pick. (Mass.) 312; 16 Am. Dec. 409; *Grew v. Burditt*, 9 Pick. (Mass.) 265; *Skinner v. King*, 4 Allen (Mass.) 498; *Gibson v. Powell*, 5 Smed. & M. (Miss.) 712; *McQueston v. Bowman*, 17 N. H. 24; *Nelson v. Wellington*, 5 Bosw. (N. Y.) 178; *Pinckney v. Keyler*, 4 E. D. Smith (N. Y.) 469; *Beers v. Waterbury*, 8 Bosw. (N. Y.) 396; *Holden v. Gilbert*, 7 Paige (N. Y.) 208; *Waring v. Lockwood*, 10 Johns. (N. Y.) 108; *Sellick v. Fox*, 12 Johns. (N. Y.) 205.

Set-off must be pleaded or notice given. A defendant cannot reduce a plaintiff's demand for goods sold by producing a debtor and creditor account in the handwriting of the plaintiff's clerk, showing goods sold by defendant to plaintiff, unless he has pleaded or given notice of set-off. *Fothergill v. Jones*, 1 C. & P. 133; 11 E. C. L. 345.

2. *Bowen v. Hale*, 4 Iowa 430; *Freeman v. Fleming*, 5 Iowa 460.

3. *Form of Plea of Set-off*.—In *England* the form of a plea of set-off given by the first common-law procedure

act was as follows: "The plaintiff at the commencement of this suit was, and still is, indebted to the defendant in an amount equal to the plaintiff's claim, for (here state the cause of set-off as in a declaration) which amount the defendant is willing to set off against the plaintiff's claim." *Broom's Com.* 203.

4. *O'Brien v. Anniston Pipe Works* (Ala. 1891), 9 So. Rep. 415; *McCord v. Croaker*, 83 Ill. 556; *Stockton v. Graves*, 10 Ind. 294; *Ward v. Bennett*, 20 Ind. 440; *Bennett v. McCracklin*, 3 Metc. (Ky.) 322; *Morrison v. Hart*, Hard. (Ky.) 157; *Coleman v. Coleman*, 3 Bibb (Ky.) 14; *Chauvrand v. Maillard*, 4 N. Y. Supp. 126.

Where an action accrues by virtue of a statute, and a general form of declaration is thereby given, a plea of set-off founded on such statute should bring defendants within its terms. *Moore v. Metropolitan Sewage Manure Co.*, 3 Exch. 333.

5. 2 Pars. Contr. 746, citing *Barb. on Set-off*; *Babb. on Set-off* (6 Law Lib.). The notice should contain the substance of a declaration. *Brady v. Hill*, 1 Mo. 315; 13 Am. Dec. 503.

The notice must describe the demand intended to be set off with reasonable certainty. *Gogel v. Jacoby*, 5 S. & R. (Pa.) 120; 9 Am. Dec. 339. See *Lewis v. Culbertson*, 11 S. & R. (Pa.) 48; 14 Am. Dec. 607.

6. The *New Hampshire Pub. Stat.* 1891, p. 619, § 11, required that the plea

all the requisites essential to the validity of pleas in bar, but must, of course, show that the debt is of a nature which entitles the defendant to set it off against the plaintiff's claim.¹

Where the demand would have been recoverable under the common money counts in a declaration, the amount may be set off under a similar description of the debt, however particular the circumstances may have been.² A plea of set-off so much resembles a declaration, that two parts of a plea of set-off, stating distinct debts, are considered as two counts in a declaration, and if one part be good, a demurrer for the misleading in the other part must be confined to the defective statement, and a general demurrer to the whole is not sustainable;³ though it is a general rule that, if one part of a plea in bar be bad, the whole is insufficient.⁴ So, in a plea of set-off, an imperfect statement of one debt intended to be set off will not prejudice a sufficient allegation of another ground of set-off.

A separate plea of set-off stands on the same ground with other special pleas and must not profess to be an answer to more than it really does answer. Therefore, a special plea of set-off which professed to answer the whole cause of action, but answered only a part, was held bad on general demurrer.⁵

It has been said that it seems that if the defendant desires to obtain a judgment for the balance of his claim, beyond the set-off under the statute, he must demand such judgment in his plea.⁶ But it has, on the other hand, been held that a notice of set-off need not expressly claim a balance in the defendant's favor, in order to warrant his recovering one; that it is enough if it set forth his demand in the usual form.⁷

c. PARTICULARS OF SET-OFF.⁸—Shortly after the enactment of the statute of 2 George II, ch. 22, the court adopted the rule, that in all cases where the defendant pleads or gives notice of set-off generally, without specific particulars, the plaintiff had the right to call upon him for the particulars of such set-off, or preclude him from giving evidence.⁹ This practice has been adopted in

or notice of set-off shall describe the debt or demand "with the same certainty as is required in a declaration." It was held that a plea of set-off need not specify any particular sum; and if it does, the party is not bound to prove that precise sum. *Crump v. Hubbard*, Litt. (Ky.) Sel. Cas. 222. But it has been held that a defendant cannot set off more than the sum pleaded. *Prior v. Jacobs*, 1 Johns. Cas. (N. Y.) 169; *Fugit v. Ewing*, 9 Ind. 345.

1. 1 Chitt. Pl. 602.

2. A notice that is as broad as the common counts will, if no bill of particulars is called for, cover any demand that can be proved under such counts. *Fergu-*

son v. Milliken, 42 Mich. 441. See also *Graham v. Chubb*, 39 Mich. 417.

3. *Dowland v. Thompson*, 2 Bl. Rep. 910.

4. 1 Chitt. Pl. 572, 593.

5. *Conklin v. Waltz*, 3 Ind. 396.

6. *Finch v. Ives*, 28 Conn. 115.

7. *People v. Judges of Onondaga*, 4 Cow. (N. Y.) 21. See *Reeside v. Walker*, 11 How. (U. S.) 272.

8. See BILL OF PARTICULARS, vol. 2, p. 244, *et seq.*

9. 2 Archibald's Pr. 197; *Graham's Pr.* 439; 1 *Burrell's Pr.* 180, 193, 433. In regard to this practice it was said by *Tindal, C. J.*, in *Bartholomew v. Carter*, 3 M. & G. 131; 42 E. C. L. 75, that

the United States.¹ It has been said in effect that, as the defendant has a right to call on the plaintiff for the particulars of his demand,² equal justice seems to require that the plaintiff, also, should be allowed to demand of the defendant the particulars of his set-off, when they are not specified in the plea or notice.³ Under a judge's order for particulars, the defendant or his attorney should deliver a particular account, in writing, of the items of his demand, and when and in what manner it arose.⁴

While the demanding and granting of particulars undoubtedly facilitate the trial of a cause, they will not be permitted to obstruct the justice of it. The party who objects to the particulars as insufficient must make the complaint at the proper time. He cannot wait until the trial of the cause, and then raise an objection which, if earlier made, might have been disposed of.⁵

"when 2 George II., ch. 22, gave the power of pleading a set-off, no one surmised that the practice, shortly afterwards adopted by the courts, that unless a particular of the set-off was delivered, no evidence of set-off should be given under the plea, was an excess of jurisdiction on their part, or a repeal of the enactment. It was a matter of practice only, subsidiary to the full and complete execution of the intention of the act." *Colorige, J., in Rankin v. Hamilton*, 15 Q. B. 192; 69 E. C. L. 185, which was decided in 1850, observing that when the statute first authorized the practice of setting off the cross-demand, instead of suing for it in a cross-action, or having recourse to a court of equity, it made notice at the time of pleading a condition precedent, thought that "the judges may well have held that the condition was not performed by a bare notice specifying no particulars."

As early as 1811, it was, according to Heath, J., "every day's practice where a defendant gives notice of a set-off, for the judges at chambers to make an order that the defendant shall not be at liberty, upon the trial, to give evidence upon the set-off, unless he delivers to the plaintiff a particular of the items of set-off." *Bateman v. Phillips*, 4 Taunt. 163. To the same effect see *Young v. Geiger*, 6 C. B. 541; 60 E. C. L. 540; *Ibbett v. Leaver*, 16 M. & W. 770. See also *Wallis v. Anderson*, 1 M. & M. 291; 22 E. C. L. 310.

1. See *Peden v. Mail*, 118 Ind. 556.

In *New Jersey*, the statute provides that, "If the defendant plead or give notice of a set-off, he shall annex to his plea a copy of the account, and a bill of

particulars of the demand, and a copy of the note or other writing so intended to be set off, with the names of the subscribing witness or witnesses, if there be any; and if in the plea or any subsequent pleading, profert be made of any writing, a copy thereof shall be annexed to such pleading, with the name of the subscribing witness or witnesses, if there be any; and no evidence thereof shall be given on the trial unless so annexed; and the same shall be copied as a part of the circuit record, and recorded with the pleadings." *Elmer's New Jersey Dig.* ed. 1855, p. 639.

Under the *New Hampshire* statute a plaintiff is entitled to one continuance in case of set-off, unless a particular statement of the debt or demand, with a notice that a defendant will set off the same, has been served on the plaintiff ten days before the sitting of the court. *New Hampshire Gen. Stats.* (ed. 1867) p. 426.

2. That this may be done, see *BILL OF PARTICULARS*, vol. 2, p. 246.

3. See *Mercer v. Sayre*, 3 Johns. (N. Y.) 248.

4. *Tidd's Pr.* (6th ed.) 622; *Young v. Geiger*, 6 C. B. 541; 60 E. C. L. 540; *Mercer v. Sayre*, 3 Johns. (N. Y.) 248.

5. *Lovelock v. Cheveley*, 1 Holt N. P. 552; 3 E. C. L. 218; *Ibbett v. Leaver*, 16 M. & W. 770.

So, in *Barnes v. Henshaw*, 21 Wend. (N. Y.) 426, it was said that it will not avail a party to object to the generality of a bill of particulars at the trial, if the cause of action or matter of defense be embraced in the bill, even in the most general terms. The party, if dis-

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Between the particulars and the evidence there should be no variance calculated to mislead.¹ And the party delivering his particulars must be considered as having confined himself to the proof of the subject-matter comprised in those particulars.² When the particulars of the defendant's set-off are delivered, they are, at the trial, considered as incorporated with the plea or notice; and, on production of the order and proof of the delivery of particulars, the defendant will not be allowed to give evidence of any demand not included in them.³ Where, however, the plaintiff puts in evidence his books of account, the defendant may claim the benefit of any credits to him found therein, though not contained in his set-off filed.⁴

d. REPLICATION TO SET-OFF.—So long as the defendant pleading a set-off is considered in respect to his plea in the light of a plaintiff, and is bound to produce the same testimony to support it that would be required to enable him to recover in that character, it follows that the plaintiff against whom the set-off is pleaded ought to be permitted by way of replication to make the same defense which the law would allow him to enter by way of plea had he been sued as defendant in an independent action.⁵ The plaintiff may avail himself in his replication of any fact which shows that the set-off is groundless. If to a plea of set-off the plaintiff reply "that he was not nor is indebted, etc.," he may under this replication prove that he has paid the amount claimed as a set-off.⁶ So the plaintiff may show under this replication that the amount claimed to be set off has been paid by a third party, and that he had ratified such payment at the time of trial.⁷ To an answer interposing promissory notes as a set-off, a reply denying the defendant's title to the notes and setting forth facts showing the title to be in another is good.⁸

So it is a good replication to a plea of set-off that after plea pleaded, the plaintiff paid the debt.⁹

So if there be an action against two or more to recover a joint debt, and the defendant's plea is set-off, it is a good replication to such plea that before plea pleaded one of the defendants had become bankrupt.¹⁰

satisfied with the bill, should have applied for further particulars.

It was held that evidence offered under a plea of set-off, to which no bill of particulars or copy of the cause of action was attached, would not be excluded from the jury by reason of the absence of such bill of particulars. *Farwell v. Tyler*, 5 Iowa 535.

1. See *Parsons v. Wilson*, 3 M. & G. 445; 42 E. C. L. 237.

2. *Andrews v. Bond*, 8 Price 213.

3. *Hatchet v. Marshal*, 1 Peake's N. P. Cas. 172; *Keen v. Batshore*, 1 Esp. N. P. 194.

4. *Pilsbury v. Fernald*, 10 Me. 168.

5. *Holding v. Smith*, 1 Murph. (N. Car.) 154; *Worth v. Fentress*, 1 Dev. (N. Car.) 419; *Watts v. Greenlee*, 2 Dev. (N. Car.) 87.

In *Indiana*, a set-off may be replied to a set-off. *Blount v. Rick*, 107 Ind. 238. But in *Maryland*, "there can be no such thing." *Spencer v. Almony*, 56 Md. 551.

6. *Stockbridge v. Sussams*, 3 Q. B. 239; 43 E. C. L. 716.

7. *Simpson v. Egginton*, 10 Exch. 845.

8. *Reilly v. Rucker*, 16 Ind. 303.

9. *Eyton v. Littledale*, 4 Exch. 159.

10. *New Quebrada Co. v. Carr*, L. R., 4 C. P. 651.

So the plaintiff may prove under *nil debet* that the debt sought to be set off is due from himself and a third party.¹

But the plaintiff cannot give in evidence under the replication of *nil debet* to a plea of set off his discharge under the bankruptcy act;² or that the debt sought to be set off is barred by the Statute of Limitations;³ and he must, therefore, reply the same specially. While the plaintiff may, in general, reply the Statute of Limitations to the defendant's plea of set-off,⁴ yet, and this is in accordance with what has already been said,⁵ if both the demands of the plaintiff and defendant accrued more than six years before the time of pleading, and the plaintiff issued process to prevent the Statute of Limitations affecting his demand, it will equally prevent the statute from barring the defendant's set-off, although the latter issued no process.⁶

c. PROOF.—The defendant must in general give the same evidence in support of his set-off as he would be bound to give if he were suing for the recovery of the debt claimed to be due him. The burden of proof is on the defendant to establish his set-off.⁷ He must show that the claim was acquired in proper time⁸ unless this is presumed.⁹

1. Arnold v. Bainbrigge, 9 Exch. 153.

2. See Ford v. Dornford, 8 Q. B. 583; 55 E. C. L. 583.

3. Chapple v. Durston, 1 C. & J. 1.

4. Remington v. Stevens, 2 Stra. 1271; Bul. N. P. 180.

5. See *supra*, this title, notes 2 and 3, p. 278.

6. Ord v. Ruspini, 2 Esp. 569; Catlin v. Skoulding, 6 T. R. 189; 2 Saund. 127; Montag. 20.

7. Callender v. Drabelle, 73 Iowa 317; Martin v. Hammond, 78 Iowa 754; Deller v. Staten Island Athletic Club (Supreme Ct.), 4 N. Y. Supp. 311; Blake v. Krom, 13 N. Y. Supp. 335.

A receipt or assignment of a bond, offered in offset, must be proved at the trial. Turberville v. Self, 4 Call. (Va.) 580.

It was held that an instruction that the burden of proof was on the defendant to establish his set-off, was fatally defective for leaving out of view that the burden of proof in the first instance was on the plaintiff to show the original indebtedness, and a new promise to take the case out of the Statute of Limitations. Nolan v. Vosburg, 3 Ill. App. 596.

But the rule which precludes a defendant from recovery unless he sustains his plea of set-off by a preponderance of the evidence, does not limit him to the proofs introduced by him,

but he takes the benefit of the evidence in his favor introduced by the plaintiff. Laird v. Warren, 92 Ill. 204.

8. Gross v. Van Wick, Minor (Ala.) 7; Kelley v. Garrett, 6 Ill. 649; Hadley v. Wray, 76 Ind. 476; Freeland v. Man, 1 Smed. & M. (Miss.) 531; Heidenheimer v. Wilson, 31 Barb. (N. Y.) 636; Smith v. Ewer, 22 Pa. St. 116.

A defendant who wishes to set off bills or bank notes issued by the plaintiffs, must show that he was the owner or possessor of the notes before the commencement of the suit. Jefferson Co. Bank v. Chapman, 19 Johns. (N. Y.) 322.

So a defendant offering in evidence as set-off a promissory note payable to a third person or bearer, must show that the title to the note was in him at the commencement of the action. Godley v. Barnes, 13 Rich. (S. Car.) 161.

The mere possession of a note on its face negotiable, having on it an indorsement in blank, which is offered as a set-off, is not evidence that it belonged to the defendant at the commencement of the suit. Smith v. Ewer, 22 Pa. St. 116; Crayton v. Clark, 11 Ala. 787.

9. It is a well settled rule that every holder of a negotiable note is considered *prima facie* to be a *bona fide* holder. BILLS AND NOTES, vol. 2, p. 391, n. 1. He is accordingly presumed to have taken it before due. Chit. on

II. RECOUPMENT—1. Definition.—Recoupment is the right of the defendant, in the same action, to claim damages from the plaintiff, either because he has not complied with some obligation of the contract upon which he sues, or because he has violated some duty which the law imposed upon him in the making or performance of that contract.¹

2. Reconvention—*a.* DISTINGUISHED.—Reconvention is the name given in *Louisiana* and *Texas* to a species of claim which the defendant is allowed to set up. It is, like recoupment and counterclaim, more extensive than set-off. It has been defined to be a cross-bill, or something in the nature of a cross-bill—a

Bills, 248. When, therefore, a negotiable note is pleaded as a set-off, and the presumption, in accordance with the above principle, is that the defendant was the *bona fide* holder at the commencement of the action, the burden is upon the plaintiff to show the contrary. *Griffin v. Evans*, 23 Ga. 438.

A defendant may file in set-off a note made by the plaintiff, and payable to the defendant or bearer, without proof that he received it before the commencement of the action. *Clark v. M'Elroy*, 1 Stew. (Ala.) 147.

1. Bouv. L. Dict.; And. L. Dict.

It has also been defined to be a keeping back of something which is due, because there is an equitable reason to withhold it. *Ives v. Van Epps*, 22 Wend. (N. Y.) 155.

In *Barber v. Chapin*, 28 Vt. 413, the court by Redfield, J., said: "It will not aid the clearness of our perceptions to go into the cases upon the subject of recoupment, or recouper, as it was one time called. The modern use of this term is confessedly so indefinite as to afford no reliable grounds upon which it is safe to proceed." And in *Davenport v. Hubbard*, 46 Vt. 200, 206, the court, by Ross, J., said: "It is sometimes difficult to discriminate set-off from reduction or recoupment. . . . When the claim of the defendant is for a breach of a stipulation in the contract other than, and independent of, the one relied upon by the plaintiff, we are not aware of any authority which holds that he is barred from prosecuting his claim in an independent action, if he fails to avail himself of it as a defense to the plaintiff's suit. We think he is not barred; for the reason that his claim may exceed that of the plaintiff, so that he could not

have a full remedy by way of reduction or recoupment; and by set-off he might be deprived from securing only so much of his claim as might happen to be due from him to the plaintiff." But see *infra*, this title, *Counterclaim*, provisions of the New York Code and others, for judgment in such case.

In *Merrill v. Everett*, 38 Conn. 40, 48, the court, by Butler, C. J., said: "The right to recoup arises where the action is upon the contract, or some obligation arising out of it, and there has been a breach of some divisible part of it, or of such obligation."

In *Roberts v. Donovan*, 70 Cal. 108, 113, the court, by Searls, J., said: "If a defendant failed to recoup damages where he might do so, he was afterward precluded from maintaining an action therefor, as he is now by our code for counterclaims arising under subd. 1 of § 438, . . . which includes a case of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. . . . A contract is a 'transaction,' but a 'transaction' is not necessarily a contract." Citing *Xenia Branch Bank v. Lee*, 7 Abb. Pr. (N. Y.) 372.

And in *New York*, in 1831 (prior to the present code), in *Reab v. McAlister*, 8 Wend. (N. Y.) 109, 117, the court, by Walworth, Ch., after reviewing the civil and the *English* law as to recoupment, said: "Indeed, if one of the parties is insolvent and the other responsible, it is the only way in which justice can be done; at least as to small demands, which will not bear the expense of a suit in chancery to obtain an equitable set-off."

cross-action by the defendant against the plaintiff in the same suit.¹

b. MATTERS OF PRACTICE—(1) In Louisiana.—Those cases of reconvention which illustrate the general principles of recoupment will be considered in the proper places for comparison with the decisions of other States upon the various branches of the subject. Those, however, which turn upon the peculiar provisions of the codes of these two States for the pleading and practice, may better at once be here presented.

The *Louisiana* Code declares: "In order to entitle the defendant to institute a demand in reconvention, it is requisite that such demand, though different from the main action, be nevertheless necessarily connected with, and incidental to the same; as, for instance, the demand instituted by the possessor in good faith, against him who sues in order to evict him, for the purpose of obtaining payment for the improvements made on the premises." *La. Code*, art. 375.²

1. See Black's L. Dict.; Burrill's L. Dict.; And. L. Dict. The term is derived from the *reconventio* of the civil law.

2. The *Louisiana* Code has not changed the civil law as to reconvention; unliquidated demands may be pleaded therein. *Agaisse v. Guedron*, 2 Martin N. S. (La.) 82; *Montgomery v. Russell*, 7 Martin N. S. (La.) 290.

A claim for unascertained damages may be pleaded in reconvention, if arising out of the same transaction which is the subject of the suit. Thus, in an action by a surety for money paid the defendant can reconvene for damages from fraudulent conduct at an execution sale under the bond. *Wilcoxon v. Bufford*, 10 La. 183.

In a superintendent's action for wages, his employer may reconvene for money delivered to pay the hands and retained unaccounted for. *Bayne v. Fox*, 18 La. 80.

If A in his individual name, but for the benefit of B, a non-resident, sues C, C may reconvene without citing B. *Smith v. Atlas Steam Cordage Co.*, 41 La. Ann. 1. Compare *State Bank of N. O. v. Evans*, 32 La. Ann. 464; *Spinney v. Hyde*, 16 La. Ann. 250.

A reconventional demand must be necessarily connected with and incidental to the main action. A demand for damages from the attachment as illegal is not such incident. *Coco v. Guyral*, 36 La. Ann. 293. Nor, in a landlord's proceeding, a tenant's claim for buildings erected. *D'Armond v.*

Pullen, 13 La. Ann. 137. Compare *Harris v. New Orleans, etc., R. Co.*, 16 La. Ann. 140; *Knox v. Thompson*, 12 La. Ann. 114.

If A sues B for a commission on a collection, B may reconvene for the amount in A's hands on which the commission is charged. *Hynson v. Wheeler*, 15 La. Ann. 409.

A plea in reconvention must be established with legal certainty. So held in a suit for specific performance, where there had been a delay of two months to ascertain the damaged condition of perishable goods. *Frank v. Hollander*, 35 La. Ann. 582.

A reconventional demand need not be equally liquidated with the one to which it is opposed. *Cain v. Pullen*, 34 La. Ann. 511.

Such demand must be tried and appealed with the main suit. *Crescent City Live Stock, etc., Co. v. Larrieux*, 30 La. Ann. 740. Compare *Sientes v. Odier*, 17 La. Ann. 153.

The Supreme Court cannot revise a judgment upon a reconventional demand of less than \$1,000. *Stevenson v. Whitney*, 33 La. Ann. 655. But where the plaintiff's claim is for less and the defendant's for more than \$1,000, the court will pass upon the latter and not upon the former. *Lamorer v. Avery*, 32 La. Ann. 1008.

A plea in reconvention need not be put in issue by answer or default. *Bayly v. Stacy*, 30 La. Ann. 1210.

A reference to the answer in a former suit, without more, is not an adequate

(2) *In Texas*.—The *Texas* Code declares: "In every action in which a defendant shall desire to prove any payment, counterclaim or set-off, he shall file with his plea, an account stating distinctly the nature of such payment, counterclaim or set-off and the several items thereof; and, on failure to do so, he shall not be entitled to prove the same, unless it be so plainly and particularly described in the plea as to give the plaintiff full notice thereof."¹

allegation of a reconventional demand. *Teal v. Lyons*, 30 La. Ann. 1140. Further as to the requisites of specification, see *Winthrop v. Jarvis*, 8 La. Ann. 434.

As to the credit to be given by a *Louisiana* court to a reconventional demand set up by one of the parties before judgment in a *Texas* court, see *McFarland v. White*, 13 La. Ann. 394.

As to the necessity of a distinct verdict on a reconventional demand, see *Collins v. Graves*, 13 La. Ann. 95.

A suit cannot be brought against a State indirectly by way of reconvention. *State v. Leckie*, 14 La. Ann. 646.

Where both parties to an action in which there is a plea of reconvention fail to make out a case, each must pay his own costs. *Peniston v. Somers*, 15 La. Ann. 679.

The plaintiff against whom a plea of reconvention is filed cannot discontinue his action. *Lanusse v. Pimpinella*, 4 Martin N. S. (La.) 439; *Barrow v. Robichaux*, 15 La. Ann. 70; *Smith v. Amacker*, 15 La. Ann. 299.

1. *Tex. Rev. Stat.* 1889, art. 1266.

The courts are justified in recurring to the Spanish system of jurisprudence to ascertain the objects and extent of the plea of reconvention. *Walcott v. Hendrick*, 6 Tex. 406.

A plea in reconvention, the matter of which is connected with one of two contracts, on which the plaintiff sues, cannot be dismissed by the discontinuance of the suit as to the contract connected with the matter of the plea, and it cannot be inferred that the defendant consented to the dismissal of his plea because the record does not show that he objected to the discontinuance. *Slaughter v. Hailey*, 21 Tex. 537.

A plea in reconvention against the plaintiff and a co-defendant, non-resident and not served, does not prevent the plaintiff from dismissing the suit as to the one not sued, if he does it

before any steps have been taken by either to bring in that non-resident. *Horne v. Black*, 24 Tex. 293.

A plea of a former suit, pending in abatement of a plea in reconvention, is bad, if such former suit has already been discontinued at the date of the plea in abatement, although it was pending at the date of the plea in reconvention. *Oldham v. Erhart*, 18 Tex. 147.

Where a plea in reconvention is well pleaded, the plaintiff cannot claim a non-suit. *Egery v. Power*, 5 Tex. 101.

And so sometimes when the matter is not well pleaded. It was so held where the plea was not such that it could be disregarded or treated as a nullity by the court, without exception to its sufficiency and the opportunity being afforded to amend, but such that, if excepted to as not having been pleaded with sufficient certainty and specialty, it might have been amended so as to obviate that objection. *Cunningham v. Wheatly*, 21 Tex. 184.

Although after a plea in reconvention the plaintiff may take a non-suit the defendant may proceed to judgment. *Marshall v. Shueber*, 3 Tex. App. Civ. Cas. 441, § 370; *Peck v. McKellar*, 33 Tex. 238.

But compare *Ewell v. Anderson*, 49 Tex. 697; *Harris v. Whitfield*, 53 Tex. Brown v. Pontius, 53 Tex. 221.

In an action of trespass to try title, the defendant may by plea of reconvention, claim that the land be decreed to him, that the title of the plaintiff be annulled, and that he have judgment from the mesne profits. *Egery v. Power*, 5 Tex. 501. And this, though his claim be for a larger number of acres than set out in the plaintiff's petition. *Pearson v. Boyd*, 62 Tex. 541.

As to the requisites of specification, see *Carothers v. Sharp*, 21 Tex. 358.

And see *Texas* cases collated *infra*, this title, *How Right to Recoup Must Arise*.

3. Origin of Recompment. — Recompment is of common-law origin.¹ It was invented and allowed in order to avoid circuity of action.²

1. 4 Minor's Inst. (2d ed.) 706; 1 Chitt. Pl. (16th Am. ed.) 595; Pom. Rem. etc., § 731.

Otherwise as to set-off, see *supra*, this article, *Set-off*; *Origin*, etc.

In *New Jersey*, it is of statutory origin. *Price v. Reynolds*, 39 N. J. L. 171; *Wakeman v. Illingsworth*, 40 N. J. L. 431; *Bozarth v. Dudley*, 44 N. J. L. 304; 43 Am. Rep. 373.

In *Hunter v. Reiley*, 43 N. J. L. 480, it was held that the lessee, in an action for rent under a sealed lease, could not recoup damages for the lessor's breach of covenant. Otherwise, now, by Rule 83 of the Supreme Court.

In *Pennsylvania*, for the statutory provision for "defalcation," also for collation of decisions thereon, see B. P. Dig. Pa. L. 1885, p. 603.

2. *M'Allister v. Reab*, 4 Wend. (N. Y.) 483; *M'Cumber v. Goodrich*, 1 Johns. (N. Y.) 56; *Peck v. Brewer*, 48 Ill. 54; *Doane v. Dunham*, 65 Ill. 512; *Shuchmann v. Knoebel*, 27 Ill. 175; *Harrington v. Stratton*, 22 Pick. (Mass.) 510; *Sawyer v. Wiswell*, 9 Allen (Mass.) 39; *Dorr v. Fisher*, 1 Cush. (Mass.) 271; *Home Sav. Bank v. Boston*, 131 Mass. 277; *Withers v. Greene*, 9 How. (U. S.) 213; *Dushane v. Benedict*, 120 U. S. 630; *Peden v. Moore*, 1 Stew. & P. (Ala.) 71; 21 Am. Dec. 649; *Sumter v. Welsh*, 2 Bay (S. Car.) 558; *Platt v. Brand*, 26 Mich. 173; *Ward v. Fellers*, 3 Mich. 281; *Timmons v. Dunn*, 4 Ohio St. 680; *Nelson v. Johnson*, 25 Mo. 430; *Ham-matt v. Emerson*, 27 Me. 308; *Flint v. Lyon*, 4 Cal. 17; *Houston v. Young*, 7 Ind. 200; *Clark v. Wildridge*, 5 Ind. 176.

In *Arkansas*, in *Wheat v. Dotson*, 12 Ark. 699, the court by Scott, J., said: "The doctrine of recompment has not grown up in the common-law courts upon the ground that the express contract upon which the suit is brought is to be considered void and that the recovery is allowed as upon a *quantum meruit* or *quantum valebat* upon an implied contract; or that such express contract has been rescinded, and thus a return of an offer to return or its equivalent, must be required as a pre-requisite to the admission of the defense. On the contrary, it has grown up under the auspices of quite another

and distinct principle of the common law that has been always operative, and of late years has not only been a great favorite of the courts both of law and equity, but of the legislature, that of the law's abhorrence of multiplicity and circuity of action, which can never legitimately tolerate a second litigation on the same matter, where a fair opportunity can be afforded by the first to do final and complete justice between the parties."

In *Illinois*, in *Streeter v. Streeter*, 43 Ill. 155, an action on notes executed contemporarily with the payee's agreement to deliver up a certain farm in good condition, the court by Breese, J., said: "This doctrine of recompment is becoming popularized in the realm of the common law. For, as was said in *Stow v. Yarwood*, 14 Ill. 424, it tends to promote justice, prevent useless litigation, avoid circuity of action, and a multiplicity of suits, adjusting in one action adverse claims growing out of the same subject-matter which can generally be much better settled in one proceeding than in several." This was reiterated in *Peck v. Brewer*, 48 Ill. 54, an action on a covenant to deliver fleeces, wherein the defendant was allowed to recoup for the plaintiff's delivery of sheep known to be infected with foot-rot.

In *Massachusetts*, in *Carey v. Guil-low*, 105 Mass. 18; 7 Am. Rep. 494, the court, by Chapman, C. J., said: "In actions of contract, the doctrine of recompment is well established in this commonwealth. It was not recognized in the case of *Everett v. Gray*, 1 Mass. 101, but in *Taft v. Montague*, 14 Mass. 282; 7 Am. Dec. 215, that decision was, in effect, overruled. The plaintiff had brought an action to recover the price of a bridge which he had built for the defendants, and they were allowed to prove in defense that it was so badly built as to be worthless. The authorities were not discussed, but Parker, C. J., said, 'It would be a reproach to the law if the plaintiff could recover.' In *Harrington v. Stratton*, 22 Pick. (Mass.) 510, the cases in which the doctrine has been established in New York were discussed, and the modern English authorities referred to. It is there said that the doctrine rests on the

4. Recoupment and Set-off Distinguished.—In recoupment the defendant's claim must arise out of the same transaction as the plaintiff's; he can recover no excess; and his claim may be for liquidated or unliquidated damages. In set-off the claims are independent; only liquidated damages can be set off, and the defendant can recover the excess above the plaintiff's claim.¹

principle that it is always desirable to prevent a cross-action when full and complete justice can be done in a single suit, and it is on this ground that the courts have of late been disposed to extend to the greatest length compatible with the legal rights of the parties, the principle of allowing evidence in defense or in reduction of damages to be introduced rather than to compel the party to resort to his cross-action."

In *Georgia* the doctrine of recoupment is held to be merely an improvement upon the old doctrine of failure of consideration. In *Lufburrow v. Henderson*, 30 Ga. 482, Stevens, J., said: "The comparatively modern doctrine of recoupment is but a liberal and beneficent improvement upon the old doctrine of failure of consideration. It looks through the whole contract treating it as an entirety and treating the things done and stipulated to be done on each side, as the consideration for the things done and stipulated to be done on the other. When either party seeks redress for the breach of stipulations in his favor, it sums up the grievances on each side instead of the plaintiff's side only, strikes a balance and gives the difference to the plaintiff if it is in his favor."

In *Tennessee* the doctrine of recoupment has been introduced, but only to a limited extent. It has been declared applicable only to cases where a special contract has been partially executed, but not according to its terms. *Porter v. Woods*, 3 Humph. (Tenn.) 56; 39 Am. Dec. 153; *Crouch v. Miller*, 5 Humph. (Tenn.) 586. See *Allen v. McNew*, 8 Humph. (Tenn.) 46; *Overton v. Phelan*, 2 Head (Tenn.) 445.

Where an engineer sued for his stipulated salary, it was held that damages sustained by his employer by reason of his unskillful performance of his duty could not be set-off against such salary either in law or in equity. *Nashville, etc., Turnpike Co. v. Harrison*, 8 Humph. (Tenn.) 558.

1. Sedgwick on Damages (8th ed.), § 1033; 7 Wait's Actions and Defenses, 545. In *Ward v. Fellers*, 3 Mich. 281, the court, by Martin J., said: "The defense (recoupment) is contradistinguished from set-off in these three essential particulars: 1st, In being confined to matters arising out of, and connected with, the transaction or contract upon which the suit is brought; 2d, In having no regard to whether such matters are liquidated or unliquidated; and 3d, That the judgment is not the subject of statutory regulation, but controlled by the rule of the common law." This was repeated by Peyton, C. J., in *Myers v. Estell*, 47 Miss. 4.

Mr. Parsons in 2 *Parsons on Contracts*, p. 740, says: "Set-off should, however, be discriminated from reduction and recoupment, to both of which it bears much analogy and with either of which it may be so mingled by the facts of a case as to make it difficult to say in which of these forms the opposing demand should be brought against the plaintiff's action. In general, a defendant may deduct from the plaintiff's claim, all those demands or claims owned by him of payments made by him in the very same transaction, or even in other but closely connected transactions. They must, however, be so connected as fairly to authorize the defendant to say that he does not owe the plaintiff on that cause of action so much as he seeks, and not that he ought not to pay the plaintiff so much because on another cause of action the plaintiff owes him. If he can so present and use his claims he diminishes the plaintiff's claim by way of reduction. Recoupment, we consider to belong rather to cases where the same contract lays mutual duties and obligations on the two parties, and one seeking remedy for the breach of duty by the second, the second meets the demand by a claim for a breach of duty against the first. The word is of recent introduction and is not used with uniformity and precision. The essential difference between recoupment or reduc-

The occasionally apparent conflict of decisions between different State courts upon allowance of recoupment or set-off or counterclaim is not wholly due to the use of the three terms as if synonymous. Statutory differentiations are to be taken into account. Besides those to be presently noticed in considering counterclaim, it will be found profitable here to compare those of *Kentucky, Alabama, Arkansas, Maryland and West Virginia*.¹

tion on the one hand and set-off on the other, is that in set-off the character taken by the defendant is that he may owe the plaintiff what he claims; that a part of the whole of this debt is paid in reason and justice by a distinct unconnected debt which the plaintiff owes him."

Whether Recoupment is a Defense.—In so far as recoupment must arise out of the same transaction and the defendant recover no excess in his favor, it would seem to be a defense and not merely a right to a cross-action set up in this manner in order to prevent circuity of action. But the fact that the matter so set up must be such as would entitle him to a cross-action—and in some States he may elect between the two remedies—would seem to imply that recoupment is not a defense in the true sense of the term.

In *Ohio*, in *Timmons v. Dunn*, 4 Ohio St. 680, the court by Ranny, J., said: "It (recoupment) is no defense to the action but only affects the amount to be recovered by the plaintiff."

In *New York*, in *Nichols v. Dusenbury*, 2 N. Y. 286, an action of replevin, plea, taking upon distress for rent, reply, failure to complete the building as by contract to lease, the court by Bronson, J., said: "It is a matter which is never pleaded in bar. It is in the nature of a cross-action. The right of the plaintiff to sue is admitted, but the defendant says he has been injured by the breach of another branch of the same contract on which the action is founded, and claims to stop, cut off or keep back so much of the plaintiff's damages as will satisfy the damages which have been sustained by the defendant."

In *McCullough v. Cox*, 6 Barb. (N. Y.) 386, the court by Edwards, J., said: "The meaning of recoupment is a reduction of the damages claimed and is not in theory and contemplation of law a complete bar. Neither can it be made so by election that the damages which the defendants claim by way of recoupment exceed those claimed by

the plaintiffs. In all the adjudicated cases both in *England* and in this State in which recoupment has been allowed, it has been considered and has been generally described as a partial defense."

It is not unusual, however, for the judges to refer to recoupment as a defense. See *Withers v. Greene*, 9 How. (U. S.) 213; *Ward v. Fellers*, 3 Mich. 281; *Harman v. Sanderson*, 6 Smed. & M. (Miss.) 41; 45 Am. Dec. 272.

In *McHardy v. Wadsworth*, 8 Mich. 349, the court by Christiancy, J., said: "A defense by way of recoupment denies the validity of the plaintiff's cause of action. It is not an independent cross-claim like a separate and distinct debt or item of account due from the plaintiff, but is confined to matters arising out of or connected with the contract or transaction which forms the basis of the plaintiff's action. It goes only in abatement or reduction of the plaintiff's claim and can be used as a substitute for a cross-action only to the extent of the plaintiff's demand."

1. *Kentucky*.—The *Kentucky* Code, 1889, § 96, defines: "1, A counterclaim is a cause of action in favor of a defendant against a plaintiff, or against him and another, which arises out of the contract or transaction stated in the petition as the foundation of the plaintiff's claim, or which is connected with the subject of the action; 2, a set-off is a cause of action arising upon a contract, judgment, or award, in favor of a defendant against a plaintiff or against him and another; and it cannot be pleaded except in an action upon a contract, judgment, or award; 3, a cross-petition is the commencement of an action by a defendant against a co-defendant or a person who is not a party to the action, or against both; or by a plaintiff against a coplaintiff, or a person who is not a party to the action, or against both; and is not allowed to a defendant, except upon a cause of action which affects, or is affected by, the original cause of action; nor to a plaintiff, except upon a cause of action

which affects, or is affected by, a set-off or counterclaim."

Ordinarily, in assumpsit for the price of merchandise unliquidated damages for non-performance of a building contract cannot be counterclaimed.

Otherwise, in case of equities arising from plaintiff's non-residence or insolvency. *Forbes v. Cooper*, 88 Ky. 285. In this case, the court, by Holt, J., after citing *Shropshire v. Conrad*, 2 Met. (Ky.) 143, and *Taylor v. Stowell*, 4 Met. (Ky.) 175, and referring to the practice before the Code, said: "It was then not uncommon to stay an insolvent or non-resident debtor in the collection of his claim until damages to which the complainant might be entitled against him, were liquidated under the order of the chancellor, and then apply them in satisfaction of his independent debt. In some of the States, it has been held that the resident debtor may proceed by attachment in an independent suit against his non-resident debtor, and attach the money owing by him in his own hands, and then answer his adversary by relying on the attachment.

"It has, however, been held by other courts that he could not do so, because it would bring him within the rule that a party cannot sue himself. Numerous cases, however, have been found in which it has been held that the party may by injunction stay his insolvent or non-resident adversary in the collection of his claim until damages claimed are liquidated by a judgment, and thus gotten in form to satisfy the independent demand. (For a complicated case still requiring such resort to injunction, etc., see *Harrison v. Bray*, 92 N. Car. 488.)

But where in absence of fraud or mistake, a defendant has neglected to plead payment, he cannot have collection of the judgment enjoined in order to make the payment a set-off. And this, even where the plaintiff is a non-resident, if also such when the judgment was rendered. *Walker v. Thomas*, 88 Ky. 486.

As to the earlier *Kentucky* decisions upon recoupment, in *Wheat v. Dotson*, 12 Ark. 699, 709 (in 1852), the court, by Scott, J., said: "Kentucky probably received the law, as her courts enforce it, from her mother, Virginia, where, in 1830, it was provided by statute that a defendant might allege by plea, not only fraud in the consideration or procurement of any contract, but any such failure in the consideration thereof, or

any breach of warranty of the title, or soundness of personal property, as would entitle him in any form of action to recover damages at law or relief in equity."

Against a demand for money borrowed of a guardian without knowledge that it belonged to the ward, the borrower may set off a debt of the guardian. *Alexander v. Alford*, 89 Ky. 105.

In one's action against a railway company for the killing of his mules, damages cannot be counterclaimed for the wrecking of the train through his neglect to fence them from the track. *Louisville, etc., R. Co. v. Simmons*, 85 Ky. 151.

Where a wife, in her action for divorce, asked protection of her right to enjoy certain land, a counterclaim that the deed be reformed according to a contract that it should be made to the husband jointly with her and the children, was held not to be allowable unless the children be made parties. *Grimes v. Grimes*, 88 Ky. 20.

A city, taking property for a street improvement, cannot set off the tax assessed against the remaining property of the owner, nor recoup for accruing benefits. The constitutional inhibition imports payment before entry. *Covington v. Worthington*, 88 Ky. 206.

A party sued by the Commonwealth may so recoup as to defeat recovery, but cannot get judgment over. *Commonwealth v. Ohio & N. R. Co.*, 81 Ky. 572.

If A wrongfully appropriates B's estate, and A's administrator sues C, C may recoup a demand due C from B's estate. *McKenzie v. Pendleton*, 1 Bush (Ky.) 164. Compare *Finnell v. Meaux*, 3 Bush (Ky.) 449.

After A has been charged in the settlement of an estate with B's note taken by A as administrator thereof, B, in A's suit thereon, can set off A's individual debt due B. *Jones v. Everman*, 15 B. Mon. (Ky.) 631.

It was once held that a set-off allowable by *Kentucky* law might be pleaded in an action on a note executed in another State where the set-off would not be allowed. *Davis v. Morton*, 5 Bush (Ky.) 160. But compare *Stevens v. Gregg*, 89 Ky. 461.

If A sells B an exempt cow, B, knowing that the sale was made to enable A to buy another giving milk, will not be allowed to recoup against the purchase price a debt due him by A. *Mulliken v. Winter*, 2 Duv. (Ky.) 256.

Recoupment.

SET-OFF.

Set-off Distinguished.

A having executed to B a note for the purchase price of an interest in the partnership of B & C, and B, having assigned the note to D but continuing in the firm, it was held that, in D's action thereon, A could recoup for damages to the concern through B's dishonest conduct. *Boughner v. Black*, 83 Ky. 541.

One's indorsement on his bank note of authorization to sell collateral and apply the proceeds to its payment, was held not to empower the bank, after a sale thereof made with consent of his administrator to apply the surplus to other claims; it must go for general distribution among all the creditors of his estate, and the bank could not set it off against a claim of the administrator. *Masonic Sav. Bank v. Bangs*, 84 Ky. 701.

An administrator cannot recoup a debt due himself against a debt due by the intestate. *Commonwealth v. Bosley*, 5 Bush (Ky.) 221. Nor can a demand against the intestate be pleaded to the administrator's bond. *Cummings v. Williams, J. J. Marsh.* (Ky.) 384.

A receiver whom the court has directed to pay funds to A, cannot retain the funds collected and pay A in individual claims held against A. *Johnson v. Gunter*, 6 Bush (Ky.) 534.

A debt due A cannot recoup a claim due the firm of A & B. *Warder v. Newdigate*, 11 B. Mon. (Ky.) 174.

In an action against a bank's debtor, by commissioners holding the bank's funds, he can recoup a claim due him from the bank at the date of its assignment. *Pinnell v. Nesbit*, 16 B. Mon. (Ky.) 351.

Unliquidated damages for breach of warranty of the quality of a commodity for which the note sued on was executed, may be recouped against the note, when the seller is a non-resident or insolvent. *Taylor v. Stowell*, 4 Met. (Ky.) 175. Otherwise, when the remedy at law is adequate. *Shropshire v. Conrad*, 2 Met. (Ky.) 143.

In an action on a note, the defendant may recoup for a conversion of personal property. *Eversole v. Moore*, 3 Bush (Ky.) 49; *Haddix v. Wilson*, 3 Bush (Ky.) 523.

Effect of Assignment in Kentucky.—"All bonds, bills or notes for money or property shall be assignable so as to vest the right of action in the assignee; but, except in case of bills of exchange, not to impair the right to

any defense, discount or offset that the defendant has and might have used against the original obligee or any intermediate assignor before notice of the assignment." Ky. Gen. Stat. 1887, p. 363, § 6.

"In case of an assignment of a thing in action, the action by the assignee is without prejudice to any discount, set-off or defense now allowed." Ky. Code 1889, § 19.

As to the equities, where a note is assigned to be used as a set-off, see *Timley v. Martin*, 80 Ky. 463; *Graham v. Tilford*, 1 Met. (Ky.) 112.

A maker, who has induced an assignee to take the note, is precluded from asserting an equity against the assignor to defeat the assignee's recovery. *McBrayer v. Collins*, 18 B. Mon. (Ky.) 833.

An acceptor, when sued by an indorser, who has paid the bill, may plead that he accepted it for the sole benefit of the drawer who died insolvent, and that the indorser was indebted to the estate of the drawer in that amount. *Bowman v. Wright*, 7 Bush (Ky.) 375.

Where, after the making of a joint note by A and B, but before its maturity, A makes an assignment to C for benefit of creditors, and B pays the note, B may, in an action by C against B on the note executed by B to A, recoup A's aliquot part of the joint debt. *Chenault v. Bush*, 84 Ky. 528.

As to the prerequisite that the demand was due before notice of the assignment, see *Walker v. McKay*, 2 Met. (Ky.) 294.

A and B, mutually indebted, executed, each to the other, notes in full for the two debts, to be used to raise money. A assigned his note to C and failed. In C's action against B, it was held that B could not set off the other note. *Barbaroux v. Barker*, 4 Met. (Ky.) 47.

On A's arrival of age, his guardian, B, assigned to him a note on which usurious interest had been paid to her; and C, the maker, took it up and gave A a new note. In A's action on the new note, it was held that C could not recoup the usury paid to B. *Stone v. McConnell*, 1 Duv. (Ky.) 54.

Kentucky Practice as to Non-suit, Judgment, etc.—"A defendant is entitled to a trial of a set-off or counterclaim, although the plaintiff dismiss his action or fail to appear." Ky. Code 1889, § 372.

"If the set-off or counterclaim exceed the sum to which the plaintiff is entitled, judgment shall be rendered for the defendant accordingly." § 387. If in an inferior court, to "be within the limits of the jurisdiction as to the amount." § 720.

"A judgment obtained in an ordinary action . . . does not prevent the recovery of any claim which was not, though it might have been, used as a defense by way of set-off or counterclaim in the action." § 17.

"No pleading, except an answer to an original petition, or a reply to a set-off, shall present a counterclaim." § 111; subs. 3.

"Proceedings upon . . . counterclaims against new parties . . . shall not delay the trial of any issue . . ." § 97.

Alabama.—"Mutual debts, liquidated or unliquidated demands not sounding in damages merely, subsisting between the parties at the commencement of the suit, may be set off one against the other by the defendant or his personal representative, whether the legal title be in the defendant or not; and such set-off, if found for the defendant, extinguishes, either in whole or in part, as the case may be, the plaintiff's demand; but the wages or hire of any head of a family in this State, not having property liable to levy and sale under such execution, cannot be defeated or abated by any set-off of a money demand acquired by the person contracting to pay such wages by assignment or transfer, unless the parties otherwise agree in writing." Ala. Code, 1886, § 2678.

"If the debt or demand so offered to be set off exceeds the amount of the plaintiff's demand, the amount of such excess being found by the jury, judgment must be rendered against the plaintiff for costs, and in favor of the defendant for such excess." § 2679.

"The provision for recoupment must not be perverted into machinery for evading the exemption acts." *Ex parte Hunt*, 62 Ala. 1.

In *Martin v. Brown*, 75 Ala. 442, 446, an action on a foreign bill of exchange, by indorser against drawer and payee, wherein the defendants sought to set off damages from defamatory cable dispatches alleging overdrafts, the court, by Brickell, C. J., said: "Certainly, the act does not admit of a construction which will authorize the defendant, in an action *ex contractu*, to interpose a

claim for damages, because of a libel published, or of a slander spoken by the plaintiff concerning him, though the libel or slander may relate to the contract, or to its subject-matter or breach. A statute which would work a change so radical in settled laws, introduced into such a multiplicity and diversity of issues, perplexing and confusing to juries, ought to be clearly and unambiguously expressed."

The provision that the demand must subsist at the commencement of the suit precludes a contingent liability as surety for the plaintiff. *Wood v. Steele*, 65 Ala. 436. So also payment by the surety after commencement of the suit. *Goldthwaite v. First Nat. Bank of Montgomery*, 67 Ala. 549.

In *Alabama*, the following may be subjects of recoupment or set-off: Witness certificates assigned after maturity. *Campbell v. Conner*, 78 Ala. 211. An attorney's fee, though unliquidated. *Briggs v. Moore*, 14 Ala. 133. Any demand in debt or assumpsit. *Weaver v. Brown*, 87 Ala. 533. Damages sustained through the plaintiff's disobedience of instructions to postpone a sale of cotton. *Gafford v. Proskauer*, 39 Ala. 264. A warehouseman's failure to deliver or account on demand. *Sledge v. Swift*, 53 Ala. 110. In an action for the purchase money, a defect in the vendor's title. *Martin v. Wharton*, 38 Ala. 637. Or payments made to extinguish incumbrances. *Holley v. Younge*, 27 Ala. 203. A statutory cause of action for cutting down trees; "not sounding in damages merely." *Rosser v. Bunn*, 66 Ala. 89. Otherwise, as to damages for trespass on the land. *Pulliam v. Russell*, 25 Ala. 492. In one's suit for wages, damages from breach of his implied contract to be competent and careful. *Krau v. Verkentoren*, 90 Ala. 113. Under a bill for account and redemption, a mortgagee's illegal seizure of personal property. *Conner v. Smith*, 88 Ala. 300. In A's action against B and C on a joint account, a debt of A to B. *Hubbleston v. Askey*, 56 Ala. 218. But B cannot recover a judgment for its excess over A's demand. *Locke v. Locke*, 57 Ala. 473.

In a guano seller's action for the price, the buyer may recoup a loss from deficient quantity. *Reynolds v. Bell*, 84 Ala. 496. So also in a landlord's action for advances, etc., may the tenant recoup for a deficiency in the number of mules furnished under

the lease. *Horton v. Miller*, 84 Ala. 537. As to injury to the crop by a landlord's cattle, see *Johnson v. Aldridge*, 93 Ala. 77. Or from his failure to repair fences, see *Rowe v. Baber*, 93 Ala. 422.

As to the "personal representative," in absence of special equities—like insolvency, non-residence, etc.—an administrator's individual debt cannot be set off against one due him in his representative capacity. *Jones v. Brevard*, 59 Ala. 499; *Farris v. Houston*, 78 Ala. 250. As to an insolvent estate, see *Palmer v. Steiner*, 68 Ala. 401.

As to "title," the set-off is available against the beneficial owner, though he be not a party to the record. *Hooper v. Armstrong*, 69 Ala. 343. The demand must be such that the defendant could maintain debt or assumpsit without bringing in the name of a stranger to the suit. *Jones v. Blair*, 57 Ala. 457. Neither at law nor in equity can a debt due from A to B be set off against A's demand upon the firm of B & C. *Watts v. Sayre*, 76 Ala. 397. But as to a case of C's consent, see *Huckaba v. Abbott*, 87 Ala. 409.

In *Alabama*, in detinue, there can be no set-off. *Whitworth v. Thomas*, 83 Ala. 309.

The statute does not apply to a suit by the State. *White v. Governor*, 18 Ala. 767.

A judgment is not conclusive against a set-off which the defendant omitted to plead. *Roach v. Privett*, 90 Ala. 391.

As to the equitable set-off deducible from the *English* law and modified, see *Tuscumbia, etc., R. Co. v. Rhodes*, 8 Ala. 206, 220.

Judgments in Alabama.—"Judgments may be set off against each other." Ala. Code 1886, § 2680. An attorney's lien is an assignment of the judgment to that extent. *Ex parte Lehman*, 59 Ala. 631. As to a judgment against a partner, see *Watts v. Sayre*, 76 Ala. 397.

"On a plea of recoupment, if the claim or demand of the defendant exceeds that of the plaintiff, judgment must be rendered for the defendant;" if it exceeds that, "and the plaintiff be the party liable to its satisfaction, judgment must be rendered against him in favor of the defendant for such excess and all costs." § 2683.

Statute of Limitations in Alabama.—"When the defendant pleads a set-off

to the plaintiff's demand, to which the plaintiff replies the Statute of Limitations, the defendant is nevertheless entitled to his set-off, where it was a legal subsisting claim at the time the right of action accrued to the plaintiff on the claim in suit." § 2682.

Such plea relates not to the time of its filing, but to that of the commencement of the action. *Riley v. Stallworth*, 56 Ala. 481. Upon a replication to the plea of set-off, it was held that the term must be computed not to the commencement of the action, but to the time the plaintiff's right accrued. *Washington v. Timberlake*, 74 Ala. 259; *Jeffries v. Castleman*, 75 Ala. 262. As to a plea setting off a penalty under a statute limiting prosecution, see *Rosser v. Bunn*, 66 Ala. 89.

Notes and Bonds in Alabama.—"A co-maker or surety sued alone may, with the consent of his co-maker or principal, avail himself by way of set-off of a debt or liquidated demand due from the plaintiff at the commencement of the suit to such co-maker or principal." § 2681. But not without such consent. *Union & Am. Pub. Co.*, 71 Ala. 60.

"Paper governed by the commercial law, negotiated before maturity, is not subject to set-off or recoupment." § 2684.

In an action by assignee against maker on a note not payable at bank, nor due at the time of the assignment and notice, another note then due from the assignor may be set off. *Russell v. Redding*, 50 Ala. 448. A demand on an intermediate holder cannot be set off by the maker, without proof of an agreement founded on a new consideration. *Brown v. Scott*, 87 Ala. 453.

Where A executed a note to B, who indorsed it to C, it was held that in C's action thereon against A, a note made by B and D payable to E, was not available to A as a set-off, on proof that it was in A's possession at the time the note sued on was transferred to C. *Bostick v. Scruggs*, 50 Ala. 10.

Where the payee or indorsee has brought suit at law on the note, the surety cannot go into equity to enjoin suit and obtain benefit of a set-off due at commencement thereof, and available therein with no difficulty; and this, though the payee be insolvent. *Bank of Mobile v. Poelnitz*, 61 Ala. 147.

As to when a maker cannot set off a demand against an intermediate indorser, see *Kennedy v. Manship*, 1 Ala.

A, owing a bank a debt whereof B was surety, transferred to the bank as collateral a note against C. B paid the debt, and by agreement with A, received the C note from the bank. In B's action thereon against C, it was held that C could not set off a demand against A acquired after notice of the transfer to the bank. *Lewis v. Faber*, 65 Ala. 460.

Arkansas.—"The counterclaim must be a cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action." Ark. Dig. Stat. 1884, § 5034.

"A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of a court." § 5036.

In an action for damages for an assault and battery, the injury which provoked the assault cannot be pleaded as a counterclaim. So held in an action by a keeper against the lessee of a penitentiary, provoked at escapes. *Ward v. Blackwood*, 48 Ark. 396. In an action on a note, the plaintiff's wrongful suing out of an attachment cannot be pleaded. *Bloom v. Lehman*, 27 Ark. 489.

In A's action for damages to A's house from an eaves-drip from B's, B cannot counterclaim damages from a water spout from A's wall, flooding B's cellar; this is not "connected with the subject of the action." *Chandler v. Lazarus*, 55 Ark. 312.

As to the right of a consignee of damaged goods to recoup damages against freight charges, see *St. Louis, etc., R. Co. v. Johnson*, 53 Ark. 282. As to a case of damages by a prior carrier, see *St. Louis, etc. R. Co. v. Lear*, 54 Ark. 399.

If A promises to furnish goods to B, and B executes a mortgage to secure the price, but A, after delivering a portion, refuses to furnish the residue, B, in A's action for the price of the goods delivered, may recoup for loss directly traceable to A's breach of the contract, and unavoidable by any reasonable effort of B. *Levy v. Sale*, 52 Ark. 246.

Set-off is no defense against replevin by a mortgagee. *Hudson v. Snipes*, 40 Ark. 75.

For an application (to a sale of timber at a fixed price per thousand feet)

of the rule not allowing unliquidated damages in set-off, even when arising from a breach of contract, see *Stewart v. Scott*, 54 Ark. 187.

In a landlord's action for rent, the tenant may set off the value of improvements made under the landlord's promise, express or implied, to allow deduction therefor. *Gocio v. Day*, 51 Ark. 46.

In an action to avoid a sale for non-payment of taxes, taxes paid pending the same cannot be set off. *McVeigh v. Lainer*, 50 Ark. 384. A claim against a levee district cannot be set off against a levee tax. *Fitzhugh v. Cotton Belt Levee Dist.*, 54 Ark. 224. In the settlement of a revenue collector's account, he cannot set off a claim for county scrip alleged to be burned or lost. *Craig v. Chicot Co.*, 40 Ark. 233. Compare *Pride v. State*, 52 Ark. 502.

A debt due from the plaintiff to one of several defendants, may be set off. *Leach v. Lambeth*, 14 Ark. 668. But not a debt from one of several defendants to the defendant. *Collier v. Dyer*, 27 Ark. 478.

As to pleading and practice upon recoupment in Arkansas, see *Heer Dry Goods Co. v. Shaffer*, 51 Ark. 368.

Judgments in Arkansas.—"Judgments for the recovery of money may be set off against each other, having due regard to the rights, legal and equitable rights, of all persons interested in both judgments," § 5173. "During the pendency of an action, the judgment in which, when recovered, could be used as a set-off against a judgment in favor of the defendants, or either of them, the court, to prevent loss by insolvency, non-residence or otherwise, may enjoin the collection of the judgment in favor of such defendants." § 5174.

A recovered a judgment against B for \$380; and in the same court C recovered a judgment against A for \$548. This judgment B purchased after A's recovery, and moved to set it off against A's. Thereupon A filed his schedule claiming the judgment against B among A's exemptions as head of a family, and showing the total not to exceed \$500. Held, that the judgment could not be set off. *Atkinson v. Pittman*, 47 Ark. 464.

A judgment in the probate court may be set off, though the assets are insufficient to pay all the assets in another statutory class. *Higgs v. Warner*, 14 Ark. 192.

Assignees, Executors, etc., in Arkansas.—"Judgments, bills, bonds, notes or other writings assigned to the defendant, after suit has been commenced against him and the writ served, shall not be . . . set off." § 5038. In a suit by an executor, etc., a debt due from the decedent to the defendant may be set off. § 5037.

But a debt contracted by an intestate cannot be set off against one contracted by his administrator. *Bizzell v. Stone*, 12 Ark. 378, citing *Dale v. Cooke*, 4 Johns. Ch. (N. Y.) 11; *Fry v. Evans*, 8 Wend. (N. Y.) 530. The administrator cannot contract for such set-off. *Bishop v. Dillard*, 49 Ark. 285.

Notes and Bills in Arkansas.—The Arkansas statute of 1873 declares bills and notes to be governed by the law merchant, as to the defendant's right of set-off against the original assignor before assignment, or the assignee thereafter. Ark. Dig. Stat. 1884, § 476.

If a note executed by A to B, be by B assigned to C, B cannot, in an action by A against B, set off the note, unless B has, by payment or otherwise, recovered it from C. *Jenkins v. Neal*, 52 Ark. 418.

As to a case of the assignee's notice of illegality of consideration—*e. g.*, purchase of arms or horses in aid of rebellion—see *Tatum v. Kelly*, 25 Ark. 209; *Ruddell v. Landers*, 25 Ark. 238. As to an assignee after maturity taking subject to the maker's defenses, see *Sorrells v. McHenry*, 38 Ark. 127. As to the effect of a material alteration without the maker's consent, see *Overton v. Matthews*, 35 Ark. 146. Rights of an assignee of a note under an original decree were held not to be prejudiced by a decree on review. *Sayre v. Thompson*, 28 Ark. 336.

Maryland.—"In any suit brought on any judgment or bond or other writing sealed by the party, if the defendant shall have any demand or claim against the plaintiff, upon judgment, bond or other instrument under seal, or upon bill of exchange, check, order for payment of money, promissory note, agreement, assumpsit or account proved, he shall be at liberty to file such demand or claim in bar, or plead the same in discount of the plaintiff's claim and judgment for the excess of the one claim over the other, as each is proved, with costs of suit shall be given for the plaintiff or the defendant, according as such excess is found

in favor of the one or the other of these parties, if such excess be sufficient to support a judgment in the court where the cause is tried according to the established jurisdiction, otherwise the finding of such excess to be due shall be sufficient *prima facie* evidence of the fact of indebtedness for such excess, as upon an award of arbitrators in a suit. Md. Pub. Gen. L. 1888, p. 1094, § 12.

Upon A's breach of a contract to saw timber of B, B may, against A's claim of interest, recoup damages for depreciation of the timber market. *Rees v. Logsdon*, 68 Md. 93.

In an action on a note given for the purchase money of wood on a tract of woodland, damages from the vendor's want of title to a part of the tract may be recouped. *South Baltimore Co. v. Muhlbach*, 69 Md. 395.

In trover for conversion of a mowing machine, the defendant may recoup for inadequacy of the delivered machine to fulfill the contract conditions. *Lee v. Rutledge*, 51 Md. 311.

A and his wife executed a mortgage of her separate estate to B, who assigned it to C. Held that the wife being considered a mere surety, A could set off against the mortgage debt, a debt due him from C's estate. *Spencer v. Almony*, 56 Md. 551.

On bill by A to enforce a contract by B and C to pay an annuity, a debt owed by A to B alone cannot be set off. *Tyrrell v. Tyrrell*, 54 Md. 167.

A bought of B a sloop which B, after receiving part payment, sold to C, to whom A agreed to surrender possession on B's promise to settle therefor. In A's action on the account, it was held that B could not recoup for "loss on the sale of the sloop," or "for the use of the said sloop," these being unliquidated damages. *Hearn v. Cullin*, 54 Md. 533.

Virginia.—"In a suit for any debt, the defendant may at the trial prove and have allowed against such debt any payment or set-off which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise. Although the claim of the plaintiff be jointly against several persons, and the set-off is of a debt not to all but only to a part of them, this section shall extend to such set-off, if it appear that the persons against whom such claim is, stand in the relation of principal and and surety, and the person entitled to

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the set-off is the principal." Va. Code, 1887, § 3298.

"The assignee or beneficial owner of any bond, note, writing or other chose in action, not negotiable, may maintain thereon in his own name any action which the original obligee, payee or contracting party might have brought, but shall allow all just discounts, not only against himself, but against such obligee," etc., "before the defendant had notice of the assignment, . . . and shall also allow all such discounts against any intermediate assignor or transferrer, the right to which was acquired on the faith of the assignment or transfer to him and before the defendant had notice," etc. § 2860.

The burden of proof is on a subsequent assignee asserting that he took for value without notice of a previous assignment alleged by him to be fraudulent. *Daily v. Warren*, 80 Va. 512.

Although a debtor may be estopped by his promise, made after notice of the assignment, to pay the debt, his mere silence will not operate as a recognition thereof. *Stebbins v. Bruce*, 80 Va. 389.

The consideration for assignment is, *prima facie*, the value of the thing assigned, and this measures the recovery on recourse. *Barley v. Layman*, 79 Va. 518.

A private agreement, unknown to the assignee, cannot be set up as defense to payment by one who lends to another his credit in the form of a note. *Etheridge v. Parker*, 76 Va. 247. As to the case of the presumption that another's indorsement in blank is a guaranty, see *Walsh v. Ebersole*, 76 Va. 247. As to the case of an indorsement of an overdue note, see *Broun v. Hull*, 33 Gratt. (Va.) 23. As to the effect of long delay of a suit, see *Wilson v. Barclay*, 22 Gratt. (Va.) 534.

A as principal, and B as surety, executed their bond to C. An account due from C to the firm of A & D was by C assigned to A. C became bankrupt, and A, after proving the account before the register, also became bankrupt. In an action by C's assignee in bankruptcy against B on the bond, it was held that the account was a valid set-off. *Edmunds v. Harper*, 31 Gratt. (Va.) 637.

West Virginia.—To the foregoing section 3298, of the *Virginia Code*, *West Virginia* adds: "And when the defendant is allowed to file and prove an account of set-off to the plaintiff's demand, the plaintiff shall be allowed to

file and prove an account of counter set-off, and make such other defense as he might have made, had an original action been brought upon such set-off, and in the issue, the jury, judge or justice shall ascertain the true state of indebtedness between the parties, and judgment be rendered accordingly." W. Va. Code, 1891, p. 812, § 4.

In a vendor's action for the purchase money under sale with warranty of title, the vendee may recoup payments made to clear off trust liens executed by the vendor upon the land. *Hoke v. Jones*, 33 W. Va. 501.

An agent, in the principal's action on the indemnifying penal bond, may recoup for services rendered. *Baltimore & O. R. Co. v. Jameson*, 13 W. Va. 813. Otherwise in an action against the security alone. *Baltimore & O. R. Co. v. Bitner*, 15 W. Va. 455.

In A's action against B for services in procuring collection business, B cannot recoup for A's causing the owner of a claim to take it out of B's hands, after B had spent money in its prosecution. *Logie v. Black*, 24 W. Va. 1.

In an action on a contract for removing paving stones, preparing for pipe-laying, and replacing them, the defendant cannot recoup damages from defective replacement, in excess of the plaintiff's claim. *Natural Gas Co. v. Healy*, 33 W. Va. 102.

In an action on the special bond of the sheriff as collector of school taxes, a balance due him from the building fund cannot be set off. *Board, etc. v. Cain*, 28 W. Va. 758.

The court will not set off one judgment against another to the injury of intervening interests of third parties. *Nuzum v. Morris*, 25 W. Va. 559; *Payne v. Webb*, 29 W. Va. 627. Compare *Frazier v. Hendren*, 80 Va. 265.

A several set-off cannot be allowed to a joint demand. *Choen v. Guthrie*, 15 W. Va. 100.

Where A dies insolvent before expiration of the term of lease of his farm to B, a debt due from A to B at the time of A's death cannot be set off by B against the administrator's claim for rents accruing after A's death. *Washington v. Castleman*, 31 W. Va. 832.

Although one trespass cannot be set off in bar of another, a defendant in action by an adjacent owner for diversion of surface water, may, in mitigation, show that the damages

5. How Right to Recoup Must Arise—*a*. IN GENERAL.—Where the plaintiff has failed to perform some of the stipulations of the contract sued on, the defendant may recoup therefor.¹ Recoupment being allowed in order to avoid circuity of action, the

were in part caused by plaintiff's wrong doings. *Knight v. Brown*, 25 W. Va. 808; *Hargreaves v. Kimberly*, 26 W. Va. 787.

1. *Van Buren v. Digges*, 11 How. (U. S.) 461; *Hunter v. Waldron*, 7 Ala. 753; *Reynolds v. Bell*, 84 Ala. 496; *Hatchett v. Gibson*, 13 Ala. 587; *Berry v. Diamond*, 19 Ark. 262; *Brunson v. Martin*, 17 Ark. 270; *Bixby v. Parsons*, 49 Conn. 483; 44 Am. Rep. 246; *Byerlee v. Mendel*, 39 Iowa 382; *Bee Printing Co. v. Hichborn*, 4 Allen (Mass.) 63; *Britton v. Turner*, 6 N. H. 481; 26 Am. Dec. 713; *Elliot v. Heath*, 14 N. H. 131; *Grant v. Button*, 14 Johns. (N. Y.) 377; *Whitbeck v. Skinner*, 7 Hill (N. Y.) 53; *Ives v. Van Epps*, 22 Wend. (N. Y.) 155; *Crane v. Hardman*, 4 E. D. Smith (N. Y.) 339; *Allaire Works v. Guion*, 10 Barb. (N. Y.) 55; *Shallies v. Wilcox*, 2 Hun (N. Y.) 419; *Per Lee v. Beebe*, 13 Hun (N. Y.) 89; *Elwell v. Skiddy*, 77 N. Y. 282; *Snook v. Fries*, 19 Barb. (N. Y.) 313; *Epperly v. Bailey*, 3 Ind. 72; *Queen v. Doolan*, 55 Ill. 526; *Babcock v. Trice*, 18 Ill. 420; 68 Am. Dec. 560; *Peck v. Bligh*, 37 Ill. 317; *Haskell v. Brown*, 65 Ill. 29; *Pepper v. Rowley*, 73 Ill. 262; *Belden v. Perkins*, 78 Ill. 449; *Cooke v. Treble*, 80 Ill. 381; *Higgins v. Lee*, 16 Ill. 495; *Prairie Farmer Co. v. Taylor*, 69 Ill. 440; 18 Am. Rep. 621; *Sanger v. Fincher*, 27 Ill. 346; *Wilder v. Stanley*, 49 Vt. 105; *Butler v. Titus*, 13 Wis. 429; *Ketchum v. Wells*, 19 Wis. 25; *Rockwell v. Daniels*, 4 Wis. 432; *Fisk v. Tank*, 12 Wis. 276; 78 Am. Dec. 737; *Porter v. Woods*, 3 Humph. (Tenn.) 56; 39 Am. Dec. 153; *Fowler v. Payne*, 49 Miss. 32; *Allen v. McKibbin*, 5 Mich. 449; *Jackson v. Armstrong*, 50 Mich. 65; *Wilson v. Wagar*, 26 Mich. 452; *Chapman v. Dease*, 34 Mich. 375; *Morehouse v. Baker*, 48 Mich. 335; *Sinker v. Diggins*, 76 Mich. 557; *Cota v. Mishow*, 62 Me. 124; *Wagner v. Dette*, 2 Mo. App. 254; *Haysler v. Owen*, 61 Mo. 270; *Abbot v. Gatch*, 13 Md. 314; 71 Am. Dec. 635; *Upton v. Julian*, 7 Ohio St. 95; *Noble v. James*, 2 Grant's Cas. (Pa.) 278; *Nickle v. Baldwin*, 4 W. & S. (Pa.) 290; *Macky v. Dillinger*, 73 Pa.

St. 85; *Johnson v. Hoosier Drill Co.*, 99 Pa. St. 216. See *Hopping v. Quin*, 12 Wend. (N. Y.) 517.

In *Peck v. Brewer*, 48 Ill. 54, the court by Breese, C. J., said: "It is the doctrine of this and other courts, that recoupment will be allowed whenever an action for damages can be sustained, and thus avoid circuity of action, and courts will favor recoupment rather than drive the party to a separate action."

Where a party received an engine for repairs and retained a portion of it, and before an action was brought against him had made an assignment in bankruptcy under the general bankruptcy law and obtained his discharge, it was held that either he or his assignee could recoup his claim for work done on the repairs. *Stow v. Yarwood*, 20 Ill. 497.

The defendant in trover for a note inclosed for collection, may recoup his services and expenses in collecting. *Turner v. Retter*, 58 Ill. 264.

In an action by a tenant against his landlord, for the conversion of a crop, the defendant's lien on the crop for rent may be made the subject of recoupment in his favor. *Jones v. Horn*, 51 Ark. 19.

In one's action for the price of sewer-pipe that had been stipulated to be delivered by water, but was not finished until navigation had closed, and was delivered by rail and accepted, it was held that the defendants could not set off the damages suffered by reason of the pipe not being delivered by water. *Malone v. Wood* (Pa. 1890.), 18 Atl. Rep. 984.

Where there is a part performance, and, by the terms of the contract, payment may be demanded for the same, an action lies. In such case, however, the other party may give evidence of damages sustained in consequence of the non-performance of the residue of the contract, in diminution or even extinguishment of the claim made against him. But he cannot, in an action against him, have a balance certified in his favor for money paid on account of the services done, nor for damages sustained by reason of the non-performance of the contract. His remedy is

by action against the other party to recover damages for the violation of the contract. *Sickels v. Pattison*, 14 Wend. (N. Y.) 257; 28 Am. Dec. 527.

Where an action was brought against a tenant to recover damages for a breach of covenants in a lease, he may introduce evidence under the general issue, by way of recoupment, tending to show that the plaintiff had represented the roof to be in good condition, but that it was leaky and the defendant's goods were injured in consequence. *Stubblefield v. Soule*, 21 Ill. App. 154.

A party, who has a defense by way of recoupment, will not be permitted to seek affirmative relief by making another person, in interest, a party defendant, by way of subrogation. So held in an action for the purchase price of a printing office, where it was sought to have a claimant of a fifth interest brought in, and his claim adjudicated. *Lyman v. Corwin*, 27 Ark. 580.

The right of a defendant to avail himself of a claim for damages by way of recoupment is not confined to cases where fraud is imputable to the plaintiff; but may exist, though the damages result from a mere breach of contract. *Batterman v. Pierce*, 3 Hill (N. Y.) 171.

Where a horse, hired to perform a certain journey, and back, becomes, without any fault of the hirer, so lamed as to be unable to travel, the hirer's consequent expenses of procuring other means of returning home, may be recouped against the bailor's demand for the hire; and if they exceed the value of the horse's services the bailor cannot recover in an action for such services. *Harrington v. Snyder*, 3 Barb. (N. Y.) 380.

The defendant, in an action on a note, pleaded that the consideration for the note was certain lots and the improvements thereon, and that the payee would add certain other improvements, which he failed to do; that the improvements to be added were worth \$100, and that the consideration of the note had wholly failed for so much. The plea was held good on demurrer (following *Wheat v. Dotson*, 12 Ark. 699). *Smith v. Capers*, 13 Ark. 9.

In an action for services at brick-making contracted to be performed carefully and skillfully, damages may be recouped for failure to make and burn the brick in a workmanlike manner. *Robinson v. Mace*, 16 Ark. 97.

Where, through one's failure to erect

a bridge in the manner contracted for, it was carried away by a flood, it was held that he could not recover on the special contract because he had not fulfilled it, nor on a *quantum meruit*, because the defendant town had received no net benefit from his labors. *Taft v. Montague*, 14 Mass. 282; 7 Am. Dec. 215.

Notice to Quit Service.—An employer when proceeded against by his servant for the recovery of his wages, may recoup such damage as he has sustained by the servant's failure before leaving the employer's service to give notice of his intention to quit. *Hunt v. Otis Co.*, 4 Met. (Mass.) 464; *Satchwell v. Williams*, 40 Conn. 371.

Bailment.—In an action by a bailee for hire, the bailor may recoup for loss from inadequate performance of the bailee's duty. *Phelps v. Paris*, 39 Vt. 511. Compare *Crowninshield v. Robinson*, 1 Mason (U. S.) 93.

Payment by Installments.—Where personal property was purchased, to be paid for by installments, and all the installments except the last one to fall due were paid, it was held in an action to recover the last installment that the damages for the breach of warranty of the personal property might be set up by way of recoupment against it. *Hutt v. Bruckman*, 55 Ill. 441. See also *Baker v. Railsback*, 4 Ind. 533; *Stilwell v. Chappell*, 30 Ind. 72; *Pepper v. Rowley*, 73 Ill. 262; *Maguire v. Howard*, 40 Pa. St. 391.

Landlord and Tenant.—As the object of inquiry on the trial of a distress for rent is to ascertain the amount of rent due, any acts of the landlord impairing the value of the use of the demised premises may be shown, and the damages caused thereby may be recouped. *Lynch v. Baldwin*, 69 Ill. 210; *Bloodworth v. Stevens*, 51 Miss. 475.

Damage for failure of the landlord to repair may be recouped by the tenant in an action of covenant by the landlord against him for the recovery of the rent. *Lunn v. Gage*, 37 Ill. 19; 87 Am. Dec. 233.

Statute of Limitations in Recoupment.—It has been held that the Statute of Limitations does not run against any recoupment claim. *Beecher v. Baldwin*, 55 Conn. 419; and *Estell v. Myers*, 54 Miss. 174. But see *Jeffries v. Castleman*, 75 Ala. 262; also *infra*, this title, *Counterclaim*. In *Louisiana* and *Texas* the statute runs against a claim to reconvention. *Harris v. New Or-*

damages must be such as the defendant could recover in a cross-action.¹ The plaintiff's conduct must be the proximate cause of the injury for which the defendant seeks to recoup.² Nor can

leans, etc., R. Co., 16 La. Ann. 140; Bennett v. Hollis, 9 Tex. 437.

Evidence.—Where the defendants in an action upon a contract for labor and materials, claim to recoup damages resulting from the plaintiff's having left the work in an unfinished state, it is competent for the defendants to show what efforts they made to finish the work after it had been left by the plaintiff. *M. E. Church v. Ladd*, 22 Mich. 280.

1. *Pettee v. Tennessee Mfg. Co.*, 1 Sneed (Tenn.) 381; *Overton v. Phelan*, 2 Head. (Tenn.) 445; *Peden v. Moore*, 1 Stew. & P. (Ala.) 71; 21 Am. Dec. 649; *McCarthy v. Henderson*, 138 Mass. 310; *Van De Sande v. Hall*, 13 How. Pr. (N. Y.) 458; *Platt v. Brand*, 26 Mich. 173; *Kinne v. New Haven*, 32 Conn. 210; *Clark v. Wildridge*, 5 Ind. 176. Under the *Texas* provision for reconvention, compare *Rose v. San Antonio, etc., R. Co.*, 31 Tex. 49; *Bickham v. Hunter*, 37 Tex. 551.

Where a suit for damages for a breach of warranty was brought against a vendor of land, it was held that he could not recoup the rents and profits received by the vendee, unless he could show that he had actually paid such rents and profits to the holder of the paramount title. *Burton v. Reeds*, 20 Ind. 87; *Greene v. Allen*, 32 Ala. 215; see *Locke v. Alexander*, 1 Hawks (N. Car.) 412.

2. **Proximate Cause.**—*Sedgwick on Damages*, § 1041; *Smith v. Osborn*, 143 Mass. 185; *Turner v. Gibbs*, 50 Mo. 556; *Green v. Bell*, 3 Mo. App. 291.

Damages which do not legally result from the breach of the contract cannot be recovered unless they are specially claimed in the pleadings. Thus damages sustained by a vendee of goods by reason of his inability to comply with a contract made by him with a third person, do not legally result from a breach of a contract of his vendor to deliver the goods to him, and in an action by his vendor cannot be recouped unless specially set forth in the answer. *Cole v. Swanston*, 1 Cal. 51; 52 Am. Dec. 288.

Plaintiff.—The recoupment must be against the party originally contracting. *Fessenden v. Forest Paper Co.*,

63 Me. 175. See also *Williams v. Schmidt*, 54 Ill. 205.

Where a misrepresentation was made by the plaintiff's assignor and not by the plaintiff, it was held that the defendant could not recoup against the plaintiff for the misrepresentation. *Van De Sande v. Hall*, 13 How. Pr. (N. Y.) 458.

In an action by the owners of a vessel, of whom the master is one, to recover freight for goods actually carried, delivered, and accepted, the consignee cannot recoup in damages a loss sustained by him by reason of the failure to deliver a cargo never actually put on board, but which the master without other authority than belonged to him in that capacity, improperly receipted for in the bill of lading. *Sears v. Wingate*, 3 Allen (Mass.) 103. It seems that evidence of usage would be inadmissible in such cases. *Meyer v. Dresser*, 16 C. B. N. S. 646; 111 E. C. L. 644.

In an action by an executor for rent due under a lease, the lessee may recoup on account of damages for breach of the intestate's covenant to repair. *Green v. Bell*, 3 Mo. App. 291.

R, with others, signed a subscription paper by which he agreed to pay D and H \$100, the amount of his subscription, for the building of a steam mill at Elk Horn; and D and H agreed to build the mill and complete the same. Before the expiration of the time for completing the mill, D and H assigned the subscription to Y who delayed suing upon the subscription until after the expiration of the time for completing the mill, which was not completed within the time limited by the contract. *Held*, that in a suit brought on the subscription in the names of D and H, for the use of Y, R, the defendant, might recoup for damages on account of the non-performance of D and H. *Rockwell v. Daniels*, 4 Wis. 432.

In *Texas*, there can be reconvention only against the party originally contracting. *Blair v. Reid*, 20 Tex. 310. And a judgment upon a reconvention by the defendant against the party originally contracting, but who is not a party to the suit, is void. *McFadin v. MacGreal*, 25 Tex. 73.

In A's attachment suit against B, B cannot plead A's breach of contract

he recoup if his own failure to comply with the terms of the contract has made it impossible for the plaintiff to fulfill them.¹

with the firm of B & C. *Kirbs v. Provine*, 78 Tex. 353.

In A's action on his separate account against H, H cannot reconvene a joint demand against A, B and C, without proving insolvency of B and C. *Hamilton v. Van Hook*, 26 Tex. 302. As to the right of the receiver of an insolvent corporation to reconvene against an intervenor, see *Continental Nat. Bank of N. Y. v. Weems*, 69 Tex. 489.

In *Louisiana*, compensation does not take place between partnership and individual debts. *Key v. Box*, 14 La. Ann. 502.

Defendant.—The claim must be due the defendant, so the recoupment shall bar action by any other party. Thus in an action against a town, damages to a few inhabitants cannot be recouped. *Kinne v. New Haven*, 32 Conn. 210. Compare *Zuckermann v. Solomon*, 73 Ill. 130.

Where a bill of exchange for the consideration of negroes is drawn by the vendee upon C and son, payable to the vendor, as there is no assignment to the drawees of the bill of sale and the latter have no interest in the negroes, the drawees cannot avail themselves of the defense of failure of consideration arising from the subsequent emancipation of the slaves.

Where a bill of sale of four negroes contained a covenant of warranty that the negroes were slaves for life and sound in body and mind, the vendee and his assignee are the only persons who have a right to recoup for breach of the warranty. *Coolidge v. Burnes*, 25 Ark. 241.

A claim of A and B to recoup damages from C, by way of set-off against the promissory note of A, B and D, held by C, cannot be sustained, nor can such claim for damages be set off against an aliquot part of the sum due on the note. *King v. Wise*, 43 Cal. 628.

In an action on a promissory note by the payee against one of two joint and several obligors, the defendant pleaded a demand as a counterclaim for damages for the unskillful construction of a mill by the plaintiff for the defendant, his co-obligor, and T, for the construction of which the note in suit was given in part payment. Held, that said counterclaim being for unliquidated damages, and in part a demand

in favor of a stranger to the note and suit, it was unavailable as a defense to the action. *Hook v. White*, 36 Cal. 299.

In an action on a promissory note given by two on a contract of purchase by one of the makers only, it is competent to recoup damages growing out of the contract of purchase to the same extent as if the note had been given by the purchaser alone. *McHardy v. Wadsworth*, 8 Mich. 349.

An accommodation indorser cannot in an action on a note given upon a sale of timber, avail himself of a breach of warranty as to the quality of the timber by way of counterclaim. *Gillespie v. Torrance*, 25 N. Y. 306; 85 Am. Dec. 355.

In an action on a promissory note given by a principal and a surety on a contract of the principal, it is competent to recoup the damages of the principal growing out of the contract to the same extent as if the note had been given by the principal and he alone were sued. *Waterman v. Clark*, 76 Ill. 428; *Springer v. Dwyer*, 50 N. Y. 19.

A surety may recoup for any damages arising out of the same subject-matter to the same extent as the principal might if he were sued alone. *Meyer v. Stookey*, 3 Ill. App. 336. Compare *Springer v. Dwyer*, 50 N. Y. 19.

Reconvention.—S purchased property at the succession sale of F, and gave his note for the price. S having married F's widow, and suit having been brought on the note, he pleaded in compensation the interest of his wife in the community of F, her former husband, and herself. Held, that the plea was bad, because the quality of debtor and creditor was not united in the same person. *Stokes v. Forman*, 12 La. Ann. 671. See also *Hanrahan v. Leclercq*, 15 La. Ann. 204.

Accommodation acceptors have no right to plead by way of reconvention a debt due by the payee to the drawer of the draft. And this is true even though the payee knew the acceptors to be accommodation acceptors. *Smith v. Adams*, 14 La. Ann. 411.

See *supra*, this title, *The Requirement of Mutuality as to Claims in Set-off*.

1. *Chapman v. Dease*, 34 Mich. 375. Where to an action on a contract

b. UPON SAME TRANSACTION WITH PLAINTIFF'S DEMAND.—
A demand in recoupment must arise from the same subject-matter as the plaintiff's right of action.¹ The rule has been ex-

the defendant seeks to recoup the damages resulting from plaintiff's failure to comply with his obligations thereunder, and the evidence is conflicting as to whether such damages resulted from the default of plaintiff or of defendant or of both, the jury may take into consideration the conduct of both parties and make their verdict accordingly. *Hill v. Sibley*, 56 Ga. 531.

1. 4 Min. Inst. (2d ed.), p. 706; 1 Chitty's Pleadings (16th Am. ed.) 595; Pom. Rem., etc., § 731; 2 Parsons on Contracts, 741; *Jackson v. Tate*, 81 Ala. 253; *Ewing v. Shaw*, 83 Ala. 333; *Walker v. McCoy*, 34 Ala. 659; *Pillsbury v. McNally*, 22 Ark. 409; *Coolidge v. Burnes*, 25 Ark. 241; *Hart v. Francis*, 2 Colo. 719; *Phillips v. Halsey*, 1 Root (Conn.) 194; *Livingston v. L'Engle*, 27 Fla. 502; *Gerding v. Adams*, 65 Ga. 79; *Hamilton v. Grangers' L., etc., Ins. Co.*, 65 Ga. 750; *Stow v. Yarwood*, 14 Ill. 424; *Brigham v. Hawley*, 17 Ill. 38; *Sanger v. Fincher*, 27 Ill. 346; *DeForrest v. Oder*, 42 Ill. 500; *Turner v. Retter*, 58 Ill. 264; *Hubbard v. Rogers*, 64 Ill. 434; *Evans v. Hughey*, 76 Ill. 115; *Waterman v. Clark*, 76 Ill. 428; *Clause v. Bullock Printing Press Co.*, 20 Ill. App. 113; *Keegan v. Kinnare*, 123 Ill. 280; *Slayback v. Jones*, 9 Ind. 470; *Miles v. Elkin*, 10 Ind. 329; *Grundy v. Jackson*, 1 Litt. (Ky.) 11; *Gilchrist v. Partridge*, 73 Me. 214; *Winthrop Sav. Bank v. Jackson*, 67 Me. 570; 24 Am. Rep. 56; *Simmons v. Haas*, 56 Md. 153; *Knitted Mattress Co. v. Griggs* (Mass.), 27 N. E. Rep. 774; *Hodgkins v. Moulton*, 100 Mass. 309; *Bartlett v. Farrington*, 120 Mass. 284; *Home Sav. Bank v. Boston*, 131 Mass. 277; *Brighton Five Cents Sav. Bk. v. Sawyer*, 132 Mass. 185; *Ward v. Wilson*, 3 Mich. 1; *Molby v. Johnson*, 17 Mich. 382; *Morehouse v. Baker*, 48 Mich. 335; *Holland v. Rea*, 48 Mich. 218; *Braze v. Bryant*, 50 Mich. 136; *Rens v. Grand Rapids*, 73 Mich. 237; *Haldeman v. Berry*, 74 Mich. 424; *Bloodsworth v. Stevens*, 51 Miss. 475; *Johnson v. Hoffman*, 53 Mo. 504; *Pratt v. Menkens*, 18 Mo. 158; *Long v. Long*, 14 N. J. Eq. 462; *Batterman v. Pierce*, 3 Hill (N. Y.) 371; *Murden v. Priment*, 1 Hilt. (N. Y.) 75; *Barhyte v. Hughes*, 33 Barb.

(N. Y.) 320; *Tuttle v. Tompkins*, 2 Wend. (N. Y.) 407; *Cram v. Dresser*, 2 Sandf. (N. Y.) 120; *Seymour v. Davis*, 2 Sandf. (N. Y.) 239; *Deming v. Kemp*, 4 Sandf. (N. Y.) 147; *Henry v. Henry*, 17 Abb. Pr. (N. Y.) 411; 27 How. Pr. (N. Y.) 25; *Wright v. Smyth*, 4 W. & S. (Pa.) 527; *Beyer v. Fenstermacher*, 2 Whart. (Pa.) 95; *Gogel v. Jacoby*, 5 S. & R. (Pa.) 117; 9 Am. Dec. 339; *Kennedy v. Kennedy*, 41 Pa. St. 185; *Nashville, etc., R. Co. v. Chumley*, 6 Heisk. (Tenn.) 325; *Sampson v. Warner*, 48 Vt. 247; *Clark's Cove Guano Co. v. Appling*, 33 W. Va. 470. See also *Wright v. Quirk*, 105 Mass. 44.

In an action of covenant by a lessor, the defendant pleaded that the premises were leased for hotel purposes, upon the false representations of the plaintiff that there was sufficient drainage; that by reason of inadequate drainage, and consequent bad odor, defendant's guests left the hotel, whereby he sustained damage to the extent of \$1000, which he offered to set off. *Held*, that these damages rose out of the subject-matter of the suit, and could be recouped. *Burroughs v. Clancey*, 53 Ill. 30.

A contract touching a pledge to secure a debt is collateral, and damages for its breach cannot be recouped in a suit to recover the debt. *Fletcher v. Harmon*, 78 Me. 465; *Taggard v. Curtenius*, 15 Wend. (N. Y.) 155. See also *Willoughby v. Comstock*, 3 Hill (N. Y.) 389.

In an action for the price of printing ballots, one twenty-fourth of which were defective, the defendants were allowed to recoup for the trouble of separating these from the general mass. *Macgowan v. Whiting*, 9 Daly (N. Y.) 86.

In a suit upon one part of a contract, consisting of mutual stipulations, made at the same time and relating to the same subject-matter, the defendant may recoup for the plaintiff's breach of another part; and this, whether the different parts are contained in one instrument or in several, or though one part be in writing and the other by parol. *Batterman v. Pierce*, 3 Hill (N. Y.) 171; *Branch v. Wilson*, 12 Fla. 543; *Mell v. Mooney*, 30 Ga. 413.

A and B, on an exchange of slaves, reciprocally executed bills of sale, under seal, containing warranties of soundness. In A's action of covenant for B's breach of warranty, held that B might recoup for A's breach of warranty. *Eckles v. Carter*, 26 Ala. 563.

Claims arising upon separate and distinct covenants in an agreement under seal cannot be set off against each other. Hence, in an action on a mechanic's lien filed against a building which had been erected by the plaintiffs under an agreement also providing for a lease to them for a term of years, a claim for rent accrued subsequently to the completion of the building cannot be set off. *McQuaide v. Stewart*, 48 Pa. St. 198. Compare *Green v. Bell*, 3 Mo. App. 291.

A note was given pursuant to a contemporaneous written agreement, by which the payee bound himself to collect certain moneys and to appropriate them on the note in reduction thereof. In a suit on the note between the original parties, it was held that the maker might recoup for the payee's breach of the agreement. *Babbitt v. Moore*, 51 N. J. L. 229.

M and A contracted that A should be the sole agent in a certain town for the sale of wagons made by M. At the same time and as part of this contract, A executed his promissory note for the purchase money of certain wagons furnished by M to be sold by A as agent. In M's action against A on this note a plea by A that M had sold and furnished his wagons to others in the town, whereby A was prevented from selling at a profit any of the wagons furnished him, was held good on demurrer; the damages to be recouped were not impossible of ascertainment. *Andre v. Morrow*, 65 Miss. 315.

In a suit to recover the value of the use of a division fence under an alleged promise to pay, the defendant may recoup damages sustained by the plaintiff's stock breaking into his premises, through defects in the division fence. Damages thus sustained would bear upon the value of the use of the fence (*citing Streeter v. Streeter*, 43 Ill. 155, 161); *Scott v. Kenton*, 81 Ill. 96.

When one has been induced by fraud to give a note and before its maturity and before discovering the fraud he, at the request of an innocent indorsee for value, has given in substitution for it a new note payable to the original payee,

it has been held that he may set up the original fraud in defense to an action by the payee upon the note. *Held*, also, that the defendant will not be precluded from this defense by proof that before maturity of the original note and before discovering the fraud he accepted from the plaintiff a conveyance of property which was made on condition that he should pay all obligations given by him to the plaintiff. *Sawyer v. Wiswell*, 9 Allen (Mass.) 39.

Expenses incurred by the hirer in successfully defending an action of trover by the bailor, for the conversion of the thing hired, cannot be recouped against a note given for the hire. *Deens v. Dunklin*, 33 Ala. 47.

In a suit for work and labor done or goods sold and delivered, the defendants under the general issue may reduce the damages by showing the work unskillfully done, or the goods not so good as warranted. And it seems that a defendant cannot under the general issue to reduce damages, show a breach by the plaintiff of stipulations, independent of those on which the plaintiff claims to recover, even though they are included in the same contract on which the suit is brought. *Keyes v. Western Vt. Slate Co.*, 34 Vt. 81.

Reconvention.—The *Texas* act of 1860 declares: "If the plaintiff's cause of action be a claim for unliquidated or uncertain damages, founded on a tort or breach of covenant, the defendant shall not be permitted to set off any debt due him by the plaintiff; and if the suit be founded on a certain demand, the defendant shall not be permitted to set off unliquidated or uncertain damages founded on a tort or breach of covenant on the part of the plaintiff." *Tex. Rev. Stat.* 1889, art. 649.

"Nothing in the preceding article shall be so construed as to prohibit the defendant from pleading in set-off any counterclaim founded on a cause of action arising out of or incident to or connected with the plaintiff's cause of action." Art. 650.

In the following *Texas* cases, the damages claimed by the defendant were held not to arise from or be connected with the main subject:

The fact that the levy of the attachment on the defendant's cattle caused a delay in the moving of his family. *Pinson v. Kirsh*, 46 Tex. 26. Compare *Half v. Curtis*, 68 Tex. 641.

tended to a tort connected with a contract transaction;¹ and

In an action on notes for hire of slaves, it was held that the plaintiff's having taken away one of the slaves could not be pleaded in reconvention. *Carothers v. Thorp*, 21 Tex. 350. So also could not be pleaded the fact that the plaintiff, while acting as the defendant's overseer, wantonly killed a slave. *Duncan v. Magette*, 25 Tex. 245. But compare *Brady v. Price*, 19 Tex. 285.

In A's action on notes given by B for purchase of a steam saw mill, it was held that B could not reconvene damages for the bursting of the boiler through A's hogs having muddied the water. *Fondren v. Leake*, 1 Tex. Unrep. Cas. 151.

A claim for malicious prosecution cannot be pleaded in a suit for an assault. *Shock v. Peters*, 59 Tex. 393.

Damages for breach of a covenant by the payees of a note, not to sue within a time certain, cannot be pleaded in reconvention against assignees, although it may against the covenantor. *Blair v. Reid*, 20 Tex. 310.

In an action for rent, a claim for non-repair of fences may be pleaded. *Coleman v. Bunce*, 37 Tex. 172. So also in a suit for rent of a farm, a claim for non-repair of a cotton gin thereon. *Calhoun v. Pace*, 37 Tex. 454.

In an action for rent, the defendant may plead breach of a covenant to repair. *Coleman v. Bunce*, 37 Tex. 171.

Damages sustained by one's steamboat may be reconvened in an action against him for wharfage dues. *Sterrett v. Houston*, 14 Tex. 153.

In a suit to enjoin collection of taxes, taxes due may be reconvened. *Rosenberg v. Weekes*, 67 Tex. 578.

As to when vindictive damages may be reconvened for the wrongful suing out of an injunction, see *Brown v. Tyler*, 34 Tex. 168. Or of a sequestration writ, see *Vela v. Guerra*, 75 Tex. 595.

In a cotton factor's action for goods, it was held that the defendant could reconvene for plaintiff's instructions in selling too low. *Nichols v. Jones*, 36 Tex. 448.

In A's action on a note of B, B may plead that A wrongfully sold of B, and retained the proceeds. *Cato v. Phillips*, 28 Tex. 101.

In A's action to recover of B for cattle sold in the same contract with

land, it was held that B could reconvene for failure of title to part of the land. *Du Bois v. Rooney*, 82 Tex. 173.

In one's action for services as conductor of a freight train, it was held that the company might reconvene damages for his neglect to place lights and torpedoes when stopping the train at a water tank. *Texas & P. R. Co. v. Hurlless*, 1 Tex. App. Civ. Cas. 306, § 582.

In *Texas*, a defendant may reconvene for usurious interest paid in excess of twelve per cent. per annum. *Smith v. Stevens*, 81 Tex. 461.

A sold to B machinery, taking a note and power of sale mortgage. At the sale thereunder, A became the purchaser. A sued B to recover possession. *Held*, that B could plead in reconvention fraud in the original sale. *Scalf v. Tompkins*, 61 Tex. 476. But compare *Grabenheimer v. Blum*, 63 Tex. 369.

And further, as to reconvention in *Texas*, see *Walcott v. Hendrick*, 6 Tex. 406; *Castro v. Gentiley*, 11 Tex. 28; *Senter v. Whitaker*, 66 Tex. 624. See also *Texas* cases stated *supra*, this title, *Reconvention—Matters of Practice*.

In *Louisiana*, damages for illegally imprisoning a slave claimed in a petitory action may be pleaded in reconvention as connected therewith. *Solomon v. Cavelier*, 4 La. Ann. 136.

When the plaintiff resides out of the State, the defendant may reconvene for any cause, whether it be connected or identical with the original demand or not. *State Nat. Bank v. Evans*, 32 La. Ann. 464; *Spinney v. Hyde*, 16 La. Ann. 250; *Woolfolk v. Ship Graham's Polly*, 18 La. Ann. 693.

And further, as to reconvention in *Louisiana*, see *King v. Ballard*, 10 La. Ann. 559; *D'Armond v. Pullen*, 13 La. Ann. 137. See also *Louisiana* cases stated *supra*, this title, *Reconvention—Matters of Practice*.

1. *Dushane v. Benedict*, 120 U. S. 630; *Waterman v. Clark*, 76 Ill. 428; *Kingman v. Draper*, 14 Ill. App. 577; *Stow v. Yarwood*, 14 Ill. 424; *Brigham v. Hawley*, 17 Ill. 38; *Streeter v. Streeter*, 43 Ill. 155; *Cunnea v. Williams*, 11 Ill. App. 72; *Burroughs v. Clancy*, 53 Ill. 30; *Chandler v. Childs*, 42 Mich. 128; *Patterson v. Hulings*, 10 Pa. St. 506; *The Allaire Works v. Guion*, 10 Barb. (N. Y.) 55.

sometimes one tort has been allowed to be set up against another, when they form parts of the same transaction.¹

(c) UPON WHAT LIABILITIES—(1) *Contracts, Express or Implied*.—The defendant has been allowed to recoup for a breach of

But in such cases the amount which may be recouped is limited to the damage which the defendant sustains by the non-performance of the contract, and no account can be taken of malice. *The Allaire Works v. Guion*, 10 Barb. (N. Y.) 55. Compare *Mimnaugh v. Partin*, 67 Mich. 391.

In *Whitworth v. Thomas*, 83 Ala. 308, it was held that in detinue or the corresponding statutory action, there could be no set-off nor recoupment of damages.

In *McSloy v. Ryan*, 27 Mich. 110, it was held that recoupment was not an available defense in a case of summary proceedings to recover possession of land.

And in *Johnson v. Hoffman*, 53 Mo. 504, that recoupment could not be used in action of forcible entry and detainer. But it was allowed to be used in an action of ejectment in *Breese v. McCann*, 52 Vt. 498.

Recoupment has been allowed in an action of replevin. *Macky v. Dillinger*, 73 Pa. St. 85; *Murray v. Pennington*, 3 Gratt. (Va.) 91.

A bailee converting goods on which he has bestowed labor and acquired a lien, may, in an action of trover brought by the owner, set up his lien claim in reduction of damages. *Longstreet v. Phile*, 39 N. J. L. 63.

In *Tennessee*, in an action for rent, it was held that the tenant could not recoup damages from trespasses by the landlord's cattle, although the latter had promised to pay for such injuries if the former would not hurt the cattle. *Hulme v. Brown*, 3 Heisk. (Tenn.) 679.

Where a person distrained growing corn for rent which he claimed to be due him from the owner thereof, and the proceedings to enforce the distress resulted in favor of the owner and while these proceedings were pending the distrainer caused the corn to be harvested, it was held, in an action of trespass by the owner for so distraining and carrying the same away, that the distrainer had a right to recoup the expense of harvesting the corn. *Bates v. Courtwright*, 36 Ill. 518.

In an action against a constable for a premature execution sale of chattels, only actual net damages can be recov-

ered; the execution plaintiff may recoup the amount realized from the sale and credited to the execution defendant. *Camp v. Ganley*, 6 Ill. App. 499.

In an action upon bonds given for the purchase money of land, the defendant may recoup for the removal and conversion of fixtures, without his knowledge or consent, after the contract of sale and before a formal transfer of the land and the execution of the bonds. *Grand Lodge v. Knox*, 20 Mo. 433. See also *Gordon v. Bruner*, 49 Mo. 570.

In replevin against a carrier of goods claiming the right to retain them until freight be paid, the owner may prove damages to them in their transit in order to reduce the amount of freight actually due, or to show that nothing is due; thereby manifesting that the defendant had no right to the possession of the goods. *Bancroft v. Peters*, 4 Mich. 619.

As to reconvention in *Texas*, see *Phillips v. Patillo*, 18 Tex. 518. In *Walcott v. Hendrick*, 6 Tex. 406, it was held that damages arising from the wrongful suing out of an attachment might be pleaded in reconvention in the same suit in which the attachment issued. See also *Peiser v. Cushman*, 13 Tex. 390; *Punchard v. Taylor*, 23 Tex. 424.

In an action on a promissory note, the defendants pleaded that the plaintiff's wrongfully, and without probable cause, sued out an attachment on the same cause of action in another State, and seized and kept the goods of the defendants to the present time, dismissing the suit before they could plead thereto. *Held*, to be a good plea in reconvention. *Wiley v. Traiwick*, 14 Tex. 662.

In a suit by an overseer for his wages, the defendant may plead in reconvention, damages caused by the willful injury of defendant's slaves by the plaintiff, during his employment as overseer. *Brady v. Price*, 19 Tex. 285.

1. *Spray v. Ammerman*, 66 Ill. 309; *Gordon v. Bruner*, 49 Mo. 570; *Carey v. Guillow*, 105 Mass. 18; 7 Am. Rep. 494.

As to reconvention in *Louisiana*, see

warranty; ¹ for fraud; ² for failure of consideration; ³ for non-de-

King v. Ballard, 10 La. Ann. 557; Harrison v. Jurgielewicz, 28 La. Ann. 238.

1. Dushane v. Benedict, 120 U. S. 630; Miller v. Smith, 1 Mason (U. S.) 437; Reab v. McAlister, 8 Wend. (N. Y.) 109; Cook v. Moseley, 13 Wend. (N. Y.) 277; Hoe v. Sanborn, 3 Abb. Pr. N. S. (N. Y.) 189; Dounce v. Dow, 57 N. Y. 16; 44 N. Y. Super. Ct. 411; Walling v. Schwartzkopf, 44 N. Y. Super. Ct. 576; Stewart v. Bock, 3 Abb. Pr. (N. Y.) 118; Nelson v. Johnson, 25 Mo. 430; Crabtree v. Kile, 21 Ill. 180; Doane v. Dunham, 65 Ill. 512; Owens v. Sturges, 67 Ill. 366; Murray v. Carlin, 67 Ill. 286; Tully v. Excelsior Iron Works, 115 Ill. 544; Mears v. Nichols, 41 Ill. 207; 89 Am. Dec. 381; Hutt v. Bruckman, 55 Ill. 441; Gibbs v. Kaszezyki, 18 Ill. App. 623; Bretz v. Fawcett, 29 Ill. App. 319; Love v. Oldham, 22 Ind. 51; Harper v. Dotson, 43 Iowa 232; Flint v. Lyon, 4 Cal. 17; Ruiz v. Norton, 4 Cal. 355; 60 Am. Dec. 618; Earl v. Bull, 15 Cal. 421; Polhemus v. Heiman, 45 Cal. 573; Eccles v. Carter, 26 Ala. 563; Egan Co. v. Johnson, 82 Ala. 233; Williams v. Miller, 21 Ark. 469; Plant v. Condit, 22 Ark. 454; Coolidge v. Burnes, 25 Ark. 241; Weed v. Dyer, 53 Ark. 155; Culver v. Blake, 6 B. Mon. (Ky.) 528; Piper v. Menifee, 12 B. Mon. (Ky.) 465; 54 Am. Dec. 547; Perley v. Balch, 23 Pick. (Mass.) 283; 34 Am. Dec. 56; Goodwin v. Morse, 9 Met. (Mass.) 278; Wescott v. Nims, 4 Cush. (Mass.) 215; Timmons v. Dunn, 4 Ohio St. 680; Mulvey v. King, 39 Ohio St. 491; Dayton v. Hooglund, 39 Ohio St. 671; Keyes v. Western Vt. Slate Co., 34 Vt. 81; Walker v. Hoisington, 43 Vt. 608; Hitchcock v. Hunt, 28 Conn. 343; Stevens v. Johnson, 28 Minn. 172; Fisk v. Tank, 12 Wis. 276; 78 Am. Dec. 737; Ketchum v. Wells, 19 Wis. 25; Bonnell v. Jacobs, 36 Wis. 59; Morehouse v. Comstock, 42 Wis. 626; Beall v. Pearre, 12 Md. 550; McHardy v. Wadsworth, 8 Mich. 349; Sinker v. Diggins, 76 Mich. 557; Smith v. Mayer, 3 Colo. 207; Dean v. Herrold, 37 Pa. St. 150; Seigworth v. Leffel, 76 Pa. St. 476; Blessing v. Miller, 102 Pa. St. 45; Parson v. Sexton, 4 C. B. 899; 56 E. C. L. 897.

Burden of Proof.—When an article is sold with warranty, or a representation amounting to a warranty as to its quality, and in an action by the seller to recover the price the buyer relies upon a breach of warranty or the

falsity of the representations to reduce the amount of his liability, the burden of proof is on him to show that the quality of the article does not correspond with the warranty or representation. Dorr v. Fisher, 1 Cush. (Mass.) 271.

If certain animals in a drove are sold under a warranty that all the animals in the drove are free from contagious and infectious diseases, the purchaser may recoup in damages, in an action for the price, the whole loss occasioned to him by the presence of the disease in the drove at that time, although some of the animals purchased by him did not take the infection till afterwards. Bradley v. Rea, 14 Allen (Mass.) 20.

2. Johnson v. Miln, 14 Wend. (N. Y.) 195; Burton v. Stewart, 3 Wend. (N. Y.) 236; 20 Am. Dec. 692; Allaire v. Whitney, 1 Hill (N. Y.) 484; Whitney v. Allaire, 4 Den. (N. Y.) 554; Sill v. Rood, 15 Johns. (N. Y.) 230; Beecker v. Vrooman, 13 Johns. (N. Y.) 302; Van Epps v. Harrison, 5 Hill (N. Y.) 63; 40 Am. Dec. 314; Harrington v. Stratton, 22 Pick. (Mass.) 510; Perley v. Balch, 23 Pick. (Mass.) 283; 34 Am. Dec. 56; Flint v. Lyon, 4 Cal. 17; Dushane v. Benedict, 120 U. S. 630; White v. Sutherland, 64 Ill. 181; Burroughs v. Clancy, 53 Ill. 30; Scheible v. Slagle, 89 Ind. 323; Love v. Oldham, 22 Ind. 51; Graham v. Wilson, 6 Kan. 489; Chandler v. Childs, 42 Mich. 128; Hammatt v. Emerson, 27 Me. 308; Hall v. Clark, 21 Mo. 415; Harman v. Sanderson, 6 Smed. & M. (Miss.) 41; 45 Am. Dec. 272; Simmons v. Cutreer, 12 Smed. & M. (Miss.) 584; Rotan v. Nichols, 22 Ark. 244; Hogg v. Cardwell, 4 Sneed (Tenn.) 151.

The defendant in a suit to enforce a vendor's lien is entitled to avail himself of a recoupment for fraudulent representations made by the vendor as to the land at the time of the sale. Haynes v. Harper, 25 Ark. 541.

Where a landlord represented to his tenant that the water in a well upon the premises was fit for use, and the tenant acted upon that representation to the detriment of the health of his family, it was held, in an action against the tenant for the rent, he could recoup the expenses of the sickness in his family, including doctor's bills. Maywood v. Logan, 78 Mich. 137.

3. Withers v. Greene, 9 How. (U. S.) 213; Spalding v. Vandercook, 2 Wend.

livery of part of goods contracted for when the residue has been delivered;¹ for neglect of duty by an attorney;² or other servant;³ for failure by a landlord to repair;⁴ for defective performance of construction contracts,⁵ or for failure to perform such contracts

(N. Y.) 431; *People v. Niagara*, 12 Wend. (N. Y.) 246; *Stewart v. Bock*, 1 Hilt. (N. Y.) 122; *Desha v. Robinson*, 17 Ark. 228; *Keller v. Vowell*, 17 Ark. 445; *Rotan v. Nichols*, 22 Ark. 244; *Davis v. Wait*, 12 Oregon 425; *Perley v. Balch*, 23 Pick. (Mass.) 283; 34 Am. Dec. 56; *Stacy v. Kemp*, 97 Mass. 166; *Piper v. Meniffee*, 12 B. Mon. (Ky.) 465; 54 Am. Dec. 547; *Miller v. Gaither*, 3 Bush (Ky.) 152; *Flint v. Lyon*, 4 Cal. 17; *Dean v. Herrold*, 37 Pa. St. 150; *Blessing v. Miller*, 102 Pa. St. 45; *Holzworth v. Koch*, 26 Ohio St. 33; *Herbert v. Ford*, 29 Me. 546.

In an action upon a promissory note given in payment for lands conveyed, with covenants against incumbrances, the defendant can recoup what he has been compelled to pay to free the land from incumbrances. *Davis v. Bean*, 114 Mass. 358.

1. *Harralson v. Stein*, 50 Ala. 347; *Finney v. Cadwallader*, 55 Ga. 75; *Upton v. Julian*, 7 Ohio St. 95; *Fessler v. Love*, 43 Pa. St. 313; *McHose v. Fulmer*, 73 Pa. St. 365; *Tipton v. Feitner*, 20 N. Y. 423; *Platt v. Brand*, 26 Mich. 173; *Rogers v. Humphrey*, 39 Me. 382; *Cole v. Swanston*, 1 Cal. 51; 52 Am. Dec. 288; *Richards v. Shaw*, 67 Ill. 222; *Bowker v. Hoyt*, 18 Pick. (Mass.) 555; *Smith v. Wall*, 12 Colo. 363.

2. *Gleason v. Clark*, 9 Cow. (N. Y.) 57; *Hopping v. Quin*, 12 Wend. (N. Y.) 517.

3. *Still v. Hall*, 20 Wend. (N. Y.) 51; *Wilder v. Stanley*, 49 Vt. 105; *Dodge v. Tileston*, 12 Pick. (Mass.) 328; *Brunson v. Martin*, 17 Ark. 270; *Garfield v. Huls*, 54 Ill. 427; *Gilson v. Collins*, 66 Ill. 136; *Piper v. Meniffee*, 12 B. Mon. (Ky.) 465; 54 Am. Dec. 547; *Goslin v. Hodson*, 24 Vt. 140; *De Witt v. Cullings*, 32 Wis. 298; *Lee v. Clements*, 48 Ga. 128; *Hunter v. Waldron*, 7 Ala. 753. See *Phelps v. Paris*, 39 Vt. 511.

In assumpsit by the master of a sloop for his wages, the owners were allowed to show that he had negligently left the sloop in such a position that it was run into and sunk. *Still v. Hall*, 20 Wend. (N. Y.) 51.

In one's action for a service wherefor he had held himself out to be competent, damages may be recouped for un-

skillful performance. *Robinson v. Mace*, 16 Ark. 97; *Goslin v. Hodson*, 24 Vt. 140. So also in an action by an overseer employed at a stipulated price per annum, but a part of the time by sickness unfitted for active service. *Jones v. Deyer*, 16 Ala. 221.

In a suit on a contract to employ another overseer for a year at stipulated wages, it appearing that the overseer had served through the year, the employer cannot give in evidence that the former was lazy and trifling and made a poor crop. *Hobbs v. Riddick*, 5 Jones (N. Car.) 80.

4. *Whitbeck v. Skinner*, 7 Hill (N. Y.) 53; *Dorwin v. Potter*, 5 Den (N. Y.) 306. See *Westlake v. De Graw*, 25 Wend. (N. Y.) 669.

5. *Dermott v. Jones*, 2 Wall. (U. S.) 1; *Florida R. Co. v. Smith*, 21 Wall. (U. S.) 255; *Robinson v. Mace*, 16 Ark. 97; *Shaefer v. Gildea*, 3 Colo. 15; *Higgins v. Lee*, 16 Ill. 495; *Queen v. Doolan*, 55 Ill. 526; *Cooke v. Treble*, 80 Ill. 381; *Howell v. Medler*, 41 Mich. 641; *Haysler v. Owen*, 61 Mo. 270; *Horn v. Batchelder*, 41 N. H. 86; *Spalding v. Vandercook*, 2 Wend. (N. Y.) 431; *Ives v. Van Epps*, 22 Wend. (N. Y.) 155; *Bloodgood v. Ingoldsby*, 1 Hilt. (N. Y.) 388; *Locke v. Smith*, 10 Johns. (N. Y.) 250; *Gibson v. Carlin*, 13 Lea (Tenn.) 440; *Wilson v. Greensboro*, 54 Vt. 533; *Natural Gas Co. v. Healy*, 33 W. Va. 102.

Where a contractor agreed to build a bridge and keep it in repair for five years, and before the expiration of that time it was swept away, it was held that the county with which the contract was made might recoup against the amount agreed to be paid the contractor, damages for the failure of the contractor to rebuild the bridge. *Jefferson Co. v. Arrghi*, 51 Miss. 667.

In one's action for lumber furnished, damages may be recouped for his breach of a stipulation to furnish lumber as fast as wanted for building the defendant's house; it having been understood by the parties that they were dependent for lumber on certain sawmills in the vicinity. *Eddy v. Clement*, 38 Vt. 486.

Where a building contract is not performed according to its terms, the

within the specified time; ¹ for damage by carrier of freight; ² for failure in quality or quantity of land.³ Recoupment has also been allowed in cases of failure of title, when the defendant has been

owner may recoup the damages arising therefrom in a suit for the price, although he may have done acts amounting to an acceptance of the building. *Estep v. Fenton*, 66 Ill. 467. See also *Snell v. Cottingham*, 72 Ill. 161.

1. *Front St., etc., R. Co. v. Butler*, 50 Cal. 574; *Korf v. Lull*, 70 Ill. 420; *Cooke v. Treble*, 80 Ill. 381; *Havana, etc., R. Co. v. Walsh*, 85 Ill. 58; *Abbott v. Gatch*, 13 Md. 314; *Rockwell v. Daniels*, 4 Wis. 432.

Where the plaintiff contracted to erect a telescopic gas-holder for the defendant, in an action brought to enforce payment of the price, the court will not allow the defendant to set off damages for delay in completion when the defendant's evidence fails to prove that any date for the completion of the gas-holder was fixed by the contract. *Minneapolis Gas Light Co. v. Kerr-Murray Mfg. Co.*, 122 U. S. 300.

In an action to recover for work done under a building contract, where the defense is that the building was not completed in the stipulated time, if it appears that the defendant did not intend to use the building himself, but intended to rent it to others, and that he did not lose any opportunity of so renting by reason of the plaintiff's delay, he cannot recoup against the plaintiff's claim any sum as rents and profits of the building from the time when it ought to have been to the time when it was completed. *Wagner v. Corkhill*, 40 Barb. (N. Y.) 175.

2. *Edwards v. Todd*, 2 Ill. 462; *Boggs v. Martin*, 13 B. Mon. (Ky.) 239; *Ward v. Fellers*, 3 Mich. 281; *Elwell v. Skiddy*, 77 N. Y. 283; *Hinsdale v. Weed*, 5 Den. (N. Y.) 172; *Edminson v. Baxter*, 4 Hayw. (Tenn.) 112; 9 Am. Dec. 751; *Snow v. Carruth*, 1 Sprague (U. S.) 324.

In an action for the recovery of freight a defendant cannot claim by way of recoupment the amount of a premium of insurance paid by him, which insurance was effected by reason of a deviation of the ship on her voyage, the goods having arrived safely and been duly delivered and no claim for unreasonable delay being made. *Nye v. Ayres*, 1 E. D. Smith (N. Y.) 532.

A claim for damages by way of re-

coupment for a neglect of duty by a shipowner under a charter party, may be set up by the hirer of the vessel against a libel brought by the shipowner for demurrage under that charter party. *Nichols v. Tremlett*, 1 Sprague (U. S.) 361.

3. *Sumter v. Welch*, 2 Bay (S. Car.) 558; *Tunno v. Fludd*, 1 McCord (S. Car.) 121; *Abercrombie v. Owings*, 2 Rich. (S. Car.) 127; *Wheat v. Dotson*, 12 Ark. 699; *Smith v. Capers*, 13 Ark. 9; *Key v. Henson*, 17 Ark. 254; *Goodwin v. Robinson*, 30 Ark. 535; *House v. Marshall*, 18 Mo. 368; *Hammatt v. Emerson*, 27 Me. 308; *Myers v. Estell*, 47 Miss. 4; *Van Epps v. Harrison*, 5 Hill (N. Y.) 63; 40 Am. Dec. 314; *Avery v. Brown*, 31 Conn. 398.

The partial failure of consideration in the quality of land for which a vendee may recoup damages in an action brought for the purchase money, embraces not only qualities essentially inherent in the land, as fertility of soil, but also qualities extrinsically added, such as preparation for cultivation, or any other material improvement made upon the land. *Barnes v. Anderson*, 21 Ark. 125.

In an action for the price of land sold, the purchaser may set up in defense the fact that he was defrauded by false representations as to the boundaries of the land. *Kelly v. Pember*, 35 Vt. 183.

Where a purchaser of land relied upon the fraudulent representations of the vendor in making the purchase, making a partial payment of the purchase money, but after he discovered fraud executed his notes for the balance and a mortgage of the premises to secure the same, it was held that while such acquiescence or affirmance of the contract on the part of the purchaser might operate to deprive him of the right to rescind for the fraud, yet upon bill to foreclose the mortgage, he had the clear right to recoup the damages occasioned thereby; nor was it essential to such right of recoupment that he shall have asserted it, before paying any of the notes. He might then have resisted the payment, but was not obliged to do so. He might delay until proceedings were commenced to foreclose, and then present his claim for

evicted, for, in that case, there is a failure of consideration;¹ but where he has failed to take covenants of warranty, he cannot recoup damages for the failure of title, unless fraud has been practiced upon him,² though he may recoup damages to the extent of the value of the incumbrance, or, rather, to the extent of the costs of the removal of the incumbrance, when he has taken covenants of warranty of title.³

damages. *White v. Sutherland*, 64 Ill. 181.

1. *Walker v. Johnson*, 13 Ark. 522; *McDaniel v. Grace*, 15 Ark. 465; *Key v. Henson*, 17 Ark. 254; *Rice v. Goddard*, 14 Pick. (Mass.) 293; *Holbrook v. Young*, 108 Mass. 83; *Burk v. Clements*, 16 Ind. 132; *Scheible v. Slagle*, 89 Ind. 323; *Tone v. Brace*, 8 Paige (N. Y.) 597; *Mayor, etc., of N. Y. v. Mabie*, 13 N. Y. 151; 64 Am. Dec. 538; *Edgerton v. Page*, 5 Abb. Pr. (N. Y.) 1; *Bentley v. Sill*, 35 Ill. 414; *Smith v. Wise*, 58 Ill. 141; *Hayner v. Smith*, 63 Ill. 430; *Field v. Herrick*, 10 Ill. App. 591.

Where lands were sold by deed with covenants of warranty and the purchaser executed his bond for the payment of the price, it is no defense to an action on the bond that the grantor had not a good title if the grantee is in possession of the premises under his deed. *Lamerson v. Marvin*, 8 Barb. (N. Y.) 9. See also *Greenleaf v. Cook*, 2 Wheat. (U. S.) 13; *Freligh v. Platt*, 5 Cow. (N. Y.) 494; *Hoopes v. Meyer*, 1 Nev. 433.

It has been held in *Maine* that a partial failure of title to land conveyed constitutes no defense to a note given in payment for the land. *Thompson v. Mansfield*, 43 Me. 490.

Where a contract for the sale of land has been rescinded and a suit has been brought by the vendee for the recovery of money paid by him to the vendor in pursuance of the contract, the vendor may recoup the value of the use and occupation of the land if it has been occupied by the purchaser unless the purchaser has been compelled by law to pay the value of the use and occupation to the owner of the paramount title. *Collins v. Thayer*, 74 Ill. 138.

Tenant May Recoup When Evicted.—

A tenant may, upon a proceeding by distress, recoup for an eviction from or for a disturbance in the possession of the premises for which the rent is due. *Wade v. Halligan*, 16 Ill. 507; *Lindley v. Miller*, 67 Ill. 244; *Lynch v. Baldwin*, 69 Ill. 210.

Where rent is due in installments, if a tenant is evicted by a stranger, such eviction is a bar to the recovery of any rent that may have accrued since the last installment became due, but not to any installment that has matured before eviction. *Pepper v. Rowley*, 73 Ill. 262; *Whitney v. Meyers*, 1 Duer (N. Y.) 266.

If a grantee has sustained damages, trespass, etc., from the negligence of the grantor in not supplying him with the muniments of title, such damages may be set off in a suit for the purchase money. *Penn v. Preston*, 2 Rawle (Pa.) 14.

2. *McDaniel v. Grace*, 15 Ark. 465; *Crowell v. Packard*, 35 Ark. 348; *Whitney v. Lewis*, 21 Wend. (N. Y.) 131; *Bowley v. Holway*, 124 Mass. 395; *Brandt v. Foster*, 5 Iowa 287; 2 Kent's Com. 473. See *Wheat v. Dotson*, 12 Ark. 699.

In *Martin v. Foreman*, 18 Ark. 249, it was held that he could not so recoup although there were covenants of title. See also *Long v. Long*, 14 N. J. Eq. 462.

In *Texas*, the vendee may plead fraud and failure of title in reconvention. *Stewart v. Insall*, 9 Tex. 397.

Statute of Frauds.—The vendor of timber lands falsely represented that he was the owner of certain logging roads, and would grant, give and secure to the vendee the proper conveyances therefor. The contract of sale was reduced to writing and the lands were afterwards conveyed to the vendee. Both the written contract and the deed was silent as to the logging roads. Held, in a suit to foreclose a mortgage for the purchase money that though a promise to grant an easement is within the Statute of Frauds, the vendee could recoup the damages resulting from the fraud. *Foss v. Newbury*, 20 Oregon 257.

3. *Key v. Henson*, 17 Ark. 254; *Schuchmann v. Knoebel*, 27 Ill. 175; *Stilwell v. Chappell*, 30 Ind. 72; *Christy v. Ogle*, 33 Ill. 295; *Tone v. Wilson*, 81 Ill. 529; *Baker v. Rails-*

(2) *Negotiable Instruments*.—In general, in actions on negotiable instruments, as in cases on ordinary contracts, the right of recoupment may exist between the original parties, or those who stand in their place.¹

But it has been held that the defendant cannot show a partial failure of consideration of the bill or note, unless such partial failure is capable of definite computation, and the defendant has made an effort to rescind the contract upon which the bill or note was given.²

(3) *Sealed Instruments*.—Under statutes making sealed instruments only presumptive evidence of consideration, capable of being rebutted to the same extent and in the same manner as if the instrument were unsealed, the defendant will be allowed to

back, 4 Ind. 533; *Burk v. Clements*, 16 Ind. 132; *Davis v. Bean*, 114 Mass. 358; *Brandt v. Foster*, 5 Iowa 287; *Fawcett v. Woods*, 5 Iowa 400; *Camp v. Douglas*, 10 Iowa 586; *Zent v. Picken*, 54 Iowa 535; *Rand v. Webber*, 64 Me. 191; *Myers v. Estell*, 47 Miss. 4; *Sheldon v. Simonds, Wright (Ohio)* 724. See *Frisbie v. Hoffnagle*, 11 Johns. (N. Y.) 50. Compare *Batterman v. Pierce*, 3 Hill (N. Y.) 171.

In a suit upon a promissory note given for the purchase money of land conveyed to the maker of the note by warranty deed containing a covenant against incumbrances, the defendant may recoup the sum actually paid by him, or his attorney for him, to discharge a prior mortgage on the land, but he cannot recoup to the full face of the mortgage debt when he has procured its assignment for a less sum. *McDowell v. Milroy*, 69 Ill. 498; *Davis v. Bean*, 114 Mass. 358.

Where the grantees, in a deed containing covenants against incumbrances, permit the land to be sold under prior liens against the grantor, and procure a third party to buy it, for the purpose of strengthening their title, they will be permitted to recoup from the purchase money the amount expended in removing the incumbrance, but cannot set up title in the purchaser, to defeat a recovery, by the grantor, of the residue of the purchase money. *Brodie v. Watkins*, 31 Ark. 319.

1. *Burton v. Schermerhorn*, 21 Vt. 289; *Torinus v. Buckham*, 29 Minn. 128; *Stevens v. Johnson*, 28 Minn. 172; *Rice v. Goddard*, 14 Pick. (Mass.) 293; *Harrington v. Stratton*, 22 Pick. (Mass.) 510; *Merrill v. Taylor*, 72 Tex. 293; *Upton v. Julian*, 7 Ohio St. 95; *Tim-*

mons v. Dunn, 4 Ohio St. 680; *Davis v. Wait*, 12 Oregon 425; *Staab v. Garcia v. Ortiz*, 3 N. Mex. 53; *Hamatt v. Emerson*, 27 Me. 308; *Hill v. Southwick*, 9 R. I. 299; 11 Am. Rep. 250.

The right to recoup is not barred by the fact that the damages to be recouped were known to the party executing the note. While the note is an admission of the amount due and evidenced, it is not conclusive of a settlement or waiver of any claim for damages, especially when given under protest. *Waterman v. Clark*, 76 Ill. 428.

2. *Pulsifer v. Hotchkiss*, 12 Conn. 234; *Burton v. Schermerhorn*, 21 Vt. 289; *Richardson v. Sanborn*, 33 Vt. 75; *Harrington v. Lee*, 33 Vt. 249.

To entitle the maker of a promissory note, in a suit against him by the payee, to an abatement from its amount, in assessing damages on the ground of misrepresentation by the payee in relation to the property for which the note was given, and the consequent want of consideration as to part of the note, three things must concur, to wit: Fraud upon him in procuring the note for the sum named in it; an offer by him to rescind the contract under which the note was given, and an ability, by computation, to fix the amount to be deducted. *Harrington v. Lee*, 33 Vt. 249.

Partial failure of consideration is *pro tanto* a good defense to a promissory note where the sum to be deducted can be ascertained by mere computation. But it is otherwise where the amount to be deducted is unliquidated. *Riddle v. Gage*, 37 N. H. 519; 75 Am. Dec. 151.

recoup damages in an action thereon.¹ And sometimes this has been permitted, independently of statute.²

6. Damages—*a*. IN GENERAL.—The general rule of damages in recoupment is that the same amount can be recouped as would be allowed the defendant if he brought a cross-action.³ But no

1. *Van Epps v. Harrison*, 5 Hill (N. Y.) 63; 40 Am. Dec. 314; *Withers v. Greene*, 9 How. (U. S.) 213. See *McCullough v. Cox*, 6 Barb. (N. Y.) 386; N. Y. Code Civ. Proc., § 840.

In *Vrooman v. Phelps*, 2 Johns. (N. Y.) 177, decided under the principles of the common law, it was held that failure of consideration could not be set up by way of recoupment in an action upon a sealed instrument. See also *Christian v. Miller*, 3 Leigh (Va.) 78; 23 Am. Dec. 251.

In *New Jersey*, it has been held that recoupment cannot be set up in an action upon a sealed instrument. *Price v. Reynolds*, 39 N. J. L. 171; *Wakeman v. Illingsworth*, 40 N. J. L. 431; *Hunter v. Reiley*, 43 N. J. L. 480; but these cases are decided under the special provisions of a statute.

2. *Gray v. Handkinson*, 1 Bay (S. Car.) 278; *Adams v. Wylie*, 1 Nott & M. (S. Car.) 78; *Stubblefield v. Soule*, 21 Ill. App. 154; *Pepper v. Rowley*, 73 Ill. 262; *Sanger v. Fincher*, 27 Ill. 346; *Eckles v. Carter*, 26 Ala. 563. See *Grand Lodge v. Knox*, 20 Mo. 433; *Ives v. Van Epps*, 22 Wend. (N. Y.) 155; *Wilson v. Greensboro*, 54 Vt. 533.

In *Adams v. Wylie*, 1 Nott & M. (S. Car.) 78, the court by Colcock, J., referring to the doctrine as stated in the text, said: "It may have been originally a departure from the strict rules of a court of law, but from the time of the case of *Gray v. Handkinson*, 1 Bay (S. Car.) 276, it has never been disputed. A deficiency in quantity or defect in quality where there has been a representation are legitimate grounds for a reduction of price or rescission of the contract, as the case may be. In all such cases, it is obvious that the matter alluded to must contradict the deed, but the case on the part of the defendant is to be considered as an action of a breach of covenant."

3. *Myers v. Estell*, 47 Miss. 4; *Estell v. Myers*, 54 Miss. 174. See *Dorwin v. Potter*, 5 Den. (N. Y.) 306; *Spratt v. Merchants*, etc., Nat. Bank (Pa. 1886), 7 Atl. Rep. 98; *Hallan v. Todhunter*, 24 Iowa 166.

Damages which are merely specula-

tive in their character, cannot be recouped. *Taylor v. Maguire*, 12 Mo. 313; *Satchwell v. Williams*, 40 Conn. 371.

Measure of Damages.—A party injured by a breach of contract is entitled to recoup his damages including gains prevented as well as losses sustained. But this general rule is subject to two conditions: The damages must be such as may fairly be supposed to have entered into contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow from its violation, and they must be certain both in their nature and in respect to the cause from which they proceeded. In the case of a breach of contract to deliver a steam engine at a given time to be used for the purpose of driving a planing mill, the rental value of the machinery to have been operated by the engine was held to be the proper measure of damages, and not the profits which might have been made by using the machinery during the time the mill was idle on account of the non-delivery of the engine at the time agreed upon. *Griffin v. Colver*, 16 N. Y. 489; *affirming Griffin v. Colver*, 22 Barb. (N. Y.) 587. See also *Abbott v. Gatch*, 13 Md. 314; 71 Am. Dec. 635.

Amount Found by Jury.—The amount of damages which the defendants are entitled to recoup should be found by the jury and not by the court. *Halderman v. Berry*, 74 Mich. 424.

The defendant in an action to recover the price of property sold under a special agreement, which proves inferior in quality to that contracted for, is not entitled to an allowance in reduction of damages beyond the difference between the price agreed upon and the value of the property sold, on the ground that the property contracted for at the stipulated time and place of delivery was of greater value than the price agreed upon. *McAlpin v. Lee*, 12 Conn. 129; 30 Am. Dec. 609.

Where a landlord contracted to supply his tenant with steam power, it was held that the tenant, in an action by the landlord for the rent, might recoup the

recoupment can be had for damages sustained after the beginning of the suit.¹ To enable the defendant to make use of this defense, it is not necessary that the damages be liquidated.²

b. EXCESS NOT RECOVERABLE.—A defendant cannot recover, by way of recoupment, any excess in his favor over the plaintiff's demand,³ but it has been held that he may have judgment for

actual loss of wages paid during very short intervals to workmen who were in his employ by the week or month, if such loss were caused by want of steam power. *Crane v. Hardman*, 4 E. D. Smith (N. Y.) 339.

Limited Damages.—The plaintiff contracted with the defendant town to dig trenches in its streets for the laying of water pipes, he to guard and light them and to be responsible for all damages caused by neglect, twenty per cent. of his pay being reserved until the end of the work as a guaranty for the performance of the contract, and any damages to person or property caused by his negligence to be deducted from the twenty per cent. reserved. Suit having been brought against the town for personal damages caused by falling into one of the trenches, the plaintiff was notified and assisted at its defense, and the issue to the jury being whether the trench was properly guarded and lighted, a recovery was had against the town in an action by the plaintiff against the town to recover pay for digging the trenches. *Held*, that the town and the plaintiff were not *in pari delicto*, and that the town could recoup in damages the amount paid by them in the former suit, although it exceeded twenty per cent. of the contract price. *Campbell v. Somerville*, 114 Mass. 334.

1. *Harger v. Edmonds*, 4 Barb. (N. Y.) 256; *Bartlett v. Holmes*, 13 C. B. 630; 76 E. C. L. 628. See also *Platt v. Brand*, 26 Mich. 173.

A distinct refusal to perform a contract will support a claim of recoupment by the party entitled to such performance without waiting for the time of performance. *Platt v. Brand*, 26 Mich. 173.

In *Alabama* it has been held that any damage resulting from the breach of a contract to a party who is sued upon it, may be recouped, and such damages are not to be restricted to the commencement of the suit, but to the time of trial. *Martin v. Hill*, 42 Ala. 275.

In *Texas* reconvention may be had of notes which fall due after the beginning of the action but before trial.

Dignowitty v. Alexander, 25 Tex. Supp. 162; *Griffin v. Chubb*, 16 Tex. 219.

2. *Ives v. Van Epps*, 22 Wend. (N. Y.) 155; *Grant v. Buttqn*, 14 Johns. (N. Y.) 377; *M'Cumber v. Goodrich*, 1 Johns. (N. Y.) 56; *Batterman v. Pierce*, 3 Hill (N. Y.) 171; *Stearns v. Marsh*, 4 Den. (N. Y.) 227; 47 Am. Dec. 248; *Sanger v. Fincher*, 27 Ill. 346; *Weaver v. Penny*, 17 Ill. App. 628; *Davis v. Wait*, 12 Oregon 425; *Keyes v. Western Vt. Slate Co.*, 34 Vt. 81; *Herbert v. Ford*, 29 Me. 516; *Avery v. Brown*, 31 Conn. 398. Compare *Morrison v. Clifford*, 1 Cranch (C. C.) 585.

In *Texas*, damages pleaded by way of reconvention need not be liquidated. *Walcott v. Hendrick*, 6 Tex. 406; *Egery v. Power*, 5 Tex. 501.

In *Louisiana*, similarly. *Lallande v. Ball*, 20 La. Ann. 193.

3. *Dushane v. Benedict*, 120 U. S. 630; *Waterman v. Clark*, 76 Ill. 428; *Burlingame v. Davis*, 13 Ill. App. 602; *Kingman v. Draper*, 14 Ill. App. 577; *Stow v. Yarwood*, 14 Ill. 424; *Babcock v. Trice*, 18 Ill. 420; 68 Am. Dec. 560; *Brunson v. Martin*, 17 Ark. 270; *Batterman v. Pierce*, 3 Hill (N. Y.) 171; *Ward v. Fellers*, 3 Mich. 281; *McHardy v. Wadsworth*, 8 Mich. 349; *Hay v. Short*, 49 Mo. 139; *Fowler v. Payne*, 52 Miss. 210; *Holcraft v. Mellott*, 57 Ind. 539; *Britton v. Turner*, 6 N. H. 481; 26 Am. Dec. 713; *Union Bank v. Blanchard*, 65 N. H. 21; *Natural Gas Co. v. Healy*, 33 W. Va. 102.

In *Hitchcock v. Hunt*, 28 Conn. 343, it was considered a question whether or not any excess could be recovered. See *Beecher v. Baldwin*, 55 Conn. 419.

It is provided by statute in some States that the defendant may have judgment for the excess, under the defense of recoupment. *Georgia* Code, § 2912 provides that in all cases where recoupment may be pleaded, if the damages of the defendant shall exceed in amount those of the plaintiff, the defendant shall recover the amount of such excess. *Held* that, under this

costs, although the damages sustained by him exceed the amount of the plaintiff's claim.¹

7. Practice, Prerequisites, etc.—a. OFFER TO RETURN.—It is not necessary for the defendant to offer to return the property, or to rescind the contract, in order to be allowed to set up the defense of recoupment.²

b. ELECTION OF REMEDIES.—The defendant is entitled to elect whether he will set up recoupment or bring a cross-action for his damages, and the failure to make use of this defense will not deprive him of his right to an action to recover whatever claim he had in the original action.³

statute, defendant is entitled to recover in an action for the price of a machine for expenses reasonably incurred in repairs on account of a latent defect, and in endeavoring to run the machine. *Cochran v. Jones*, 85 Ga. 678. See also *Ewing v. Shaw*, 83 Ala. 333; *citing Alabama Code of 1886*, § 2683; *Smith v. Dukes*, 5 Minn. 373; *Mason v. Heyward*, 3 Minn. 182; *Comp. Stat. Minnesota* 481, § 24.

In *Texas*, the fact that the plaintiff has no cause of action is no reason for a refusal to give judgment in favor of the defendant, upon the admitted cause of action set up in his answer in reconvention. *Griffin v. Chubb*, 16 Tex. 219.

1. *Union Bank v. Blanchard*, 65 N. H. 21.

2. *Brown v. Freeman*, 79 Ala. 406; *Williams v. Miller*, 21 Ark. 469; *Rotan v. Nichols*, 22 Ark. 244; *Goodwin v. Robinson*, 30 Ark. 535; *Mears v. Nichols*, 41 Ill. 207; 89 Am. Dec. 381; *Owens v. Sturgis*, 67 Ill. 366; *Gibbs v. Kaszeyki*, 18 Ill. App. 623; *Harrington v. Stratton*, 22 Pick. (Mass.) 510; *Myers v. Estell*, 47 Miss. 4; *Day v. Pool*, 52 N. Y. 416; 11 Am. Rep. 719; *Dayton v. Hooglund*, 39 Ohio St. 671; *Fisk v. Tank*, 12 Wis. 276; 78 Am. Dec. 737.

It is only in cases of executory contracts and without warranty, that a purchaser accepting goods and retaining them without notice to the seller or offering to return them within a reasonable time, is held to waive all defects as to their quality. *Marcus v. Thornton*, 44 N. Y. Super. Ct. 411; *Walling v. Schwartzkopf*, 44 N. Y. Super. Ct. 576.

Defendant bought a machine from plaintiff company through its agent. A mutual mistake as to the kind of machine ordered was not discovered till the machine was received, partly paid for, and a note given for the balance.

In the correspondence which ensued no arrangement was effected, but the machine was retained, used, and afterwards sold by the defendant. In an action on the note it was held that the defendant was not estopped to claim recoupment for the machine's defects, either by his use and sale thereof, or his promise to pay the note. *Egan Co. v. Johnson*, 82 Ala. 233.

In an action for goods sold and delivered, where it appeared that under the contract plaintiff was to deliver the goods for the holiday trade, but failed to deliver all of them in time, whereby defendant was obliged to purchase elsewhere, at an increased expense, defendant may recoup such damages as he may have suffered by reason thereof, and this without returning the goods that were furnished by plaintiff. *Traverse v. Montpelier Carriage Co.*, 62 Vt. 67.

3. *Cook v. Moseley*, 13 Wend. (N. Y.) 277; *Batterman v. Pierce*, 3 Hill (N. Y.) 171; *Barth v. Burt*, 43 Barb. (N. Y.) 628; *Gillespie v. Torrance*, 25 N. Y. 306; 85 Am. Dec. 355; *Mimnaugh v. Partlin*, 67 Mich. 391; *Morehouse v. Baker*, 48 Mich. 335; *Britton v. Turner*, 6 N. H. 481; 26 Am. Dec. 713; *Davenport v. Hubbard*, 46 Vt. 200; 14 Am. Rep. 620; *Crabtree v. Kile*, 21 Ill. 180; *McKinney v. Springer*, 3 Ind. 59; 54 Am. Dec. 470; *Rankin v. Harper*, 4 Ind. 585.

A buyer of personal property in case of failure of title to a portion thereof is not bound to wholly rescind the contract, but may retain so much as he has secured a title to and recoup his damages for the loss of the residue in an action against him for the purchase-money, or he may bring an action therefor; and this option is not defeated by a transfer of the claim against him and the bringing of an action in the name of the transferee, except

But its use is a complete bar to a suit by him for the same cause.¹

c. NOTICE OF INTENTION TO RECOUP.—It has sometimes been held that when the claim to be recouped is sufficient to extinguish the plaintiff's right of action, it may be proved under the general issue without notice;² but that if the claim goes merely

where the claim is negotiable paper transferred to a *bona fide* purchaser discharged of all equities. *McKnight v. Devlin*, 52 N. Y. 399.

Where the matter of recoupment would have gone in bar of the whole action, it was held that the defendant's failure to make use of it was a bar to his cross-action for damages. *Dunham v. Bower*, 77 N. Y. 76; 33 Am. Rep. 570.

1. *Jones v. Scriven*, 8 Johns. (N. Y.) 453; *Batterman v. Pierce*, 3 Hill (N. Y.) 171; *Britton v. Turner*, 6 N. H. 481; 26 Am. Dec. 713; *O'Connor v. Varney*, 10 Gray (Mass.) 231; *Burnett v. Smith*, 4 Gray (Mass.) 50; *Timmons v. Dunn*, 4 Ohio St. 680. See also *McLean v. Miller*, 10 Ala. 856; *Merriam v. Woodcock*, 104 Mass. 326.

In *Ward v. Fellers*, 3 Mich. 281, it was considered a question whether or not the defendant after setting up part of his claim by way of recoupment could maintain a cross-action for the residue.

The defendant is not precluded by the fact that he has begun a cross-action against the plaintiff, from setting up his claim by way of recoupment; but if he elects to set up his claim in this manner he is barred from further prosecution of his cross-action. *Fabbricotti v. Launitz*, 3 Sandf. (N. Y.) 743; *Naylor v. Schenck*, 3 E. D. Smith (N. Y.) 135.

In an action on a note given for certain barrels of beef, the defendant sought to recoup for breach of warranty. *Held*, that an erroneous exclusion of this defense, not being seasonably corrected by appeal, the defendant was thenceforth precluded from maintaining an action for the same breach. *Beall v. Pearre*, 12 Md. 550.

In assumpsit to recover for a breach of warranty in the sale of cotton, it appeared that the plaintiff had pleaded the facts on which his right of action depended, in defense, *pro tanto*, of a suit brought against him for the price of the cotton by the present defendants in Massachusetts; that he afterwards suffered judgment therein to go against him by default, offering no

evidence in support of his plea. *Held*, that he was not estopped by the record and proceedings in *Massachusetts* from maintaining the present action. *Bascom v. Manning*, 52 N. H. 132.

A purchaser of land who has sustained injury by the deceit of the vendor pending the negotiations may either set up his damages by way of recoupment in an action for the price or may afterwards sue for them in an independent action at his option; but if he fails to recoup, he will not afterwards be entitled to an injunction against the execution of a judgment for the price, pending a suit for the damages, on a mere allegation of the vendor's insolvency. *Hall v. Clark*, 21 Mo. 415.

In answer to a declaration on an account annexed for goods sold and delivered, the defendant set up that they were sold under a special contract fixing their quantity, quality and price; that he was damaged by failure of the plaintiff to deliver the stipulated quantity; that he was also damaged by the inferior quality of those delivered; that he did not accept them, and that he had paid on account more than their value, and he brought a cross-action upon like allegations of damage. On the trial of the actions together, he contended that the plaintiff had no claim otherwise than under the special contract; but refused to elect whether to avail himself of his own claim for damages, for breaches of that contract, in defense against the original action, or in support of the cross-action. *Held*, that he was precluded from claiming that there had been no delivery under the special contract, that his entire damages for breaches of that contract were to be assessed, and applied, first, to cancel in whole or in part any balance due upon it for the goods delivered, and that for any excess he was entitled to recover in the cross-action. But if there was no such excess, then judgment was to be entered against him therein. *Star Glass Co. v. Morey*, 108 Mass. 570.

2. *E. g.*, in *New York*, prior to the

to diminish the plaintiff's claim without extinguishing it, notice should be given of the defendant's intention to set up the defense of recoupment;¹ and that, in equity, when the claim goes merely to diminish the plaintiff's recovery, it must be set up by cross-bill.² But the practice, in many States, requires matter in recoupment to be either specially pleaded, or notice to be given of the defendant's intention to set it up.³ The purpose of notice being to prevent surprise at the trial, it must be sufficiently certain to apprise the plaintiff of the nature of the defendant's claim.⁴

Code provision for counterclaim. *Gleason v. Clark*, 9 Cow. (N. Y.) 57; *People v. Niagara*, 12 Wend. (N. Y.) 246; *Stearns v. Marsh*, 4 Den. (N. Y.) 227; 47 Am. Dec. 248.

1. *Gleason v. Clark*, 9 Cow. (N. Y.) 57; *People v. Niagara*, 12 Wend. (N. Y.) 246; *McCullough v. Cox*, 6 Barb. (N. Y.) 386; *Eldridge v. Mather*, 2 N. Y. 157. See also *Shute v. Hamilton*, 3 Daly (N. Y.) 462; *Willis v. Taggard*, 6 How. Pr. (N. Y.) 433; *Runyan v. Nichols*, 11 Johns. (N. Y.) 547; *Van Epps v. Harrison*, 5 Hill (N. Y.) 63; 40 Am. Dec. 314; *Mayor, etc., of Albany v. Trowbridge*, 5 Hill (N. Y.) 71; *Barber v. Rose*, 5 Hill (N. Y.) 76; *Trowbridge v. Mayor, etc., of Albany*, 7 Hill (N. Y.) 429.

2. *Parker v. Hartt*, 32 N. J. Eq. 225; *Miller v. Gregory*, 16 N. J. Eq. 274; *O'Brien v. Hulfish*, 22 N. J. Eq. 471.

3. In *Arkansas*, it seems to be necessary either to plead recoupment specially or to give notice of the special matter relied upon by way of recoupment in all cases, whether the amount relied upon will extinguish the plaintiff's right of recovery or not. *McLure v. Hart*, 19 Ark. 19; *Tatum v. Mohr*, 21 Ark. 349; see *Brunson v. Martin*, 17 Ark. 270; *Desha v. Robinson*, 17 Ark. 228; *Wheat v. Dotson*, 12 Ark. 699.

In *Arkansas*, the defense of partial want or failure of consideration may be interposed to a note or bond when facts constituting the defense are specially pleaded or set out by way of recoupment or as a bar to so much of the demand as may be thus answered. *Keller v. Vowell*, 17 Ark. 445.

In *New Jersey*, under N. J. Pr. Rev., p. 868, § 129, damages of the defendant from defective performance of the contract on the part of the plaintiff may be recouped; but not unless the notice required has been filed with the plea, and the damages arise out of the very contract sued upon. *Bozarth v. Dudley*, 44 N. J. L. 304; 43 Am. Rep. 373.

In *Massachusetts*, as to when recoupment must be specially pleaded, see *Wentworth v. Dows*, 117 Mass. 14; *Jackman v. Doland*, 116 Mass. 550; *Lamson, etc., Mfg. Co. v. Russell*, 112 Mass. 387.

As to other States, see *Kennedy v. Richardson*, 70 Ind. 524; *Estep v. Morton*, 6 Ind. 489; *Heaston v. Colgrove*, 3 Ind. 265; *Simonds v. Cross*, 63 N. H. 123; *Wilson v. Greensboro*, 54 Vt. 533; Vt. Rev. L. 1880, § 924; *Traverse v. Montpelier Carriage Co.*, 62 Vt. 67; *Hogg v. Cardwell*, 4 Sneed (Tenn.) 151; *Steamboat Wellsville v. Geisse*, 3 Ohio St. 333; *Timmons v. Dunn*, 4 Ohio St. 680; *Upton v. Julian*, 7 Ohio St. 95; *Nixon v. Carson*, 38 Iowa 338.

In *Illinois*, notice in such case seems not to have been insisted on. *Babcock v. Trice*, 18 Ill. 420; 68 Am. Dec. 560; *Turner v. Retter*, 58 Ill. 264; *Murray v. Carlin*, 67 Ill. 286; *Stubblefield v. Soule*, 21 Ill. App. 154; *Cooke v. Treble*, 80 Ill. 381; *Higgins v. Lee*, 16 Ill. 495; *Crabtree v. Kile*, 21 Ill. 180. See *Waterman v. Clark*, 76 Ill. 428.

As to the practice in *Louisiana* and *Texas*, see *supra*, this title, *Reconvention*.

4. *Ritter v. Daniels*, 47 Mich. 617; *McHardy v. Wadsworth*, 8 Mich. 349; *Watkins v. Ford*, 69 Mich. 357; *Sinker v. Diggins*, 76 Mich. 557; *Burgess v. Beaumont*, 7 M. & G. 962; 49 E. C. L. 962; *Stever v. Lamoure*, Hill & D. Supp. (N. Y.) 352; *Merrill v. Everett*, 38 Conn. 40; *Concord v. Pillsbury*, 33 N. H. 310.

A notice averring damages for breach of plaintiff's contract must explicitly point out wherein. *Roethke v. Philip Best Brewing Co.*, 33 Mich. 340.

In an action for a balance of salary, notice of recoupment for damages from neglect of instructions, must specify instances and the time and place thereof. *Bolt v. Friederick*, 56 Mich. 20.

Where the defendant's answer contained all the facts necessary to consti-

III. COUNTERCLAIM—1. Definition.—A counterclaim is “a claim presented by a defendant in opposition to or deduction from the claim of the plaintiff;”¹ an opposition claim or demand of something due;² a demand of something which of right belongs to the defendant in opposition to the right of the plaintiff.³ A counterclaim is a species of set-off or recoupment, introduced by

tute a defense for want of consideration or for recoupment of damages, it was not necessary for him to state which he would insist upon; it is the facts alleged which constitute the defense. *Springer v. Dwyer*, 50 N. Y. 19.

In an action by a mortgagee in a mortgage for future advances in pursuance of a contract for advances made by virtue of the same, an answer which sets up a breach of the contract by way of recoupment but which alleges no facts upon which a recovery for more than nominal damages could be sustained and which shows a probable excuse for the breach, is demurrable. *Levy v. Sayle*, 52 Ark. 246.

As to the prerequisite notice in *Louisiana* and *Texas*, see *supra*, this title, *Reconvention*.

Practice Upon Recoupment Generally.

—The plaintiff suing when there is no balance due him, should, of course, be subjected to costs. Otherwise, when he becomes debtor after bringing suit. A note falling due after suit begun, but before plea, cannot be allowed in recoupment. *Whitaker v. Turnbull*, 18 N. J. L. 172. As to an award published after suit begun, see *Varney v. Brewster*, 14 N. H. 49. As to a demand accruing after suit from a liability incurred before, see *Houston v. Fellows*, 27 Vt. 634. As to an order for goods accepted by the plaintiff after delivery of the goods sued for, see *Davis v. McGrath*, 10 Pa. St. 170. As to the case of a third person offering, and the captain receiving freight making up a deficiency under a shipping contract, see *Hecksher v. McCrea*, 24 Wend. (N. Y.) 304; *Emery v. St. Louis, etc., R. Co.*, 77 Mo. 339. As to the case of an exchange of railroad bonds for stock, see *Galena, etc., R. Co. v. Barrett*, 95 Ill. 467. As to recouping, in a suit upon one's contract to make shooks, the damage to him from the plaintiff's failure to deliver the lumber, see *Rogers v. Humphrey*, 39 Me. 382.

1. Black's L. Dict.

The word “counter” is defined to be “contrary to,” “contrary way,” “opposition to,” etc. The word “claim” is

defined to mean the demand of anything that is in possession of another; to demand, to require, etc. *Silliman v. Eddy*, 8 How. Pr. (N. Y.) 122.

Counterclaim is the opposite of claim. The plaintiff makes a claim in his complaint against the defendant; the defendant besides his defense makes a counterclaim against the plaintiff. *Wolf v. E. H.*, 13 How. Pr. (N. Y.) 84.

2. *Silliman v. Eddy*, 8 How. Pr. (N. Y.) 122.

A counterclaim is an affirmation of a cause of action against the plaintiff, in the nature of a cross-action, and upon which the defendant may have an affirmative judgment against the plaintiff. *Clarkson v. Manson*, 60 How. Pr. (N. Y.) 45.

3. *Silliman v. Eddy*, 8 How. Pr. (N. Y.) 122.

A counterclaim is that which might have arisen out of, or could have had some connection with the original transaction in view of the parties, and which, at the time the contract was made, they could have intended might in some event give one party a claim against the other, for compliance or non-compliance with its provisions. *Conner v. Winton*, 7 Ind. 523; *Lovejoy v. Robinson*, 8 Ind. 399; *Thompson v. Toohey*, 71 Ind. 296.

A counterclaim is a claim existing in favor of a defendant against a plaintiff (and it must be a cause of action) arising out of contract, or the transaction set forth in the complaint, or connected with the subject of the action. *Williams v. Upton*, 8 How. Pr. (N. Y.) 205.

In *Silliman v. Eddy*, 8 How. Pr. (N. Y.) 122, the court by Crippen, J., said: “It has been found very difficult to apply the term ‘counterclaim’ to the various actions which are daily arising in our courts, and I very much doubt whether a more perplexing, undefinable, impracticable combination of words could have been joined together in the English language than those selected in this particular by the modern reformers who claim to stand as sponsors for the present code.”

the Codes of Civil Procedure in several of the States, of a broad and liberal character.¹

It embraces both set-off and recoupment,² and is broader and more comprehensive than either,³ and is intended to secure to a defendant all the relief which either an action at law or a bill in equity or a cross-bill would have secured on the same state of facts.⁴ It is not a mere defense, but admits of affirmative relief beyond the dismissal of the plaintiff's complaint.⁵

1. Black's L. Dict.

2. *Leavenworth v. Packer*, 52 Barb. (N. Y.) 132; *Boston Silk, etc., Mills v. Eull*, 37 How. Pr. (N. Y.) 299; *Pattison v. Richards*, 22 Barb. (N. Y.) 146; *Clinton v. Eddy*, 1 Lans. (N. Y.) 61; *Wilder v. Boynton*, 63 Barb. (N. Y.) 547; *Chamboret v. Cagney*, 2 Sweeny (N. Y.) 378; *Lawrence v. Bank of the Republic*, 3 Robt. (N. Y.) 142; *Gordon v. Bruner*, 49 Mo. 570; *Hay v. Short*, 49 Mo. 139; *Woodruff v. Garner*, 27 Ind. 4; 89 Am. Dec. 477; *Slayback v. Jones*, 9 Ind. 470.

As to the distinction between recoupment, counterclaim, cross-action and set-off, see *Hurst v. Everett*, 91 N. Car. 391; *Garrett v. Love*, 89 N. Car. 205.

The defense of counterclaim under the *Arkansas* Code is but the plea of recoupment under the old practice, and, in general, is to be governed by the same doctrines, except that where the defendant's demand exceeds that of the plaintiff, he may be entitled to a judgment for the excess. *Bloom v. Lehman*, 27 Ark. 489.

3. *Boston Silk, etc., Mills v. Eull*, 37 How. Pr. (N. Y.) 299; *Leavenworth v. Packer*, 52 Barb. (N. Y.) 132; *Beardsley v. Stover*, 7 How. Pr. (N. Y.) 294; *Cohn v. Husson*, 66 How. Pr. (N. Y.) 150; *Clinton v. Eddy*, 1 Lans. (N. Y.) 61; *Vassear v. Livingston*, 13 N. Y. 248; *Xenia Bank v. Lee*, 2 Bosw. (N. Y.) 694; *Chamboret v. Cagney*, 2 Sweeny (N. Y.) 378; *Gillespie v. Torrance*, 25 N. Y. 306; 82 Am. Dec. 355; *Lawrence v. Bank of the Republic*, 3 Robt. (N. Y.) 149; *Shute v. Hamilton*, 3 Daly (N. Y.) 462; *Bloodgood v. Ingoldsby*, 1 Hilt. (N. Y.) 388; *Lemon v. Trull*, 13 How. Pr. (N. Y.) 248; *Ogden v. Coddington*, 2 E. D. Smith (N. Y.) 317; *Carpenter v. Manhattan L. Ins. Co.*, 22 Hun (N. Y.) 52; *Welch v. Hazelton*, 14 How. Pr. (N. Y.) 97; *Vail v. Jones*, 31 Ind. 468; *Woodruff v. Garner*, 27 Ind. 4; 79 Am. Dec. 477; *Lapham v. Osborne*, 20 Nev. 168.

Under the provisions for counter-

claims a defendant may avail himself of any other cause of action, arising also on contract in a contract action, and existing at the commencement of the action, whereas a set-off must be for real estate sold, or for personal property sold, or for money paid or services done, or if it be not such a demand, the amount must be liquidated or capable of being ascertained by calculation. *Welch v. Hazelton*, 14 How. Pr. (N. Y.) 97.

4. *Leavenworth v. Packer*, 52 Barb. (N. Y.) 132; *Boston Silk, etc., Mills v. Eull*, 37 How. Pr. (N. Y.) 299; *Gleason v. Moen*, 2 Duer (N. Y.) 642; *Vassear v. Livingston*, 13 N. Y. 248; *Xenia Bank v. Lee*, 2 Bosw. (N. Y.) 694; *Chamboret v. Cagney*, 2 Sweeny (N. Y.) 378; *Lawrence v. Bank of the Republic*, 3 Robt. (N. Y.) 142; *Lemon v. Trull*, 13 How. Pr. (N. Y.) 248; *Vail v. Jones*, 31 Ind. 468; *Woodruff v. Garner*, 27 Ind. 4; 89 Am. Dec. 477; *Douthitt v. Smith*, 69 Ind. 463; *Lapham v. Osborne*, 20 Nev. 168; *Ford v. Thompson*, 1 Head (Tenn.) 265.

The term "counterclaim" obviously includes recoupment and set-off as between the parties to the record, and something more. It is the set-off of the Revised Statutes together with the set-off of courts of equity, and yet something more. It embraces all sorts of claims which a defendant may have against a plaintiff in the nature of a cross-action or demand, or for which a cross or separate action would lie. *Wolf v. E. H.*, 13 How. Pr. (N. Y.) 84.

That which was denominated set-off, counterclaim, and cross-demand in the *Iowa* Revision, are all called counterclaims in the Code. *Sherman v. Hale*, 76 Iowa 383.

5. *Lawrence v. Bank of the Republic*, 3 Robt. (N. Y.) 142; *Shute v. Hamilton*, 3 Daly (N. Y.) 462; *Ogden v. Coddington*, 2 E. D. Smith (N. Y.) 317; *Davidson v. Remington*, 12 How. Pr. (N. Y.) 310; *Vassear v. Livingston*, 13 N. Y. 248; *Collins v. Suau*, 7 Robt. (N. Y.) 94; *Fettretch v. McKay*, 47 N.

The doctrine of counterclaim being a creature of statute and existing only by virtue of statutory law, reference must be had to the statutes of the different states to ascertain as to its existence as well as its scope and extent in any particular state.¹

2. Essential Elements.—A counterclaim must be a complete cause of action, containing substance necessary to sustain an

Y. 426; *Williams v. Willis*, 15 Abb. Pr. U. S. (N. Y.) 11; *Hay v. Short*, 49 Mo. 139; *Bloom v. Lehman*, 27 Ark. 489; *Love v. Oldham*, 22 Ind. 51; *Boil v. Simms*, 60 Ind. 162.

A counterclaim may coexist with the plaintiff's claim, and is simply a cross-action to enforce a legal and equitable set-off. *Bellinger v. Craigie*, 31 Barb. (N. Y.) 534.

While usury is not a counterclaim, where a defendant pleads it with other matters and demands such relief as formerly constituted the subject of a cross-bill, the answer is a counterclaim as well as a defense. *Geenia v. Keah*, 66 Barb. (N. Y.) 245.

1. See *New York Rev. Stats.* 1890, pp. 2236, 2238, §§ 25-32; *New York Code Civ. Proc.*, §§ 500, 513; *Cal. Code Civ. Proc.*, § 440; *Ohio Rev. Stats.* 1890, § 5072; *Minnesota Stats.* 1891, §§ 4546, 4547; *North Carolina Code* 1883, § 244; *Dakota Comp. Laws* 1887, § 4915; *Mont. Comp. Stats.* 1888, p. 82, § 90; *Nev. Gen. Stats.* 1885, § 3069; *Millers's Iowa Rev. Code*, 1888, § 2659; *Ind. Rev. Stats.* 1888, § 350; *Wisconsin Stats.* 1889, § 2656; *Kansas Rev. Stats.*, § 97, 99; *Kentucky Code of Prac.*, § 152; *Mo. Wag. Stats.*, pp. 1015, 1016, § 12.

Professor Pomeroy says that most of the codes with reference to counterclaims may be separated into two groups, each following a certain well defined type. The first group providing generally that the counterclaim must be one existing in favor of the defendant and against a plaintiff between whom a several judgment might be had in the action and arising out of one of the following causes of action: First, a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action; second, in an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action; and the second group providing generally that the counterclaim must be one existing in favor of a defendant and against a plaintiff between

whom a several judgment might be had in the action and arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action. The Codes of *Indiana* and *Iowa*, however, cannot be referred to either of these two general groups. Their provisions are quite different in language from the common type and much broader in meaning. *Pomeroy Rem.* (2d. ed.) 762, § 726.

The *Indiana Code*, § 59, provides that a counterclaim is any matter arising out of or connected with the cause of action which might be the subject of an action in favor of a defendant or which would tend to reduce the plaintiff's claim or demand for damages.

The *Iowa Code*, § 2659, provides that each counterclaim must be stated in a distinct count or division and must be one, first, when the action is founded on contract, a cause of action also arising on contracts or ascertained by the decision of a court; second, a cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contracts or transactions set forth in the petition or connected with the subject of the action; third, any new matter constituting a cause of action in favor of the defendant, or all of the defendants, if more than one, against the plaintiff, or all of the plaintiffs, if more than one, and which the defendant or defendants might have brought when suit was commenced or which was then held either matured, or not if matured, when so pleaded.

The *California* statute belonging to the first group was amended in 1874 as follows: "When cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other. *California Code Civ. Proc.*, § 440.

action on behalf of the defendant against the plaintiff¹ existing in favor of the defendant,² and against the plaintiff,³ or, in a proper

1. *Vassear v. Livingston*, 13 N. Y. 248; *Cragin v. Lovell*, 88 N. Y. 258; *Van Valen v. Lapham*, 13 How. Pr. (N. Y.) 240, *affirmed* 5 Duer (N. Y.) 689; *Ward v. Cornegus*, 2 How. Pr. N. S. (N. Y.) 428; *Mattoon v. Baker*, 24 How. Pr. (N. Y.) 329; *Waddell v. Darling*, 51 N. Y. 327; *Chamboret v. Cagney*, 2 Sweeny (N. Y.) 378; *Tyler v. Willis*, 33 Barb. (N. Y.) 327; *Pierson v. Safford*, 30 Hun (N. Y.) 521; *Elliott v. Gibbons*, 30 Barb. (N. Y.) 498, *affirmed* 31 N. Y. 67; *Barnes v. Gilmore*, 6 Civ. Pro. Rep. (N. Y.) 286; *Canaday v. Steger*, 55 N. Y. 452; *Linn v. Rugg*, 19 Minn. 181; *Jones v. Moore*, 42 Mo. 418; *Holzbauer v. Heine*, 37 Mo. 443; *McPherson v. Meek*, 30 Mo. 345; *Bank v. Weyand*, 30 Ohio St. 126; *Hill v. Butler*, 6 Ohio St. 207; *Matteson v. Ellsworth*, 28 Wis. 254; *Briggs v. Seymour*, 17 Wis. 255; *Greve v. Schweitzer*, 36 Wis. 554; *Muth v. Frost*, 68 Wis. 425; *Dolph v. Rice*, 21 Wis. 590.

When the defendant has against the plaintiff a cause of action, upon which he might have maintained a suit, such cause of action is a counterclaim, and the parties then have cross-demands. When such a cross-demand is interposed by a defendant, there are in effect two causes of action before the court for trial in the same suit; both parties are, in some sense, plaintiffs, and both defendants. The answer containing the cross-demand, called a counterclaim, is, in pleading, treated like a complaint by the defendant against the plaintiff, and the reply to such an answer like an answer to a complaint. Each party claims affirmative relief against the other. *Davidson v. Remington*, 12 How. Pr. (N. Y.) 310.

Where anything remains to be done under an executory contract, it cannot be a subject of set-off. It must be executed, or all that the party is required to do must be done before it can be enforced for any purpose, whether by way of set-off or otherwise. *Schleffelin v. Hawkins*, 14 Abb. Pr. (N. Y.) 112.

Matters proper to be proved on an accounting do not constitute a counterclaim in an action for a dissolution of partnership and for an accounting. *Cook v. Jenkins*, 79 N. Y. 575.

In the absence of fraud in an action to foreclose a mortgage for purchase money, the mortgagor having cove-

nants of title in his deed from the mortgagee, cannot set up damages for defects in the title as a counterclaim. *Hill v. Butler*, 6 Ohio St. 207.

A plea of payment is not a counterclaim. *Holzbauer v. Heine*, 37 Mo. 443; *Union Nat. Bank v. Carr*, 49 Iowa 359; *Stacy v. Stichton*, 9 Iowa 399; *Kirk v. Woodbury Co.*, 55 Iowa 190.

Taxes on real estate, paid by the occupant or tenant, constitute a good set-off in an action against such occupant or tenant for use and occupation, but the value of improvements voluntarily made do not. *Grossman v. Lauber*, 29 Ind. 618.

2. *Davidson v. Remington*, 12 How. Pr. (N. Y.) 310; *Cabot v. Ensign*, 13 Civ. Pro. Rep. (N. Y.) 89; *Metropolitan Trust Co. v. Tonawanda, etc., R. Co.*, 43 Hun (N. Y.) 521; *Ives v. Goddard*, 1 Hilt. (N. Y.) 434; *Chaffee v. Cox*, 1 Hilt. (N. Y.) 78; *Beers v. Waterbury*, 8 Bosw. (N. Y.) 396; *Paine v. Hunt*, 40 Barb. (N. Y.) 75; *Merrick v. Gordon*, 20 N. Y. 93; *Tyler v. Willis*, 33 Barb. (N. Y.) 327; *Delafield v. DeGrauw*, 9 Bosw. (N. Y.) 1; *Exline v. Lowery*, 46 Iowa 556; *Hill v. Golden*, 16 B. Mon. (Ky.) 551; *Clarke v. Finnell*, 16 B. Mon. (Ky.) 329; *Oberholtzer v. Heist* (Pa. 1889), 16 Atl. Rep. 804; *Holzbauer v. Heine*, 37 Mo. 443; *Hook v. White*, 36 Cal. 299; *Briggs v. Seymour*, 17 Wis. 255; *Matteson v. Ellsworth*, 28 Wis. 254; *Resch v. Senn*, 31 Wis. 138; *Hiner v. Newton*, 30 Wis. 640; *Dolph v. Rice*, 21 Wis. 590.

Where a stock broker, who has been holding stock on a customer's account for several years, as partial security for a debt, is sued by the customer on that and other transactions, he is not obliged to realize on the stock before counterclaiming for the whole amount of the indebtedness existing at the time. *Mattern v. Sage*, 9 N. Y. Supp. 527.

Where the plaintiff sues for the purchase money of a life estate in land, whereof he is tenant in common with the defendant and others, of the reversion in fee, the defendant cannot set up a counterclaim for damage done by the plaintiff to the inheritance in cutting timber from the land and committing other acts of waste, during the continuance of the life estate and before the sale thereof to the defendant. *Devries v. Warren*, 82 N. Car. 356.

3. *Davidson v. Remington*, 12 How.

case, against the person whom he represents,¹ upon which he might have sued the plaintiff and obtained affirmative relief in a separate action.²

Pr. (N. Y.) 310; Metropolitan Trust Co. v. Tonawanda, etc., R. Co., 43 Hun (N. Y.) 521; Van De Sande v. Hall, 13 How. Pr. (N. Y.) 458; Bissell v. Pearse, 21 How. Pr. (N. Y.) 130; Chaffee v. Cox, 1 Hilt. (N. Y.) 78; New York Ice Co. v. Parker, 8 Bosw. (N. Y.) 688; Rogers v. King, 66 Barb. (N. Y.) 495; Merrick v. Gordon, 20 N. Y. 93; Paine v. Hunt, 40 Barb. (N. Y.) 75; Ogilvie v. Lightstone, 1 Daly (N. Y.) 129; Pittman v. Mayor, etc., of N. Y., 3 Hun (N. Y.) 370; *affirmed* 62 N. Y. 637; Himmelmann v. Reay, 38 Cal. 163; McCrary v. Deming, 38 Iowa 527; Parker v. Cochrane, 11 Colo. 363; Kent v. Cantrall, 44 Ind. 452; Challiss v. Wylie, 35 Kan. 506; Holzbauer v. Heine, 37 Mo. 443; Matteson v. Ellsworth, 28 Wis. 254; Risch v. Senn, 31 Wis. 138; McConihe v. Hollister, 19 Wis. 269; Plimpton Mfg. Co. v. U. S., 15 Ct. of Cl. 14; and see Van De Sande v. Hall, 13 How. Pr. (N. Y.) 458; Boyle v. Youmans (Supreme Ct. 1890), 9 N. Y. Supp. 14.

A defendant who is sued for breach of an agreement to do certain acts necessary to fix the liability of a third party on a contract with the plaintiff, cannot avail himself of a set-off existing in favor of the third party. *Reed v. Darlington*, 19 Iowa 349.

In an action to recover money claimed to be due, the defendant cannot counterclaim, the value of the use and occupation of premises claimed by him which the defendant entered upon and holds under a third person, and in hostility to the defendant's alleged title. *Quin v. Smith*, 49 Cal. 163.

1. Metropolitan Trust Co. v. Tonawanda, etc., R. Co., 43 Hun (N. Y.) 521; Pendergast v. Greenfield, 40 Hun (N. Y.) 494; Merrill v. Green, 55 N. Y. 270; Shipman v. Lansing, 25 Hun (N. Y.) 290; Atwater v. Spader, 12 N. Y. St. Rep. 506. And see Challiss v. Wylie, 35 Kan. 506; Judson v. Stilwell, 26 How. Pr. (N. Y.) 513.

Stockholders who have made advances or incurred liabilities for the benefit of the corporation may, when called upon to respond to statutory liability, set off such advances or liabilities in extinguishment thereof, as they are equally entitled with any other creditors to be indemnified from the funds of the company, or from the

individual liability of the stockholders, for the indebtedness due them. *Remington v. King*, 11 Abb. Pr. (N. Y.) 278; *Briggs v. Penniman*, 8 Cow. (N. Y.) 387; 18 Am. Dec. 454; and see *Tallmadge v. Fishkill Iron Co.*, 4 Barb. (N. Y.) 182; *Wheeler v. Millar*, 90 N. Y. 353; *Christensen v. Colby*, 43 Hun (N. Y.) 362.

But a stockholder in a corporation cannot set off a debt due him by the corporation, against his statutory liability as such stockholder, where his claim against the corporation consists of a judgment assigned to him, for which he has never paid. Such a defense being an equitable one, it is essential to its maintenance that the defendant and the creditor, by whom he is sued, stand upon an equality, and that is not the case where it is simply shown that he became possessed of the judgment. *Bulkley v. Whitcomb*, 49 Hun (N. Y.) 290.

One having insurance in a mutual insurance company cannot set up as a counterclaim, a demand for a loss covered by the insurance in an action against him, brought by a receiver or an assignee of the company, for insurance premiums or otherwise, inasmuch as he occupies the double relation of debtor and creditor; and being bound to make compensation, as well as to receive it, it would be inequitable to allow him, when the funds of the company are not adequate to pay all the losses, to set off his entire demand. *New Amsterdam Sav. Bank v. Tartter*, 4 Abb. N. Cas. (N. Y.) 215. And see *Lawrence v. Nelson*, 21 N. Y. 158; *Butterworth v. Fox*, 15 How. Pr. (N. Y.) 515.

2. *Belleau v. Tompson*, 33 Cal. 495; *Conner v. Winton*, 7 Ind. 523; *Lovejoy v. Robinson*, 8 Ind. 399; *Reed v. Chubb*, 9 Iowa 178; *Quin v. Smith*, 49 Cal. 163; *Barker v. Walbridge*, 14 Minn. 469; *Swift v. Fletcher*, 6 Minn. 550; *Englebrecht v. Rickert*, 14 Minn. 140; *Clinton v. Eddy*, 1 Lans. (N. Y.) 61; 54 Barb. (N. Y.) 54; *Weeks v. Pryor*, 27 Barb. (N. Y.) 79; *Berdell v. Johnson*, 18 Barb. (N. Y.) 559; *People v. Corner*, 59 Hun (N. Y.) 299; *Nichols v. Boerum*, 6 Abb. Pr. (N. Y.) 290; *Duffy v. Duncan*, 35 N. Y. 186; *Cook v. Jenkins*, 79 N. Y. 575; *Coakley v. Mahar*, 36 Hun (N. Y.) 157; *Levy v.*

It must belong to the defendant at the time of the commencement of the action,¹ and must be then due and payable, or enforceable by action;² and it must, when established, in some way

Loeb, 85 N. Y. 365; and see *Mansfield v. Beard*, 82 N. Y. 60; *Senear v. Woods*, 74 N. Y. 615; *Gates v. Smith*, 2 Minn. 30; *Reed v. Tobacco Warehouse Co.*, 2 Mo. App. 82; *Blakely v. Boruff*, 71 Ind. 93; *Nill v. Comparet*, 15 Ind. 243; *Bogardus v. Parker*, 7 How. Pr. (N. Y.) 303; *Resch v. Senn*, 31 Wis. 138; *Jarvis v. Peck*, 19 Wis. 74; *Kingston Bank v. Gay*, 19 Barb. (N. Y.) 459; *Pacific Express Co. v. Malin*, 132 U. S. 53; *Benkard v. Babcock*, 2 Robt. (N. Y.) 175.

An express verbal contract for the sale of real estate, being void under the Statute of Frauds, cannot be pleaded by way of counterclaim or cross-action. *Ryan v. Dunphy*, 4 Mont. 342; 47 Am. Rep. 355.

Where by law a note given on a usurious contract of loan is valid to secure the repayment of the principal sum loaned, and no more, an answer to a complaint upon a note for money borrowed, which alleges that the contract was usurious, and that a certain sum (less than the principal) has been "paid on the note," does not set up a counterclaim. *Schmitz v. Schmitz*, 19 Wis. 207; 88 Am. Dec. 681.

In an action to foreclose a mortgage, facts set up in the answer of one of the defendants, a lien creditor subsequent to the mortgage upon which he claims, that plaintiffs should be required to exhaust other security held for debt, before resorting to the mortgaged property, is not a counterclaim requiring a reply. *First Nat. Bank v. Kidd*, 20 Minn. 234.

Waiver of Counterclaim.—It would appear that the right to interpose a counterclaim can be waived only by such acts as will estop the party in whose favor it exists from maintaining an action upon the cause of action of which it consists. See *Cook v. Soule*, 56 N. Y. 420; *Nottebohm v. Maas*, 3 Robt. (N. Y.) 249; *Schweickhart v. Stuewe*, 71 Wis. 1; *Chatfield v. Simonson*, 92 N. Y. 209.

Where premises are sold, and the lease thereof is assigned by the seller to the purchaser, the tenants continuing to occupy, in an action against them for rent accruing subsequent to their assent to occupy as tenants of the purchaser, a debt due to them prior to

the assignment of the lease from their lessor, cannot be interposed as a counterclaim. *Peckham v. Leary*, 6 Duer (N. Y.) 494.

Where judgment absolute is rendered against a defendant, in accordance with his stipulation, given on appeal from an order granting to plaintiff a new trial, his right to affirmative relief is lost, and he cannot enter judgment for the amount found due him. *Rust v. Hauselt*, 59 How. Pr. (N. Y.) 389; and see *People v. Denison*, 59 How. Pr. (N. Y.) 157.

An agreement to waive a counterclaim is valid and binding. *Gutchess v. Daniels*, 49 N. Y. 605.

1. *Chambers v. Lewis*, 11 Abb. Pr. (N. Y.) 200; *Van Valen v. Lapham*, 13 How. Pr. (N. Y.) 240, affirmed in 5 Duer (N. Y.) 689; *Vassear v. Livingston*, 13 N. Y. 248; *Heidenheimer v. Wilson*, 31 Barb. (N. Y.) 636; *Gage v. Angell*, 8 How. Pr. (N. Y.) 335; *Chamboret v. Cagney*, 2 Sweeney (N. Y.) 378; *Mayo v. Davidge*, 44 Hun (N. Y.) 342; *Belknap v. McIntyre*, 2 Abb. Pr. (N. Y.) 366; *Martin v. Kunzmüller*, 37 N. Y. 403; *Enter v. Quesse*, 30 S. Car. 126; *Rickard v. Kohl*, 22 Wis. 506.

The law relating to counterclaim in force at the time of the commencement of the action governs, though pending the action the law is changed. *Jordan v. National Shoe, etc., Bank*, 74 N. Y. 467; 30 Am. Rep. 319.

In *Van Valen v. Lapham*, 13 How. Pr. (N. Y.) 240, the court, by Bosworth, J., said: "I should require very clear and precise language to satisfy me that the legislature intended to provide that a defendant, after he was sued, might purchase a note or account against the plaintiff, and set it up to defeat the action."

2. *Rice v. O'Connor*, 10 Abb. Pr. (N. Y.) 362; *Van Valen v. Lapham*, 13 How. Pr. (N. Y.) 240; affirmed in 5 Duer (N. Y.) 689; *Chamboret v. Cagney*, 2 Sweeney (N. Y.) 378; *Wells v. Stewart*, 3 Barb. (N. Y.) 40; *Duncan v. Stanton*, 30 Barb. (N. Y.) 533; *Richards v. La Tourette*, 53 Hun (N. Y.) 623; *Moody v. Steele*, 11 Civ. Pro. Rep. (N. Y.) 203; *Swords v. Blake*, 3 Edw. Ch. (N. Y.) 112; *Mayo v. Davidge*, 44 Hun (N. Y.) 342; *Reed v. Chubb*, 9 Iowa 178; *Tessier v. Engle-*

qualify, diminish, or defeat the recovery to which the plaintiff is otherwise entitled;¹ or it must have arisen out of, or been connected with, the transaction which is the foundation of the plaintiff's claim or subject-matter of the action.² The relation or connection between the demands should be such that the success of the prosecution of the one inevitably defeats or diminishes the

hart, 18 Neb. 167; *Orton v. Noonan*, 29 Wis. 541; *Rickard v. Kohl*, 22 Wis. 506.

Where the affidavit for the writ of attachment is filed with the petition in the principal action, and the writ is sued out at the commencement thereof, if it is wrongfully sued out, the damages sustained by the defendant therefrom, constitutes a claim against the plaintiff existing at the commencement of the action and may be set off against his demand; but if the writ is sued out by separate petition, filed after the commencement of the principal suit, damages sustained by it cannot be pleaded as an offset. *Reed v. Chubb*, 9 Iowa 178.

In *Shannon v. Wilson*, 19 Ind. 112, it was held that it is not necessary that matter of set-off should be due at the commencement of the action in which it is pleaded, but that it is available if it is due when offered in evidence on the trial.

Contra When Connected with Subject of Action.—Where a claim arising out of the contract or transaction, upon which the action was brought, exists against the plaintiff, which would be a proper counterclaim in the action, defendant may be allowed to set it up by way of supplemental answer, even though the claim accrued subsequent to the commencement of the action. *Howard v. Johnston*, 82 N. Y. 271. And see *Acer v. Hotchkiss*, 97 N. Y. 395; *Willis v. Chipp*, 9 How. Pr. (N. Y.) 568.

1. *National F. Ins. Co. v. McKay*, 21 N. Y. 191; *Leavenworth v. Packer*, 52 Barb. (N. Y.) 132; *Mattoon v. Baker*, 24 How. Pr. (N. Y.) 329; *Waddell v. Darling*, 51 N. Y. 327; *Heidelberg v. Kilpatrick*, 3 Civ. Pro. Rep. (N. Y.) 209; *Pendergast v. Greenfield*, 40 Hun (N. Y.) 494; *Grange v. Gilbert*, 44 Hun (N. Y.) 9; *Barnes v. Gilmore*, 6 N. Y. Civ. Pro. 286; *Shipman v. Lansing*, 25 Hun (N. Y.) 290; *Williams v. Williams* (Supreme Ct.), 11 N. Y. Supp. 753; *O'Daugherty v. Remington*, 1 N. Y. St. Rep. 523; *Lipman v. Jackson Architectural Iron*

Works, 128 N. Y. 58; *Lemon v. Trull*, 13 How. Pr. (N. Y.) 248; *Agate v. King*, 17 Abb. Pr. (N. Y.) 159; *Moffatt v. Van Doren*, 4 Bosw. (N. Y.) 609; *Dietrich v. Koch*, 35 Wis. 618.

A counterclaim to be available to a party must afford him protection in some way against the plaintiff's demand for judgment, either in whole or in part. It must present an answer to the plaintiff's demand for relief; must show that he is not entitled, according to the law, or under the application of just principles of equity, to judgment in his favor, as or to the extent claimed in the complaint. *Mattoon v. Baker*, 24 How. Pr. (N. Y.) 329.

If a person be sued on a promissory note, he cannot set up by way of defense or counterclaim, a contract with the plaintiff for the purchase of lands, and an alleged payment of the purchase price, and claim a decree in the action for specific performance. *Mattoon v. Baker*, 24 How. Pr. (N. Y.) 329.

In *Missouri*, it is held that a cause of action which wholly defeats the demand of the plaintiff cannot be a counterclaim. *Jones v. Moore*, 42 Mo. 413.

2. *Waddell v. Darling*, 51 N. Y. 327; *Mattoon v. Baker*, 24 How. Pr. (N. Y.) 329; *Lazarus v. Heilman*, 11 Daly (N. Y.) 189; 11 Abb. N. Cas. (N. Y.) 93; *Grange v. Gilbert*, 10 Civ. Pro. Rep. (N. Y.) 98; *Bernheimer v. Willis*, 11 Hun (N. Y.) 16.

A cause of action for the specific performance of a contract in reference to real estate arises upon contract, but it cannot be set up as a counterclaim in a contract action, unless it grew out of, or is connected with the cause of action alleged in the complaint. *Waddell v. Darling*, 51 N. Y. 327. And see *Moser v. Cochrane*, 107 N. Y. 435.

In an action to recover possession of a pension certificate, attempted to be pledged in contravention of the act of Congress, the claim for the indebtedness sought to be secured by such pledge cannot be set off by way of

recovery upon the other,¹ or such as to render it just and equitable that the controversy between the parties should be settled in one action by one litigation.²

A single judgment in an action is alone contemplated which shall determine the substantial rights of the parties.³ Where there is no claim on the part of the plaintiff, there cannot, strictly and

counterclaim. *Moffatt v. Van Doren*, 4 Bosw. (N. Y.) 609.

1. *Grange v. Gilbert*, 44 Hun (N. Y.) 9; *Hinkle v. Margerum*, 50 Ind. 240; and see *Mattoon v. Baker*, 24 How. Pr. (N. Y.) 329; *Agate v. King*, 17 Abb. Pr. (N. Y.) 159; *Woodruff v. Garner*, 27 Ind. 4; 89 Am. Dec. 477; *Tabor v. Mackkee*, 58 Ind. 290.

An answer alleging title and a right to possession is a valid counterclaim in an action to quiet title. *Jarvis v. Peck*, 19 Wis. 74; *Eastman v. Linn*, 20 Minn. 433; *Tabor v. Mackkee*, 58 Ind. 290.

To a complaint on promissory notes, a pleading alleging facts arising out of or connected with the cause of action, as a foundation of a claim against the plaintiff to enjoin the collection of the notes, is a counterclaim. *Hinkle v. Margerum*, 50 Ind. 240.

In a proceeding against property as to foreclose a mortgage or other lien in which no personal judgment is asked, a money demand is not a proper counterclaim. *Carpenter v. Leonard*, 5 Minn. 155; *Agate v. King*, 17 Abb. Pr. (N. Y.) 159.

In an action for the recovery of the possession of property, and for damages for its detention, the counterclaim for services may be allowed upon the ground that when established it diminishes, and in whole or part defeats the plaintiff's claim for damages, even though it does not diminish or defeat his claim for possession of the property; and the fact that no damages are allowed, does not render the counterclaim inadmissible. *Lapham v. Osborne*, 20 Nev. 168.

Where the one cause of action can, in no legal sense, qualify or affect the other, and where fully to hear and determine, either will require no reference to or knowledge of the other, the one cause cannot be set up as a counterclaim in an action upon the other, and the fact that they resulted from the existence of the same power over the property concerned, does not in any way unite or identify them. *Bradhurst v. Townsend*, 11 Hun (N. Y.) 104.

2. *Carpenter v. Manhattan L. Ins. Co.*, 93 N.Y. 552; *Lapham v. Osborne*, 20 Nev. 168; and see *Conaway v. Carpenter*, 58 Ind. 477.

In an action against a surety to compel the reconveyance of property conveyed to him, for the purpose of securing him against his liability as surety, he may set up that he had purchased it at a certain price, and had been compelled to pay off the debts and defalcations of his principal to an amount exceeding the value of such land as a counterclaim. *Teague v. Fowler*, 56 Ind. 569.

In an action brought by a purchaser of real estate to recover a portion of the purchase price paid by him, upon the ground of the defect in title, an answer admitting the contract and averring readiness and tender of a deed and offer to perform, and asking for a specific performance, is a good counterclaim. *Moser v. Cochrane*, 107 N. Y. 35.

A demand for a specific performance of a contract of sale of real estate may be set up as a counterclaim in an action by the heirs of the seller to recover the land. *Fisher v. Moolick*, 13 Wis. 321; and see *Ingles v. Patterson*, 36 Wis. 373.

3. *Pomeroy on Rem.* (2d ed.) 786, § 747.

Foreclosure Actions.—A party to an action to foreclose a mortgage, against whom either a personal judgment or one which may operate to transfer his estate in the land is sought, has a right to interpose a counterclaim as a defense to the action. *Seligman v. Dudley*, 14 Hun (N. Y.) 186; *Lathrop v. Godfrey*, 3 Hun (N. Y.) 739; *Richmond v. Lattin*, 64 Cal. 273; *Merritt v. Gouley*, 58 Hun (N. Y.) 372; *Hunt v. Chapman*, 51 N. Y. 555; *Allen v. Shackelton*, 15 Ohio St. 145.

But one sued upon contract cannot set up by way of counterclaim an action for the foreclosure of a mortgage against the plaintiff if he is not personally liable for the mortgage debt. *Mattoon v. Baker*, 24 How. Pr. (N. Y.) 329.

In *Humbert v. Brisbane*, 25 S. Car.

logically speaking, be a counterclaim;¹ and matter which shows that the plaintiff never had any cause of action against the defendant, which the law would aid him in enforcing is no counterclaim,² a counterclaim being a cross-action to enforce a legal or equitable set-off containing matter which may be used not only to defeat but to sustain an action.³

The allowance of a demand as a counterclaim depends upon the nature or state of the demand, however, and not upon any especial rule or regulation touching the situation of the debtor or creditor.⁴ If the debt has accrued due and payable, and it is

506, it was held that a defendant cannot counterclaim for an eviction from a part of the mortgaged premises in a suit for the foreclosure of an equitable mortgage.

1. *Bellinger v. Craigie*, 31 Barb. (N. Y.) 534; *Davidson v. Remington*, 12 How. Pr. (N. Y.) 310; *Kneedler v. Sternberg*, 10 How. Pr. (N. Y.) 67; *Steele v. Etheridge*, 15 Minn. 501; *Mason v. Hayward*, 3 Minn. 182; *Whalon v. Aldrich*, 8 Minn. 348; *Koempel v. Shaw*, 13 Minn. 488; *Dove v. Hayden*, 5 Oregon 501.

A counterclaim admits the plaintiff's demand, but seeks to reduce or extinguish it by legal or equitable offset. *Bellinger v. Craigie*, 31 Barb. (N. Y.) 534.

A defendant by pleading a counterclaim for damages for the breach of a contract, which is connected with the subject of the action, admits a claim against him on the part of the plaintiff, which he avoids by his counterclaim; and by so pleading he tenders an issue upon all the equities existing between him and the plaintiff arising out of the contract, and must abide by that issue, whether he be benefited or prejudiced thereby. *Koempel v. Shaw*, 13 Minn. 488; *Mason v. Heyward*, 3 Minn. 186; *Whalon v. Aldrich*, 8 Minn. 348.

Where the defendant sets up a counterclaim in pleading, the presumption is that the plaintiff has a good cause of action against him, which he proposes to meet by establishing another cause of action against the plaintiff. *Holzbauer v. Heine*, 37 Mo. 443.

2. *Prouty v. Eaton*, 41 Barb. (N. Y.) 409; *Barthet v. Elias*, 2 Abb. N. Cas. (N. Y.) 364; *True v. Triplett*, 4 Metc. (Ky.) 57; *Nichols v. Boerum*, 6 Abb. Pr. (N. Y.) 290; *Caryl v. Williams*, 7 Lans. (N. Y.) 416; *Dillaye v. Niles*, 4 Abb. Pr. (N. Y.) 253. And see *Equitable L. Assurance Soc. v. Cuyler*, 75 N. Y. 511; *Lash v. McCormick*, 17

Minn. 403; *Holzbauer v. Heine*, 37 Mo. 443; *Jones v. Moore*, 42 Mo. 413; *Jarvis v. Peck*, 19 Wis. 74.

But although the matter pleaded may constitute a complete defense, it may also be pleaded as a counterclaim if it constitutes a cause of action in favor of the defendant and against the plaintiff, and has the other requisites of a counterclaim. *Griffin v. Jorgenson*, 22 Minn. 92.

The right of a defendant in an action of claim and delivery to a return of the property replevied, and to damages for the taking and detention of the same in such action, is not a cause of action which can constitute a counterclaim therein. *Sylte v. Nelson*, 26 Minn. 105.

Usury.—The defense of usury is not a counterclaim within the meaning of the *New York Code*. *Prouty v. Eaton*, 41 Barb. (N. Y.) 409; *Equitable L. Assurance Co. v. Cuyler*, 75 N. Y. 511.

But under the *New York Revised Statutes*, a party, who for any loan or forbearance of money, shall pay or deliver any greater sum than is allowed by law, may set up such payment as a counterclaim in an action for the recovery of the money loaned. *Pixley v. Ingram*, 53 Hun (N. Y.) 93; *National Bank v. Lewis*, 75 N. Y. 516; 31 Am. Rep. 484.

3. See *Chamboret v. Cagney*, 10 Abb. Pr. N. S. (N. Y.) 31; 41 How. Pr. (N. Y.) 125; *Williams v. Willis*, 15 Abb. Pr. N. S. (N. Y.) 11; *Feltretch v. McKay*, 47 N. Y. 427; *Gleason v. Moen*, 2 Duer (N. Y.) 639; *Ogden v. Coddington*, 2 E. D. Smith (N. Y.) 317; *Bellinger v. Craigie*, 31 Barb. (N. Y.) 534; *Boil v. Simms*, 60 Ind. 162; *Slone v. Slone*, 2 Metc. (Ky.) 339.

4. *Taylor v. Mayor, etc., of N. Y.*, 82 N. Y. 10; *Clark v. Story*, 29 Barb. (N. Y.) 295. But see *Guilford v. Cooley*, 58 N. Y. 116.

the duty of the debtor to pay, and the right of the creditor to have payment, though he is disqualified to maintain an action to enforce his demand as plaintiff, it would not affect his right to set off the debt as defendant at the action of another.¹

The right of the plaintiff to claim, and the right of the defendant to counterclaim upon any given or supposed facts in controversy, must be reciprocal;² and a defendant cannot avail himself of a counterclaim which the court before which the action is pending has no jurisdiction to try and determine.³ A counterclaim that is inconsistent with the defense to the action,

1. *Taylor v. Mayor, etc.*, of N. Y., 82 N. Y. 10; *Clark v. Story*, 29 Barb. (N. Y.) 295; *Wells v. Henshaw*, 3 Bosw. (N. Y.) 625; *Cornell v. Donovan*, 14 N. Y. St. Rep. 687. And see *Mader v. Lawrence*, 49 Hun (N. Y.) 360.

A statutory prohibition against bringing actions upon a justice's judgment, within a prescribed time after its rendition, does not prevent the holder of a judgment from using it as a set-off or counterclaim in an action against him, particularly if he is a mere assignee, and not the party in whose favor the judgment was rendered. *Clark v. Story*, 29 Barb. (N. Y.) 295.

2. *Xenia Bank v. Lee*, 2 Bosw. (N. Y.) 694; 7 Abb. Pr. (N. Y.) 372; *Mayor, etc., of N. Y. v. Parker Vein Steamship Co.*, 12 Abb. Pr. (N. Y.) 301; *Jordan v. National Shoe, etc., Bank*, 74 N. Y. 467; 30 Am. Rep. 319; *Taylor v. Mayor, etc.*, of N. Y., 82 N. Y. 10; *National F. Ins. Co. v. McKay*, 21 N. Y. 191; *Agate v. King*, 17 Abb. Pr. (N. Y.) 159; *Knour v. Dick*, 14 Ind. 20; *Blankenship v. Rogers*, 10 Ind. 333; *Johnson v. Kent*, 9 Ind. 252; *Booe v. Watson*, 13 Ind. 387; *Reed v. Coale*, 4 Ind. 283; *M'Dowell v. Tate*, 1 Dev. (N. Car.) 249.

If any two or more persons are mutually indebted in any manner whatever, and one of them commences an action against the other, one debt may be set off against the other, although such debts are of a different nature. *McAdow v. Ross*, 53 Mo. 199.

3. *Cragin v. Lovell*, 88 N. Y. 258; *Emery v. St. Louis, etc., R. Co.*, 77 Mo. 339; *Wiggins v. Guthrie*, 101 N. Car. 661; *State v. Smith*, 14 Wis. 564.

The sending of a cause to the county court upon the defendant's application for a change of venue, when the amount in litigation is greater than that over which such court has juris-

diction, does not affect a discontinuance of the defendant's counterclaim, when it does not appear that his petition indicated to what court the cause should be sent. *State v. Smith*, 14 Wis. 564.

Under *Texas Rev. Stat.*, art. 316, in an action in a justice's court, to which a counterclaim has been filed, and judgment rendered in the whole case, and an appeal taken to a district court, the party filing the counterclaim will not be allowed in the latter court to enlarge it, by adding items of damages not embraced in the pleadings in the justice's court, which amount to a sum greater than the justice's court would have jurisdiction of. *Bowdon v. Gilbert*, 67 Tex. 689.

In *Wisconsin*, however, the circuit court has power to allow an amendment of the answer setting up a counterclaim, although amendment has been refused by the justice. *Richardson v. Chynoweth*, 26 Wis. 656. And see *Heath v. Heath*, 31 Wis. 223.

In *Heigle v. Willis*, 50 Hun (N. Y.) 588, it was held that no limit is imposed upon the amount of a counterclaim which a defendant may set up in a justice's court, and it cannot be objected that such a counterclaim exceeds the amount of a justice's jurisdiction.

In *Harris v. Simpson*, 50 Ark. 422, it was held that in an action in a justice's court upon contract, it is no objection to a counterclaim based on misrepresentations, that such claim constitutes an action of tort, over which the justice had no jurisdiction, as such defense may be regarded as a plea of failure of consideration; or, if demanding more than what is due plaintiff, as an action on an implied promise to repay sums wrongfully received.

An amendment to a counterclaim originally setting up a cause of action for a sum within the jurisdiction of the

which is successfully maintained, cannot be allowed,¹ though a defendant may put his defense upon distinct and even upon inconsistent grounds.²

A counterclaim must be a complete cause of action within the jurisdiction where it is asserted,³ and must not be barred by the Statute of Limitations at the time of the commencement of the action in which it is set up.⁴ Subject to these qualifications, a counterclaim may be either for liquidated or for unliquidated

court raising it to a sum beyond that jurisdiction cannot be objected to after the parties have gone to trial and procured a judicial determination of the cause without objection. *Jackson v. Swope*, 49 Ind. 388.

1. *Walker v. Millard*, 29 N. Y. 375; *Fellerman v. Dolan*, 7 Abb. Pr. (N. Y.) 395, note; *McAdow v. Ross*, 53 Mo. 199; *Fugate v. Pierce*, 49 Mo. 441; *Dove v. Hayden*, 5 Oregon 500; and see *Cohn v. Husson*, 66 How. Pr. (N. Y.) 150.

Where a defendant interposes the plaintiff's breach of a contract, in avoidance of his own obligation, and procures a ruling in his favor, he is in no situation to enforce the contract against the other party in any particular, especially in the same action, and he cannot therefore recover upon a counterclaim based upon the breach of a covenant contained in such contract. *Walker v. Millard*, 29 N. Y. 375.

Where in an action to recover the value of work done and materials furnished by the plaintiff to the defendant in the alteration of a building, the defendant counterclaimed the expenses of taking down and rebuilding a wall, alleging that the defect was caused by the negligence of the plaintiff, and the court excluded evidence of the acceptance, it was held that the exclusion was harmless, as the finding of the jury for the plaintiff negated the counterclaim. *Hine v. Meyer*, 61 N. Y. 171.

A defendant need not deny the allegations of damage in the complaint in order to entitle him to prove a counterclaim set up in his answer for a breach by plaintiff of a provision of the contract sued upon. *Meissner v. Brennan*, 15 N. Y. Supp. 671.

2. *Goodwin v. Wertheimer*, 99 N. Y. 149; *Bruce v. Burr*, 67 N. Y. 237; *Ross v. Duffy*, 12 N. Y. St. Rep. 584.

3. *Cragin v. Lovell*, 88 N. Y. 258; *Bennett v. McCrocklin*, 3 Metc. (Ky.) 322. But see *Vail v. Jones*, 31 Ind. 467.

The *Indiana* rule is that the defendant may set up such counterclaim as he may have without regard to the location of the subject-matter. *Vail v. Jones*, 31 Ind. 467.

Where a court of equity has jurisdiction of the parties it may compel them to do equity in relation to lands located without its jurisdiction. *Vail v. Jones*, 31 Ind. 467; *Gardner v. Ogden*, 22 N. Y. 327; 78 Am. Dec. 192.

4. *DeLavallette v. Wendt*, 75 N. Y. 578; 31 Am. Rep. 494; *Taylor v. Mayor*, etc., of N. Y., 82 N. Y. 10; *Van Alen v. Schermerhorn*, 14 How. Pr. (N. Y.) 287; *Trumble v. Brown*, 71 N. Car. 513. And see *Heath v. Heath*, 31 Wis. 223; *Von Sachs v. Kretz*, 10 Hun (N. Y.) 95; *Williams v. Willis*, 15 Abb. Pr. N. S. (N. Y.) 11.

If the counterclaim is not barred at the time of the commencement of the action, it is sufficient even though the statutory time elapses before the demand is actually set up as a defense in the action. *Bumble v. Brown*, 71 N. Car. 513.

Where the right to damages resting in the defendant arises out of a partial failure of the plaintiff to perform the contract which is the foundation of his right to recover and that remains unaffected by the Statute of Limitations, it follows that it must be in a like condition as to the defendants. *Herbert v. Day*, 33 Hun (N. Y.) 461. And see *Maders v. Lawrence*, 49 Hun (N. Y.) 360.

The assignee of a bankrupt stands in the position of trustee for his creditors, and the Statute of Limitations does not run against their claims against the estate of the bankrupt, not barred at the time of the adjudication. *Von Sachs v. Kretz*, 72 N. Y. 548. And see *Minot v. Thacher*, 7 Met. (Mass.) 348; 41 Am. Dec. 444.

In *Iowa* in an action to foreclose a mortgage, the defendant may plead, in set-off, an account against a firm of which plaintiff is a member; and the

damages;¹ even a demand due upon an unliquidated and unsettled partnership account demanding an accounting, and the application of the balance found due in extinguishment of the plaintiff's claim being permitted as a general rule in contract actions.² But the plea to be good must show a dissolution of the partnership, and a balance due the defendant growing out of the entire partnership transactions.³ It may as well consist of a right to equitable relief as a cause of action on which a recovery can be had at law,⁴ and may be set up as well in an equitable

Statute of Limitations is not a bar to the set-off. *Allen v. Maddox*, 40 Iowa 124.

In *Indiana* a set-off may be pleaded to the amount of any cause of action, though it is barred by the Statute of Limitations. *Fankboner v. Fankboner*, 20 Ind. 62; *Fox v. Barker*, 14 Ind. 309.

1. *Schubart v. Harteau*, 34 Barb. (N. Y.) 447; *Xenia Bank v. Lee*, 2 Bosw. (N. Y.) 694; *Williams v. Wieting*, 3 Thomp. & C. (N. Y.) 439; *Lignot v. Redding*, 4 E. D. Smith (N. Y.) 285; *Boston Silk, etc., Mills v. Eull*, 37 How. Pr. (N. Y.) 299; *Gleason v. Moen*, 2 Duer (N. Y.) 639; *Chamboret v. Cagney*, 2 Sweeny (N. Y.) 378; *Ogden v. Coddington*, 2 E. D. Smith (N. Y.) 317; *Pardo v. Osgood*, 2 Abb. Pr. N. S. (N. Y.) 365; *McAdow v. Ross*, 53 Mo. 199; *Gallande v. Ball*, 20 La. Ann. 193; *Morrison v. Lovejoy*, 6 Minn. 319. And see *Cummings v. Morris*, 25 N. Y. 625. But see *Ricketson v. Richardson*, 19 Cal. 330; *Hook v. White*, 36 Cal. 299.

It may be interposed in an action for the recovery of unliquidated damages as well as for liquidated. *Lignot v. Redding*, 4 E. D. Smith (N. Y.) 285.

In *Illinois*.—Unliquidated damages for breach of a covenant disconnected with the subject-matter of the plaintiff's claim cannot be set off. *Hawks v. Lands*, 8 Ill. 227.

In *Nebraska* it is held that a demand for unliquidated damages cannot be set up as a counterclaim. *Boyer v. Clark*, 3 Neb. 161.

2. *Waddell v. Darling*, 51 N. Y. 327; *Gage v. Angell*, 8 How. Pr. (N. Y.) 335; *Clift v. Northrup*, 6 Lans. (N. Y.) 330; *Irish v. Snelson*, 16 Ind. 365; *Hendry v. Hendry*, 32 Ind. 349; *Mills v. Carrier*, 30 S. Car. 617; and see *Pendergast v. Greenfield*, 40 Hun (N. Y.) 494; *Merrill v. Green*, 55 N. Y. 270. But see to the contrary, *Hammond v. Terry*, 3 Lans. (N. Y.) 186; *Ives v.*

Miller, 19 Barb. (N. Y.) 196; *Sample v. Griffith*, 5 Iowa 376; *Haskell v. Moore*, 29 Cal. 437; *Collins v. Butler*, 14 Cal. 223; *Love v. Rhyne*, 86 N. Car. 576; and see *Iliff v. Brazill*, 27 Iowa 131; 99 Am. Dec. 645.

Federal Courts.—In an action at law, in a Federal court, an adjustment of partnership affairs is not proper matter of counterclaim. *Church v. Spiegelburg*, 31 Fed. Rep. 601.

3. *Hendry v. Hendry*, 32 Ind. 349; *Waddell v. Darling*, 51 N. Y. 327; *Mills v. Carrier*, 30 S. Car. 617; and see *Tate v. Evans*, 54 Ala. 16.

An allegation that plaintiff is indebted to defendant in an amount greater than the amount of plaintiff's claim, on account of unsettled partnership matters which were then in litigation in another pending action, is too indefinite to constitute a counterclaim. *Lipscomb v. Lipscomb*, 32 S. Car. 243.

4. *Currie v. Cowles*, 6 Bosw. (N. Y.) 452; *Hicksville, etc., R. Co. v. Long Island R. Co.*, 48 Barb. (N. Y.) 355; *Xenia Bank v. Lee*, 2 Bosw. (N. Y.) 694; *Cummings v. Morris*, 25 (N. Y.) 625; *Blair v. Claxton*, 18 (N. Y.) 529; *Chamboret v. Cagney*, 2 Sweeny (N. Y.) 378; *Gleason v. Moen*, 2 Duer (N. Y.) 639; *Mowry v. Peet*, 13 N. Y. Wkly. Dig. 16; *Bernheimer v. Willis*, 11 Hun (N. Y.) 16; *Andrews v. Gillespie*, 47 N. Y. 487; *Shipman v. Lansing*, 25 Hun (N. Y.) 290; *McMannus v. Smith*, 53 Ind. 211; *Sample v. Rowe*, 24 Ind. 208; *Hampson v. Fall*, 64 Ind. 382; *Sigler v. Hidy*, 56 Iowa 504; *Dorsey v. Reese*, 14 B. Mon. (Ky.) 127; *Dougherty v. Stamps*, 43 Mo. 243; *Dempsey v. Rhodes*, 93 N. Car. 120; *Smith v. Smith*, 79 N. Car. 455; *Whedbee v. Reddick*, 79 N. Car. 521; *Boyd v. Beaudin*, 54 Wis. 193; *Atwater v. Schenck*, 9 Wis. 160; *Du Pont v. Davis*, 35 Wis. 631; *Pennoyer v. Allen*, 50 Wis. 308.

Under the present *New York Code*, the term "counterclaim," subject to

action as in a legal action,¹ a defendant being permitted to set forth by answer as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both,² the theory of counterclaim being to bring about the liquidation of mutual debts, and to find the balance between them in one proceeding.³

3. In What Actions Interposed.—Provisions relating to counterclaims are solely applicable to actions, and to such actions only as are mentioned in the statute making such provision.⁴ They have no application to special or other irregular proceedings,⁵

other prescribed limitations, includes any cause of action in favor of the defendant which tends in any way to diminish or defeat the plaintiff's recovery. *Scribner v. Levy* (Supreme Ct.), 4 N. Y. Supp. 918.

In *Missouri*, it is held that equitable matter—i. e., an equity of relief—can constitute a defense only, but not properly a counterclaim; and that if it be not a defense, it cannot be joined in the same suit with a cause of action at law. *Jones v. Moore*, 42 Mo. 413.

In *Wisconsin*, equitable defenses to legal actions must be pleaded by way of counterclaim and not merely as a defense. *Du Pont v. Davis*, 35 Wis. 631; *Lombard v. Cowham*, 34 Wis. 486.

1. *Mackellar v. Rogers*, 109 N. Y. 468; *Grange v. Gilbert*, 44 Hun (N. Y.) 9; *Peck v. Brown*, 2 Robt. (N. Y.) 120; *Lazarus v. Heilman*, 11 Daly (N. Y.) 189; *Walker v. Sedgwick*, 8 Cal. 398; *Coy v. Downie*, 14 Fla. 544; *Revere F. Ins. Co. v. Chamberlin*, 56 Iowa 508; *Lowry v. Hurd*, 7 Minn. 356; *Walker v. Wilson*, 13 Wis. 522; *Eaton v. Tallmadge*, 22 Wis. 526; *Hall v. Gale*, 14 Wis. 54; *Akerly v. Vilas*, 21 Wis. 88.

The counterclaim which a defendant is authorized to interpose in a suit of equitable cognizance, must be one upon which a suit might be maintained by the defendant against the plaintiff, and must be connected with the subject of the suit. *Dove v. Hayden*, 5 Oregon 501; *Owen v. Miller*, 10 Ohio St. 136; 75 Am. Dec. 502; *New York, etc., R. Co. v. Schuyler*, 38 Barb. (N. H.) 534.

A counterclaim for the specific performance of the contract, which the plaintiffs seek by the action to have adjudged vacated and void, is good. *Boyd v. Schlesinger*, 59 N. Y. 201.

An Unliquidated Demand, triable before a jury and not related to the sub-

ject-matter of an equitable proceeding, cannot be set off therein. *Burrage v. Bonanza Gold, etc.*, Min. Co., 12 Oregon 169.

2. *McAdow v. Ross*, 53 Mo. 199; *Shipman v. Lansing*, 25 Hun (N. Y.) 290; *Gage v. Angell*, 8 How. Pr. (N. Y.) 335; *Western Bank v. Sherwood*, 29 Barb. (N. Y.) 383; *Vail v. Jones*, 31 Ind. 467; *Lapham v. Osborne*, 20 Nev. 168; *Wilson v. Hughes*, 94 N. Car. 185.

A demand for equitable relief may be set up as a counterclaim against a legal demand. *Geenia v. Keah*, 66 Barb. (N. Y.) 245; *Lawrence v. Bank of the Republic*, 3 Robt. (N. Y.) 142; reversed on other grounds in 35 N. Y. 320; *Dempsey v. Rhodes*, 93 N. Car. 120.

Ejectment may be defeated by an equitable counterclaim. *Randall v. Bodenhamer*, 89 N. Car. 78.

3. *Taylor v. Mayor, etc.*, of N. Y., 82 N. Y. 10; *Mattoon v. Baker*, 24 How. Pr. (N. Y.) 329; *Waddell v. Darling*, 51 N. Y. 327; *More v. Rand*, 60 N. Y. 208; *Vail v. Jones*, 31 Ind. 467; *Judah v. Vincennes University*, 16 Ind. 56.

The statute of counterclaim should therefore be liberally construed to accomplish the object of its enactment. *More v. Rand*, 60 N. Y. 208.

4. *People v. Walton*, 2 Thomp. & C. (N. Y.) 533.

Not Retroactive.—A counterclaim is not admissible in actions pending at the time of the adoption of the provision authorizing them. *Teague v. James*, 63 N. Car. 91; *Gaither v. Gibson*, 63 N. Car. 93; *Valentine v. Holman*, 63 N. Car. 475; *Folsom v. Carli*, 6 Minn. 420; 80 Am. Dec. 456.

5. *People v. Walton*, 2 Thomp. & C. (N. Y.) 533; *Hogan v. Kirkland*, 64 N. Car. 250.

A counterclaim cannot be set up on the return to a writ of mandamus,

and do not apply to actions of a *quasi* criminal nature,¹ as actions for the recovery of a statutory penalty.² Nor can a claim for the recovery of a statutory penalty be interposed as a counterclaim in an action.³

4. What May be the Subject of a Counterclaim.—A counterclaim must be a claim either arising out of the contract or transaction sued upon, or connected with the subject-matter of the action; or, in actions upon contract, it may be some other contract.⁴ It must consist in a set-off, or a claim by way of recoupment, or be in some way connected with the subject of the action stated in the complaint.⁵

and there can be no reply to such return. *People v. Order of American Star*, 53 N. Y. Super. Ct. 66. And see *Reeside v. Walker*, 11 How. (U. S.) 272. Nor can one be pleaded in a summary proceeding. *Durant Land Imp. Co. v. East River Electric Co.*, 17 Civ. Pro. Rep. (N. Y.) 224.

1. *Woodward v. Conder*, 33 Mo. App. 147.

2. *Denniston v. Trimmer*, 27 Hun (N. Y.) 393; *Nash v. White's Bank*, 13 N. Y. Wkly. Dig. 141; *Furber v. McCarthy*, 18 Civ. Pro. Rep. (N. Y.) 69; *Moore v. Trimmer*, 17 Civ. Pro. Rep. (N. Y.) 99.

3. *Farmers' etc., Bank v. Lang*, 22 Hun (N. Y.) 372; *National Bank v. Lewis*, 81 N. Y. 15; *Culbertson v. Lennon*, 4 Minn. 51; *Barnet v. National Bank*, 98 U. S. 555.

A claim under the *United States Revised Statutes* to recover double the amount of usurious interest paid to a national bank, is not a cause of action founded upon contract, and cannot be set off in an action by the bank upon a note other than upon which the usurious interest was paid. *Fraker v. Culum*, 24 Kan. 679. In *Ohio* such a claim is not available as a set-off. *Hade v. McVay*, 31 Ohio St. 231.

4. *Vassear v. Livingston*, 13 N. Y. 248; *Gleason v. Moen*, 2 Duer (N. Y.) 639; *Putnam v. De Forest*, 8 How. Pr. (N. Y.) 146; *Bogardus v. Parker*, 7 How. Pr. (N. Y.) 303; *Xenia Bank v. Lee*, 2 Bosw. (N. Y.) 694; *Drake v. Cockcroft*, 4 E. D. Smith (N. Y.) 34; *Shipman v. Lansing*, 25 Hun (N. Y.) 290; *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226; *Pendergast v. Greenfield*, 40 Hun (N. Y.) 494; *McKensie v. Farrell*, 4 Bosw. (N. Y.) 192; *Chamboret v. Cagney*, 2 Sweeny (N. Y.) 378; *Bathgate v. Haskin*, 59 N. Y. 533; *Edgerton v. Page*, 20 N. Y. 281; *Metropolitan Trust Co. v. Tonawanda, etc., R.*

Co., 43 Hun (N. Y.) 521; *Barnes v. Gilmore*, 6 Civ. Pro. Rep. (N. Y.) 286; *Lehmair v. Griswold*, 40 N. Y. Supr. Ct. 100; *Forbes v. Cooper*, 88 Ky. 285; *Sherman v. Hale*, 76 Iowa 383; *McAdow v. Ross*, 53 Mo. 199; *Jones v. Moore*, 42 Mo. 413; *Holzbauer v. Heine*, 37 Mo. 443; *Latimer v. Sullivan*, 30 S. Car. 111; and see *Driscall v. Sandersen*, 15 N. Y. St. Rep. 134; *Thorp v. Philbin*, 22 N. Y. St. Rep. 27.

In suit to recover money alleged to have been obtained from plaintiff by duress of imprisonment, upon a void warrant, for fornication with defendant's daughter, and by threats of future prosecution for the same, defendant cannot set up, by way of counterclaim, the debauching of his daughter and getting her with child. *Heckman v. Swartz*, 55 Wis. 173.

5. *Mattoon v. Baker*, 24 How. Pr. (N. Y.) 329; *Drake v. Cockcroft*, 4 E. D. Smith (N. Y.) 34; *Chamboret v. Cagney*, 2 Sweeny (N. Y.) 378; *Waddell v. Darling*, 51 N. Y. 327; *Hinkley v. Troy, etc., R. Co.*, 42 Hun (N. Y.) 281; *Boreel v. Lawton*, 90 N. Y. 293; 43 Am. Rep. 170; *Smith v. Hall*, 67 N. Y. 48; *People v. Denison*, 84 N. Y. 272; *Pattison v. Richards*, 22 Barb. (N. Y.) 143; *Kurtz v. McGuire*, 5 Duer (N. Y.) 660; *Burns v. Nevins*, 27 Barb. (N. Y.) 493; *Union Ins. Co. v. Vandercook*, 21 N. Y. Wkly. Dig. 506; *Arnold v. Daley* (Ark. 1891), 16 S. W. Rep. 9; *Allen v. Coates*, 29 Minn. 46; *Schmidt v. Bidenbach*, 29 Minn. 122.

Under the *Iowa* statute, an independent cause of action, arising on contract, or ascertained by the decision of a court, and which can be pleaded only in an action on contract, is denominated a set-off; and a cause of action in favor of the defendants, or some of them against the plaintiffs, or some of them, arising out of the con-

In actions upon contract, a counterclaim may consist of a demand arising out of another contract,¹ or out of a breach of a covenant, either express or implied, of the contract sued upon,² or of any other demand arising out of or connected with the transaction sued upon or the subject-matter of the action.³ But

tracts or transactions set forth in the plaintiff's petition, as the foundation of his claim, or connected with the subject of the action, is denominated a counterclaim. *Musselman v. Galligher*, 32 Iowa 383.

In *Wisconsin*, where the plaintiff is a non-resident, the defendant may set up as a counterclaim any cause of action he may have against such non-resident, and it is not an abuse of discretion for the trial court to permit an amendment of the answer setting up a counterclaim for plaintiff's breach of a contract of agency in action for a conversion of moneys collected by the defendant as plaintiff's agent. *Phoenix Mut. L. Ins. Co. v. Walrath*, 53 Wis. 669.

1. Pomeroy on Rem. (2d ed.) 835, § 796; and see cases cited *infra*, this title, *Causes of Actions Upon Contract in Contract Actions*.

Whenever assumpsit will lie for money had and received, the demand therefor may be set off in an action of assumpsit brought by the party against whom it exists. *Harway v. Mayor*, etc., of N. Y., 1 Hun (N. Y.) 628; *Clay v. Carroll*, 67 Cal. 19; *Bidwell v. Madison*, 10 Minn. 13.

2. *Sandford v. Travers*, 40 N. Y. 140; *Samson v. Freedman*, 102 N. Y. 699; *Brooklyn Sugar Refining Co. v. Earle*, 1 N. Y. Law Bull. 46; *Warren v. Van Pelt*, 4 E. D. Smith (N. Y.) 202; *Patton v. Royal Baking Powder Co.*, 114 N. Y. 1; 45 Hun (N. Y.) 248; *Griffin v. Colver*, 16 N. Y. 489; *Maders v. Lawrence*, 49 Hun (N. Y.) 360; *Merritt v. Gouley*, 58 Hun (N. Y.) 372; *Howe Machine Co. v. Reber*, 66 Ind. 498; *Mills v. Rosenbaum*, 103 Ind. 152; *Kisler v. Tinder*, 29 Ind. 270; *Logan v. Tibbott*, 4 Greene (Iowa) 389; *Donahue v. Prosser*, 10 Iowa 276; *Price v. Kearney Canal, etc., Co.*, 29 Neb. 33; *Rogers v. Humphrey*, 39 Me. 382; *Harlan v. St. Paul, etc., R. Co.*, 31 Minn. 427; *Schurmeier v. English* (Minn. 1891), 48 N. W. Rep. 1112; *McKinnon v. Morrison*, 104 N. Car. 354; *Earl v. Bull*, 15 Cal. 421; *Cow Run Co. v. Lehmer*, 41 Ohio St. 384; *Dennis v. Belt*, 30 Cal. 247; *Wheelock v. Pacific Pneumatic Gas Co.*, 51 Cal.

223; *Natural Gas Co. v. Healy*, 33 (W. Va.) 102; *Walker v. Wilson*, 13 Wis. 522; *Hall v. Gale*, 14 Wis. 54; *Church v. Spiegelburg*, 31 Fed. Rep. 601; *Akerly v. Vilas*, 21 Wis. 88.

Where a contract of purchase is a single one, though separate notes are given for the property, damages for a breach of warranty can be deducted from the notes. *Aultman v. Mason*, 83 Ga. 212; and see *Dounce v. Dow*, 57 N. Y. 16.

In an action to foreclose a mechanics' lien for work done and materials furnished under a contract, a counterclaim may be set up for damages for omissions and defaults in the performance of the contract. *Bulkley v. Healy*, 58 Hun (N. Y.) 608.

What May be Recovered.—In an action for the specific performance of a contract to convey real property, a counterclaim for breach of a covenant against incumbrances may be maintained, and damages for the percentage paid by the defendant at the time of the purchase, the auctioneer's fees, and the expenses paid for examining the title, may be recovered thereunder. *Wetmore v. Bruce*, 118 N. Y. 319.

In an action to recover damages for breach of contract, in refusing to complete a purchase of land, the defendant may maintain a counterclaim for any sums paid by him as a part of the purchase money at the time of the execution of the contract, where the performance of the contract has become impossible by the subsequent sale of the land or otherwise. *Hening v. Punnett*, 4 Daly (N. Y.) 543.

3. See *Cass v. Higenbotam*, 100 N. Y. 248; *Michel v. Halheimer* (Supreme Ct.), 10 N. Y. Supp. 489; *Thomson v. Sanders*, 118 N. Y. 252; *Whitelegge v. De Witt*, 12 Daly (N. Y.) 319; *Apperson v. Triplett* (Ky. 1890), 13 S. W. Rep. 791.

Torts arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action, are plainly included. *Heigel v. Willis* (Supreme Ct.), 3 N. Y. Supp. 497; *Thomson v. Sanders*, 18 N. Y. 252; *Wadley v. Davis*, 63 Barb. (N.

in actions for tort, to be available, a counterclaim must arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or be connected with the subject of the action.¹

a. CAUSES OF ACTIONS UPON CONTRACT IN CONTRACT ACTIONS.—In actions arising upon contract, a counterclaim interposed by the defendant, if unconnected with the transaction set forth in the complaint, must also arise upon contract.² It is not essential that the contract, upon which the counterclaim is based,

Y.) 500; *Carpenter v. Manhattan L. Ins. Co.*, 22 Hun (N. Y.) 49; *Campbell v. Fox*, 11 Iowa 318; *Tinsley v. Tinsley*, 15 B. Mon. (Ky.) 454.

A counterclaim founded upon a tort cannot be set off against a demand founded on contract, however, unless it arose out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or was connected with the subject of the action. *Collier v. Ervin*, 3 Mont. 142; *Slayback v. Jones*, 9 Ind. 470; *Jeffreys v. Hancock*, 57 Cal. 646; *Warner v. Foote*, 40 Minn. 176; *Steinhart v. Pitcher*, 20 Minn. 102; *Street v. Bryan*, 65 N. Car. 619; *Smith v. Fife*, 2 Neb. 10; *Harris v. Rivers*, 53 Ind. 216; *Humphrey v. Merritt*, 51 Ind. 197; *Indianapolis, etc., R. Co. v. Ballard*, 22 Ind. 448; *Mahan v. Ross*, 18 Mo. 121; *Johnson v. Jones*, 16 Mo. 495; *Pratt v. Menkens*, 18 Mo. 158; *Brake v. Corning*, 19 Mo. 125; *State v. Modrell*, 15 Mo. 421; *Meeks v. Berry*, 21 N. Y. St. Rep. 248.

A counterclaim founded solely on alleged fraud on the part of plaintiff in procuring the contract, for which defendant seeks damages, can be set up without restoring to plaintiff the amount paid by him to defendant as consideration for making it. *Thomson v. Sanders*, 118 N. Y. 252.

In *Florida*, matters arising out of a tort cannot be set off in an action on a contract, even though they grew out of the subject-matter of the contract. *Matthews v. Lindsay*, 20 Fla. 962. See also as to *North Carolina*, *Trotter v. Swain Co.*, 90 N. Car. 455; *Street v. Bryan*, 65 N. Car. 619.

1. *Lehmair v. Griswold*, 40 N. Y. Super. Ct. 100; *Chamboret v. Cagney*, 2 Sweeny (N. Y.) 378; *Chambers v. Lewis*, 11 Abb. Pr. (N. Y.) 210; *Rhine-lander v. Martin*, 23 Abb. N. Cas. (N. Y.) 267; *Henry v. Henry*, 17 Abb. Pr. (N. Y.) 411; *Barker v. Platt* (Supreme Ct.), 1 N. Y. Supp. 416; *Venice v.*

Breed, 65 Barb. (N. Y.) 597; *Van Dyck v. McQuade*, 57 How. Pr. (N. Y.) 62; *People v. Denison*, 84 N. Y. 276; *Smith v. Hall*, 67 N. Y. 48; *Green v. Parsons*, 14 N. Y. St. Rep. 97; *Gottler v. Babcock*, 7 Abb. Pr. (N. Y.) 392, note; *Lee v. Eure*, 93 N. Car. 2; *Manney v. Ingram*, 78 N. Car. 96; *Holliday v. McMillan*, 83 N. Car. 270; *Humbert v. Brisbane*, 25 S. Car. 506; and see *Judah v. Vincennes University*, 16 Ind. 56; *Humphrey v. Merritt*, 51 Ind. 197; *Hess v. Young*, 59 Ind. 379; *Boil v. Simms*, 60 Ind. 162.

Formerly the rule was that in an action for tort a counterclaim, whether arising on contract or based on another tort, could not be allowed. *Chamboret v. Cagney*, 2 Sweeny (N. Y.) 378. Nor could a debt be set off against a tort. *Allen v. Randolph*, 48 Ind. 496; *Harris v. Rivers*, 53 Ind. 216.

A cross-complaint to recover damages for a trespass on land cannot be filed in an action to recover damages for a trespass to personal property, unless it appears therefrom that the trespass on the land related to or depended upon or affected the trespass charged in the complaint. *Demartin v. Albert*, 68 Cal. 277.

In an action for wrongfully taking possession of notes belonging to the plaintiff and wrongfully receiving money thereon, a counterclaim for services rendered in collecting the notes, is proper. *Birch v. Hall* (Supreme Ct.), 3 N. Y. Supp. 747.

2. *Andrews v. Artisans' Bank*, 26 N. Y. 298; *Xenia Bank v. Lee*, 2 Bosw. (N. Y.) 694; *Williams v. Upton*, 8 How. Pr. (N. Y.) 205; *Gage v. Angell*, 8 How. Pr. (N. Y.) 335; *Harway v. Mayor, etc., of N. Y.*, 1 Hun (N. Y.) 628; *Donohue v. Mayor, etc., of N. Y.*, 10 Hun (N. Y.) 137; *Parsons v. Sutton*, 66 N. Y. 92; *Hunt v. Chapman*, 51 N. Y. 555; *Blake v. Krom*, 128 N. Y. 64; *Beardsley v. Stover*, 7 How. Pr. (N. Y.) 294; *Stoddard v. Treadwell*, 26 Cal.

should be an express one. No distinction between express and implied contracts is recognized.¹ This class embraces but is not restricted to the set-offs used in the former procedure,² including also all cases of damages for the non-performance of contracts, as well as causes of action for debt,³ and extending to cases of

294; *Sherman v. Hale*, 76 Iowa 383; *Empire Transp. Co. v. Boggiano*, 52 Mo. 294; *Davis v. Frederick*, 6 Mont. 600; *McKinnon v. Morrison*, 104 N. Car. 354; *Foulks v. Rhodes*, 12 Nev. 225; *Warner v. Foote*, 40 Minn. 176; *Atwater v. Schenck*, 9 Wis. 160; *The C. B. Sanford*, 22 Fed. Rep. 863; and see *Westervelt v. Ackley*, 62 N. Y. 505.

In an action for breach of a contract of partnership, defendant's answer set up a counterclaim, alleging that the plaintiff failed to bring to the firm the amount and kind of business he had agreed to. *Held*, that under Code Civil Proc. *New York*, § 501, the cause of action set forth in the complaint arising on contract, the counterclaim, which also arose on contract, might be set up. *Church v. Spiegelburg*, 31 Fed. Rep. 601.

An undertaking executed in the form required by the statute upon an application to obtain an order of arrest, does not create a contract obligation, and an action brought for the recovery of damages thereon is not an action upon contract to which a liability existing upon another contract can be interposed as a counterclaim. *Furber v. McCarthy*, 54 Hun (N. Y.) 435.

A promise to pay based upon a consideration growing out of the commission of a tort, creates no new cause of action in favor of the party against whom the tort was committed, and a counterclaim alleging such promise cannot be upheld as one arising upon contract. *Vilas v. Mason*, 25 Wis. 370.

Abandonment of Contract.—A written contract filed with a counterclaim for damages for defective workmanship thereunder, under which a slight deviation by mutual consent was proved, does not establish an abandonment of the contract, and is not fatal to the defendant's right to recoup the damages for such defective work. *Moellering v. Kayser*, 110 Ind. 533.

1. *Andrews v. Artisans' Bank*, 26 N. Y. 298; *Harway v. Mayor, etc.*, of N. Y., 1 Hun (N. Y.) 628; and see *Carpenter v. Butler*, 13 N. Y. Wkly. Dig. 112; *Tolman v. Johnson*, 43 Iowa 127.

A warranty, whether express or implied, is matter not of tort, but of contract. *Berdell v. Johnson*, 18 Barb. (N. Y.) 559.

A bank which has discounted a customer's note may, upon his failure to pay it, set it off against the customer's deposit. *Robinson v. Howes*, 20 N. Y. 84.

In *McDougall v. Walling*, 48 Barb. (N. Y.) 364, *affirmed* in 51 N. Y. 666, it was held that the right to recover for money lost in betting is a demand arising on contract, and may be set up as a counterclaim in a contract action.

The personal liability of a trustee of a manufacturing corporation for the debts thereof, occasioned by his failure to file the annual report required by law, is not based upon a contract, within the restriction of *New York* Code, § 501 as to counterclaims. *Clapp v. Wright*, 21 Hun (N. Y.) 240.

2. *Pomeroy on Rem.* (2d ed.) 778, § 742; *Gleason v. Moen*, 2 Duer (N. Y.) 639; *Beardsley v. Stover*, 7 How. Pr. (N. Y.) 294.

In *Folsom v. Carli*, 6 Minn. 420, 80 Am. Dec. 456, it is said that "this is merely an enunciation of the law of set-off, and does not enlarge it in any respect."

In *Indiana*, however, any matter which is pleaded as a counterclaim must either arise out of, or be connected with, the contract or transaction set forth in the complaint as the ground of plaintiff's claim; otherwise the counterclaim must be held bad on demurrer. *Miller v. Roberts*, 106 Ind. 63; *Douthitt v. Smith*, 69 Ind. 463. This class of cases is covered by the statutory provision for set-off. *Curran v. Curran*, 40 Ind. 473.

In *California* a matter which does not arise out of the transaction set forth in the complaint, and which is not connected with the subject of the action, does not constitute a counterclaim. *James v. Center*, 53 Cal. 31.

3. *Pomeroy on Rem.* (2d ed.) 778, § 742; *Lignot v. Redding*, 4 E. D. Smith (N. Y.) 285; *Denny v. Horton*, 3 Civ. Pro. Rep. (N. Y.) 255; *Phillips v. Taylor*, 101 N. Y. 639; *Gleason v.*

equitable relief, arising from or growing out of contract.¹ The counterclaim must consist of a demand on which the defendant could have maintained an action against the plaintiff, however, at the time of the commencement of the action in which it is set up.² A judgment is a contract which can be set up as a counterclaim in a contract action, even though it was recovered in an action for tort.³

Moen, 2 Duer (N. Y.) 639; Healy v. McManus, 23 How. Pr. (N. Y.) 238; Stoddard v. Treadwell, 26 Cal. 294; Bidwell v. Madison, 10 Minn. 13; Empire Transp. Co. v. Boggiano, 52 Mo. 294; and see Williams v. Wieting, 3 Thomp. & C. (N. Y.) 439; Ulster Co. Sav. Inst. Fourth Nat. Bank, 28 N. Y. St. Rep. 24.

Unliquidated damages arising on a contract different from the contract on which the action is brought, may be set up as a counterclaim. Lignot v. Redding, 4 E. D. Smith (N. Y.) 285; Boston Silk, etc., Mills v. Eull, 37 How. Pr. (N. Y.) 299; Schubart v. Harteau, 34 Barb. (N. Y.) 447; Morrison v. Lovejoy, 6 Minn. 319; Stoddard v. Treadwell, 26 Cal. 294.

In *Illinois* unliquidated damages arising out of a contract unconnected with the subject-matter of plaintiff's suit are not a subject of set-off. Clouse v. Bullock Printing Press Co., 118 Ill. 612. And see Olyphant v. St. Louis Ore, etc., Co., 39 Fed. Rep. 308.

Proof of Value.—In an action for damages for breach of warranty, defendant cannot, as a counterclaim, recover either the contract price, where the breach consisted in defendant's failure to deliver the article which he agreed to deliver, or the value of the article, where the value is not proved. Riss v. Messmore, 58 N. Y. Super. Ct. 23.

1. Pomeroy on Rem. (2d ed.) 778, § 742; Gleason v. Moen, 2 Duer (N. Y.) 639; Currie v. Cowles, 6 Bosw. (N. Y.) 453; Hicksville, etc., R. Co. v. Long Island R. Co., 48 Barb. (N. Y.) 355; Xenia Bank v. Lee, 2 Bosw. (N. Y.) 694; Stoddard v. Treadwell, 26 Cal. 294; Judah v. Vincennes University, 16 Ind. 56.

The rule that in an action upon contract, a counterclaim of any other cause of action also arising on contract may be allowed, embraces all cases heretofore denominated set-off, legal or equitable; and any other legal or equitable demand, liquidated or unliquidated, whether within the proper

definition of set-off or not. Xenia Bank v. Lee, 2 Bosw. (N. Y.) 694; Gleason v. Moen, 2 Duer (N. Y.) 642; Moser v. Cochrane, 13 Daly (N. Y.) 159.

A **foreclosure action** arises upon contract within this rule. See Hunt v. Chapman, 51 N. Y. 555; Mayo v. Davidge, 44 Hun (N. Y.) 342; Lowry v. Hurd, 7 Minn. 356; Eaton v. Tallmadge, 22 Wis. 526; Akerly v. Vilas, 21 Wis. 88; Walker v. Wilson, 13 Wis. 522; Hall v. Gale, 14 Wis. 55.

2. Gleason v. Moen, 2 Duer (N. Y.) 639; Moody v. Steele, 11 Civ. Pro. Rep. (N. Y.) 205; Spencer v. Babcock, 22 Barb. (N. Y.) 326; Weeks v. Pryor, 27 Barb. (N. Y.) 79; Kingston Bank v. Gay, 19 Barb. (N. Y.) 459; Nichols v. Boerum, 6 Abb. Pr. (N. Y.) 290; Lemon v. Trull, 13 How. Pr. (N. Y.) 248; Kneeder v. Sternbergh, 19 How. Pr. (N. Y.) 67; Silliman v. Eddy, 8 How. Pr. (N. Y.) 122; Williams v. Upton, 8 How. Pr. (N. Y.) 205; Parsons v. Sutton, 66 N. Y. 92; Swords v. Blake, 3 Edw. Ch. (N. Y.) 112; Carver v. Shelly, 17 Kan. 472; and see *infra*, this title, *Essential Elements*.

Each party must owe the other and each debt must be due and payable before the smaller debt can be taken from the larger. Patterson v. Patterson, 59 N. Y. 574; 17 Am. Rep. 384; Taylor v. Mayor, etc., of N. Y., 82 N. Y. 10.

A defendant may properly plead as a set-off or cross-demand, an account which he in fact owned at the time of the commencement of the action, though the written assignment of it from the person of whom he purchased it, purported to have been made subsequent to that date. West v. Moody, 33 Iowa 137.

In Vail v. Tuthill, 10 Hun (N. Y.) 31, a judgment obtained by defendant after the commencement of an action against him was permitted to be set up as a counterclaim in such action. See also Badlam v. Springsteen, 41 Hun (N. Y.) 160.

3. Taylor v. Root, 4 Keyes (N. Y.)

Where facts exist upon which the law implies a promise to repay money fraudulently obtained, the tort arising from the manner in which the money was obtained may be waived, and a claim may be founded upon the implied contract, thus rendering it a proper subject of counterclaim in a contract action brought by the party against whom it exists;¹ and a cause of action for conversion may be interposed as a counterclaim by waiving the tort and proceeding as for breach of an implied contract, where a conventional relation, as that of principal and agent, exists between the parties;² and it has been held, that where a party may elect either to sue in tort for the wrong done him, or in assumpsit as upon an implied contract, he may waive the tort, and interpose the demand as a counterclaim in a contract action.³ But

335; *Clark v. Story*, 29 Barb. (N. Y.) 295; *Wells v. Henshaw*, 3 Bosw. (N. Y.) 625; *McAdow v. Ross*, 53 Mo. 199; and see *Cornell v. Donovan*, 20 N. Y. St. Rep. 261; *Lush v. Adams*, 10 Civ. Pro. Rep. (N. Y.) 60; *Badlam v. Springsteen*, 41 Hun (N. Y.) 160.

Parol evidence of the existence of a judgment is sufficient to establish it in support of a right of set-off, unless objection to that mode of proof is taken at the trial. *Stillwell v. Carpenter*, 2 Abb. N. Cas. (N. Y.) 238.

In *Michigan* it is held that in an accounting in chancery, in order that the whole controversy may be settled and adjusted, equity will sometimes permit a judgment, though obtained in an action for a wrong, to be made an item in favor of the party holding it in the account to be taken. *Dole v. McGraw*, 71 Mich. 106.

1. *Rothschild v. Mack*, 115 N. Y. 1; *Harway v. Mayor, etc.*, of N. Y., 1 Hun (N. Y.) 628; *City Nat. Bank v. National Park Bank*, 32 Hun (N. Y.) 107; *Wood v. Mayor, etc.*, of N. Y., 73 N. Y. 556; *Berrian v. Mayor, etc.*, of N. Y., 15 Abb. Pr. N. S. (N. Y.) 207; *Stuart v. Atlantic Dredging Co.*, 1 N. Y. Law Bull. 18.

To render such a cause of action available as a counterclaim, the tort must be waived, and the recovery sought as on an implied contract, and the answer must set forth facts showing defendant's election to proceed on the implied contract, and not for the wrong. *Berrian v. Mayor, etc.*, of N. Y., 15 Abb. Pr. N. S. (N. Y.) 207.

In *Oregon*, a tort cannot be pleaded as a counterclaim in an action on a contract, unless it constitutes a breach of the contract. *Zigler v. McClellan*, 15 Oregon 499; and see also *Rhine-*

lander v. Martin, 23 Abb. N. Cas. (N. Y.) 267.

2. *Coit v. Stewart*, 50 N. Y. 17; 12 Abb. Pr. N. S. (N. Y.) 216; *Bell v. Lespini*, 66 How. Pr. (N. Y.) 385; *Andrews v. Artisans' Bank*, 26 N. Y. 298; *Lubert v. Chauviteau*, 3 Cal. 458; 58 Am. Dec. 415; *Brady v. Brennan*, 25 Minn. 210; *Bitting v. Thaxton*, 72 N. Car. 541; and see *Seaman v. Reeve*, 15 Barb. (N. Y.) 454; *St. Louis Public Schools v. Broadway Sav. Bank*, 84 Mo. 56.

Where defendant pleads as a set-off his claim for pasturing plaintiff's cattle, he may recover for the pasturage of a larger number than he agreed to pasture, where they were turned on his land by the plaintiff, as he may waive the trespass and damages therefor, and sue on an implied contract to pay for the pasturage of the excess. *McCuin v. Frazier*, 38 Mo. App. 63.

In *Minnesota*, where one wrongfully takes and sells the property of another, the owner may sue, as upon contract, for the money received at such sale; and there being no proof to the contrary, the jury may presume that the sale was for cash, and for the value of the property, and such a claim is a proper matter for counterclaim in an action of contract. *Brady v. Brennan*, 25 Minn. 210.

3. *Norden v. Jones*, 33 Wis. 600; 14 Am. Rep. 782; *Ainsworth v. Bowen*, 9 Wis. 348; *Vilas v. Mason*, 25 Wis. 310; *Brady v. Brennan*, 25 Minn. 210; *International Bank v. Monteath*, 39 N. Y. 297; and see *Berrian v. Mayor, etc.*, of N. Y., 15 Abb. Pr. N. S. (N. Y.) 207; *Seaman v. Reeve*, 15 Barb. (N. Y.) 454; *Harris v. Simpson*, 50 Ark. 422.

The liability of an executor *de son*

the rule is well supported that in the absence of such conventional relation, in an action for conversion or for the recovery of other demands arising in tort, a waiver of a remedy which the law affords, would not alter the facts constituting the foundation of the action, nor bring the claim within the class wherein it might be interposed by way of defense to another contract.¹

The waiver by a plaintiff of a remedy which the law affords him by reason of the tortious acts of the defendant, does not entitle the defendant to assert a counterclaim upon contract by way of defense, when the action is one arising on a tort,² though when the action is based upon a contract for the violation of the obligations of which an action, as for tort, may be maintained, the plaintiff cannot deprive the defendant of a right to interpose a counterclaim by electing to sue in tort.³ A demand arising upon

tort to persons interested in the estate to the extent of the value of the property appropriated by him, may be interposed as a counterclaim by a defendant sued on a contract indebtedness to the estate, with which the plaintiff wrongfully interfered. *McKenzie v. Pendleton*, 1 Bush (Ky.) 164.

The cases which restrict the right of election to the narrowest limits admit that if the wrongdoer has sold property converted, the owner may sue as upon contract for the money received at the sale. *Brady v. Brennan*, 25 Minn. 210.

1. Mayor, etc., of N. Y. v. *Parker Vein Steamship Co.*, 12 Abb. Pr. (N. Y.) 300; *Bell v. Lesbini*, 66 How. Pr. (N. Y.) 385; *Piser v. Stearns*, 1 Hilt. (N. Y.) 86; *Chambers v. Lewis*, 11 Abb. Pr. (N. Y.) 210; *Donohue v. Henry*, 4 E. D. Smith (N. Y.) 162; *McKensie v. Farrell*, 4 Bosw. (N. Y.) 192; *New York Ice Co. v. Parker*, 8 Bosw. (N. Y.) 300; *Smith v. Hall*, 67 N. Y. 48; *Kurtz v. McGuire*, 5 Duer (N. Y.) 660; *Barker v. Platt* (Supreme Ct.), 1 N. Y. Supp. 416; *Western Union Tel. Co. v. Milliken*, 14 Daly (N. Y.) 170; *Van Dyck v. McQuade*, 57 How. Pr. (N. Y.) 62; *Emery v. St. Louis, etc., R. Co.*, 77 Mo. 339; *Scheunert v. Kaehler*, 23 Wis. 523.

In *Scheunert v. Kaehler*, 23 Wis. 523, it is held that where a plaintiff has a choice of remedies to sue upon a contract, as for an express or implied violation of it, or to maintain an action of tort for the wrong which had been done him, the subject of the action is the tort or wrong; and for the purpose of testing the admissibility of a counterclaim that only must be looked to,

and it can make no difference that there was a contract upon which the plaintiff had a concurrent right of action, in case he had seen fit to bring a suit of that kind.

In *Missouri* it is held that in case of the conversion of personal property, where the same has not been sold by the wrongdoer but still remains in his hands, the owner may waive the tort and sue as for goods sold, and such a cause of action may be set up as a counterclaim in a contract action. *Gordon v. Bruner*, 49 Mo. 570.

2. *Chambers v. Lewis*, 11 Abb. Pr. (N. Y.) 210; *Smith v. Hall*, 67 N. Y. 48; Mayor, etc., of N. Y. v. *Parker Vein Steamship Co.*, 12 Abb. Pr. (N. Y.) 300; *Heidelberg v. Kilpatrick*, 3 Civ. Pro. Rep. (N. Y.) 209; and see *Neff v. Pennoyer*, 3 Sawy. (U. S.) 495; *Lehmair v. Griswold*, 40 N. Y. Super. Ct. 100; *Scheunert v. Koehler*, 23 Wis. 523; *People v. Denison*, 84 N. Y. 273.

Where the gravamen of the action is fraud, a counterclaim founded upon contract cannot be allowed. *People v. Denison*, 84 N. Y. 272.

A gave B a note for supplies, secured by a lien on A's crop of 1888. C, as agent of B, bid off a bale of cotton of A's crop of 1890, and gave the weight-ticket to B. In A's action against B for conversion of the bale, it was held that B could not counterclaim the balance due upon the note. *Smith v. Young*, 109 N. Car. 224.

3. *Thompson v. Kessel*, 30 N. Y. 383; *Harris v. Curet*, 9 Abb. Pr. N. S. (N. Y.) 199; *Gopen v. Crawford*, 53 How. Pr. (N. Y.) 278; *Ritchie v. Hayward*, 71 Mo. 560; *Folsom v. Carli*, 6 Minn. 420; 80 Am. Dec. 456; and see

contract is none the less available to a defendant in a contract action because a breach of the contract may amount to a tort, or because the plaintiff has tortiously violated it.¹

b. CAUSES OF ACTION ARISING OUT OF THE TRANSACTION SET FORTH IN THE COMPLAINT.—A cause of action against the plaintiff, arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, may be pleaded as a counterclaim.² A cause of action arises from the transaction set forth in the complaint when the combination of acts and events, circumstances and defaults, upon which the rights of the parties are based, when viewed in one aspect, results in the plaintiff's right of action, and when viewed in another aspect, results in that of the defendant,³ the leading facts being identical, but the particulars about which the parties differ modifying

Empire Transp. Co. v. Boggiano, 52 Mo. 294.

Defendant may counterclaim where the action is on a tort springing out of a contract pleaded as inducement. *Kamerick v. Castleman*, 23 Mo. App. 481.

An action by a pledgor to recover damages of the pledgee for selling the property pledged at private sale and without notice, is not an action for trover or conversion, but is an action upon contract, which will admit of a counterclaim consisting of an independent contract. *Seaman v. Reeves*, 15 Barb. (N. Y.) 454.

1. *Folsom v. Carli*, 6 Minn. 420; 80 Am. Dec. 456; *Brady v. Brennan*, 25 Minn. 210; *Gordon v. Bruner*, 49 Mo. 570; *Thompson v. Kessel*, 30 N. Y. 383; *Bryce v. Parker*, 11 S. Car. 337.

2. *Xenia Bank v. Lee*, 2 Bosw. (N. Y.) 694; *Gleason v. Moen*, 2 Duer (N. Y.) 639; *Chamboret v. Cagney*, 2 Sweeny (N. Y.) 378; *Brown v. Buckingham*, 11 Abb. Pr. (N. Y.) 387; 21 How. Pr. (N. Y.) 190; *Grange v. Gilbert*, 10 Civ. Pro. Rep. (N. Y.) 98; *Littman v. Coulter*, 23 Abb. N. Cas. (N. Y.) 60; *Tinsley v. Tinsley*, 15 B. Mon. (Ky.) 454; *Grimes v. Duzan*, 32 Ind. 361; *Judah v. Vincennes University*, 16 Ind. 56.

Any claim arising out of the transaction set out in the complaint may be set up as a counterclaim, whether in tort or contract. *Bitting v. Thaxton*, 72 N. Car. 541. And see *Tinsley v. Tinsley*, 15 B. Mon. (Ky.) 454.

Where the cause of action in favor of the purchaser is founded on a contract, in part performance of which a mortgage was given by him to the vendor, his cause of action can be

asserted, by way of counterclaim, in an action brought by the vendor to foreclose the mortgage. But, whether the claim of the purchaser is sought to be enforced by an independent action or by way of counterclaim, the measure of damages is the same. *Burckhardt v. Burckhardt*, 36 Ohio St. 261.

3. *Pomeroy on Rem.* (2d ed.) 781, § 744; *Ritchie v. Hayward*, 71 Mo. 560; *O'Brien v. Garniss*, 25 Hun (N. Y.) 446; *Xenia Bank v. Lee*, 2 Bosw. (N. Y.) 694; *Harlock v. Le Baron*, 1 Civ. Pro. Rep. (N. Y.) 168; *Metropolitan Trust Co. v. Tonawanda, etc.*, R. Co., 43 Hun (N. Y.) 521; *Bernheimer v. Willis*, 11 Hun (N. Y.) 16; *Mayor, etc., of N. Y. v. Wood*, 4 Abb. Pr. N. S. (N. Y.) 332; *Revere F. Ins. Co. v. Chamberlin*, 56 Iowa 508; *Wall v. Williams*, 91 N. Car. 477.

Where the complaint alleges title and possession in plaintiffs, and contains a prayer that defendant be enjoined from committing waste on the premises, and for general relief, defendant has a right to plead title and exclusive possession in himself as a counterclaim, and to ask to have the title adjudged in him. *Grignon v. Black*, 76 Wis. 674.

Where matters in controversy between parties are mutually submitted to arbitration, and bonds to abide the decision of the arbitrators are mutually executed and delivered, and after the hearing but before completion, one of the parties revokes the submission and brings action against the other party to recover the claim submitted, the latter may recover by way of counterclaim in such action the damages sustained by him by reason of the revoca-

their legal effect upon the rights of the parties, and pointing the transaction favorable to the one or to the other,¹ the counterclaim having some connection with the original transaction in view of the parties, and which, at the time it was had, they could have intended might in some event give one party a claim against the other.²

The term transaction thus used, is one of very general nature, and more extensive signification than contract,³ and sometimes includes a series of contracts with respect to the same business or subject.⁴ It is used in application to some commercial or busi-

tion. *Curtis v. Barnes*, 30 Barb. (N. Y.) 225; *McMahan v. Spinning*, 51 Ind. 187.

1. *Xenia Bank v. Lee*, 2 Bosw. (N. Y.) 694; *Metropolitan Trust Co. v. Tonawanda, etc.*, R. Co., 43 Hun (N. Y.) 521; *Moser v. Cochrane*, 107 N. Y. 35; *Heigel v. Willis* (Supreme Ct.), 3 N. Y. Supp. 497; *Bucking v. Hansett*, 6 N. Y. Wkly. Dig. 412; *Boughner v. Black*, 83 Ky. 521; *Gossard v. Ferguson*, 54 Ind. 520; *McMannus v. Smith*, 53 Ind. 211; *Woodruff v. Garner*, 27 Ind. 4; 89 Am. Dec. 477; *Perkins v. Port Washington*, 37 Wis. 177; *Inglis v. Patterson*, 36 Wis. 373.

The amount recoverable in an action for a sum fixed by an agreement as liquidated damages, may be reduced, by proving that a portion of the consideration expressed in the agreement has not been paid. For such portion, defendant has a cause of action arising out of the same transaction, and may offset it as a counterclaim against plaintiff's claim for damages. *Baker v. Connell*, 1 Daly (N. Y.) 469.

Where one acting under an employment by another, since deceased, obtained possession of the property of the deceased, and by virtue of a power of attorney made an assignment dating it back to a time when the deceased was living, it is a transaction growing out of the employment, although done after the death of the client. *Lerche v. Brasher*, 37 Hun (N. Y.) 385.

2. *Conner v. Winton*, 7 Ind. 523; *McMahan v. Spinning*, 51 Ind. 187; *Thompson v. Toohey*, 71 Ind. 296; *Louisville, etc., R. Co. v. Thompson*, 18 B. Mon. (Ky.) 735; *Mayor, etc., of N. Y. v. Parker Vein Steamship Co.*, 8 Bosw. (N. Y.) 300; and see *Lovejoy v. Robinson*, 8 Ind. 399.

In an action upon contract, the defendant's claim that a second contract

covering the provisions of the first, and designed to be substituted in its place, has been fully performed whereby plaintiff's cause of action is extinguished, arises out of the contract or transaction set forth in the complaint, and may be set up as a counterclaim by supplemental answer. *Corrigan v. Ritter* (Supreme Ct.), 15 N. Y. Supp. 163.

A right to redeem the mortgaged premises and to have a deed, which was in fact a mortgage, canceled and a mortgage satisfied, may be set up by a defendant as a counterclaim in a foreclosure action. *Bernheimer v. Willis*, 11 Hun (N. Y.) 16.

In an action against partners for services rendered, plaintiff alleged a contract for a certain amount per month and board. Defendants denied the contract, and one of them, alleging that the plaintiff boarded with him, set up a counterclaim therefor. It was held, that, having denied the contract set up in the petition, defendant could not pretend that the counterclaim arose out of the transaction alleged in the petition. *Jenkins v. Barrows*, 73 Iowa 438.

3. *Barhyte v. Hughes*, 33 Barb. (N. Y.) 320; *Xenia Bank v. Lee*, 2 Bosw. (N. Y.) 694; *Ritchie v. Hayward*, 71 Mo. 560.

Every contract may be said to be a transaction, but every transaction is not a contract. *Xenia v. Lee*, 2 Bosw. (N. Y.) 694.

The term "transaction" is more extensive than cause of action, or subject of the action, for out of it the defendant's cause of action is said to arise. *Pomeroy on Rem.* (2d ed.) 818, § 774.

4. *Barker v. Walbridge*, 14 Minn. 469; *Bernheimer v. Willis*, 11 Hun (N. Y.) 16; *Walker v. Wilson*, 13 Wis. 522; *Hall v. Gale*, 14 Wis. 54.

Where the transactions connected with several conveyances of land, as alleged in the answer, appear to be connected and continuous, they must be

ness negotiation between the parties,¹ and must be held to include all the facts and circumstances out of which the injury complained of arose, and if these facts and circumstances also furnish to the defendant a ground of complaint or cause of action against the plaintiff, the defendant will be entitled to present it as a counterclaim.²

A cause of action for fraud in inducing a contract or transaction, arises out of the transaction set forth in the complaint in an action brought thereon;³ and an allegation of mistake, with a

regarded as part of one transaction, and they may be properly pleaded as a defense to the action. *State v. Smith*, 14 Wis. 564.

In an action on one of several notes secured by mortgage, after foreclosure for default in payment of another of the notes, an answer setting up the invalidity of the foreclosure and asking to redeem, is a valid counterclaim. *Fouts v. Mann*, 15 Neb. 172.

Where two brothers enter into an oral contract with their mother for her support for the remainder of her life, and afterwards enter into a written contract for the same purpose, in a suit brought by the one against the other to recover one-half the amount expended by him in excess of that expended by the other under said written contract, the defendant may counterclaim for one-half the amount previously expended by him in excess of that expended by the plaintiff under the former oral contract. *Heath v. Heath*, 31 Wis. 223.

1. *Barhyte v. Hughes*, 33 Barb. (N. Y.) 320; *Barker v. Walbridge*, 14 Minn. 469.

A transaction involves the operation of at least two minds. *Rothchilds v. Whitman*, 57 Hun (N. Y.) 135.

In an action to set aside a deed of real property and a contract to reconvey, the transaction set forth as the foundation of the plaintiff's claim is the execution of the deed and the contract. *Barnes v. Gilmore*, 6 Civ. Pro. Rep. (N. Y.) 286.

In an action brought by a broker for the loss on stock purchased for a minor, who afterwards repudiated the transaction, the minor is entitled to counterclaim the amount deposited by him with the broker to cover margins. *Heath v. Mahoney*, 12 N. Y. Wkly. Dig. 414.

2. *Ritchie v. Hayward*, 71 Mo. 560; *Woodruff v. Garner*, 27 Ind. 4; 89 Am. Dec. 477; *Tinsley v. Tinsley*, 15 B.

Mon. (Ky.) 454; *Moody v. Moody*, 16 Hun (N. Y.) 189; *Harlock v. LeBaron*, 1 Civ. Pro. Rep. (N. Y.) 168; *Michel v. Halheimer* (Supreme Ct.), 10 N. Y. Supp. 489.

A petition setting forth that the defendants came into the possession of certain sacks belonging to the plaintiffs, and wrongfully converted them to their own use, sets forth a transaction in a legal sense, although no contract is therein set forth. *Ritchie v. Hayward*, 71 Mo. 560.

Where a municipal corporation brings suit to rescind an executory agreement for a lease under which it has occupied, on the ground that fraud was practiced in procuring the corporation to take it, the landlord may set up a counterclaim for rent accrued by such occupancy. The proposed lease, and resolution of the corporation to accept it, are regarded as "the transaction" constituting the foundation of plaintiff's claim. *Mayor, etc., of N. Y. v. Wood*, 4 Abb. Pr. N. S. (N. Y.) 332; *Wood v. Mayor, etc., of N. Y.*, 3 Abb. Pr. N. S. (N. Y.) 467.

3. *Thomson v. Sanders*, 118 N. Y. 258; *Burton v. Stewart*, 3 Wend. (N. Y.) 236; 20 Am. Dec. 692; *Spalding v. Vandercok*, 2 Wend. (N. Y.) 431; *Love v. Oldham*, 22 Ind. 51; *Vail v. Jones*, 31 Ind. 467; *Allen v. Shackleton*, 15 Ohio St. 145; *Moberly v. Alexander*, 19 Iowa 162; *More v. Rand*, 60 N. Y. 208; *Bruce v. Burr*, 67 N. Y. 237; *Wilson v. Hughes*, 94 N. Car. 185; *Walsh v. Hall*, 66 N. Car. 233; and see *Litchult v. Treadwell*, 7 N. Y. Wkly. Dig. 83, affirmed in 74 N. Y. 603; *Moody v. Moody*, 16 Hun (N. Y.) 189; *Betz v. Peter*, 3 N. Y. Wkly. Dig. 517; *Carpenter v. Manhattan L. Ins. Co.*, 93 N. Y. 552; *Kelly v. Bernheimer*, 3 Thomp. & C. (N. Y.) 140; *Allaire v. Whitney*, 1 Hill (N. Y.) 484; *Brown v. Tuttle*, 66 Barb. (N. Y.) 169; *Beecker v. Vrooman*, 13 Johns. (N. Y.) 302; *Rothschild v. Mack*, 115 N. Y. 1;

demand for reformation or correction, is a valid counterclaim in an action based upon the transaction, with reference to which the mistake was made.¹ Damages for the negligent or wrongful performance of a contract or of a service, may be set up in an action to recover compensation therefor, or for a breach thereof;² and a

More v. Rand, 60 N. Y. 208; *Walsh v. Hall*, 66 N. Car. 233; *House v. Marshall*, 18 Mo. 368; *Morrison v. Kramer*, 58 Ind. 38; *Hoffa v. Hoffman*, 33 Ind. 172; *Pierce v. Tiersch*, 40 Ohio St. 168. But see *Jones v. Moore*, 42 Mo. 413; *Pass v. Pass*, 109 N. Car. 484.

Fraud in procuring an agreement in liquidation between a corporation and its creditors is no defense to an action by the trustees, in liquidation against a creditor of the corporation upon a note given by him to them, after the execution of the liquidation agreement for property bought by him from such trustees. *Otis v. Shantz*, 128 N. Y. 45.

Where property was sold, and the grantor afterwards executed another deed of the same property to another person, who first recorded his deed, it was held in an action by the prior grantor brought to set aside the second deed, as a cloud upon his title, that the defendants might allege and prove as a counterclaim that the plaintiff's deed was fraudulently procured and ask to have the same set aside. *Moody v. Moody*, 16 Hun (N. Y.) 189.

In an action to recover a balance due upon a contract for sale of two separate patent processes, described in a single written agreement, for an entire sum payable in installments, the vendee is entitled to set off damages arising out of the vendor's representations as to one of the processes, although the other proves to be more valuable than the price paid for both. *Rawley v. Woodruff*, 2 Lans. (N. Y.) 419.

Fraud inducing a contract may be used either as a counterclaim or a cross-demand, or as a defense in an action upon the contract. *Coe v. Lindley*, 32 Iowa 437.

1. *Andrews v. Gillespie*, 47 N. Y. 487; *McKee v. U. S.*, 12 Ct. of Cl. 504; *Sample v. Rowe*, 24 Ind. 208; *Charlton v. Tardy*, 28 Ind. 452; *Born v. Schoenkeisen*, 110 N. Y. 55; and see *Terre Haute, etc., R. Co. v. Pierce*, 95 Ind. 496; *Hicks v. Sheppard*, 4 Lans. (N. Y.) 335; *Bruce v. Burr*, 67 N. Y. 237; *Garrett v. Love*, 89 N. Car. 205.

In a suit by the grantor to rescind a conveyance of land, on the ground of

fraudulent representations, the defendant set up a special denial of the fraud alleged, and a counterclaim, denying the alleged fraud, and averring that the plaintiff wrongfully kept the defendant out of possession, and praying judgment for possession, and rents and profits. *Held*, on demurrer, that the counterclaim was good. *Woodruff v. Garner*, 27 Ind. 4; 89 Am. Dec. 477.

Distinction Between Fraud and Mistake.—A cause of action based on fraud in the execution of a written contract, is distinct from that founded on a mistake merely, and it is not competent upon the trial to make a substitution of one for the other. *Dudley v. Scranton*, 57 N. Y. 424.

2. *Wadley v. Davis*, 63 Barb. (N. Y.) 500; *Stoddard v. Treadwell*, 26 Cal. 294; *Page v. Ford*, 12 Ind. 46; *Morrison v. Kramer*, 58 Ind. 38; *Harlan v. St. Paul, etc., R. Co.*, 31 Minn. 427; *Gleadell v. Thomson*, 56 N. Y. 194; *Harlock v. Le Baron*, 1 Civ. Pro. Rep. (N. Y.) 168; *Ayres v. O'Farrell*, 4 Robt. (N. Y.) 668; *Lerche v. Brasher*, 37 Hun (N. Y.) 385; *Lancaster, etc., Mfg. Co. v. Colgate*, 12 Ohio St. 344; and see *Starbird v. Barrons*, 43 N. Y. 200; *Merlette v. North & East River Steamboat Co.*, 13 Daly (N. Y.) 114; *Zigler v. McClellan*, 15 Oregon 499; *Berkey, etc., Furniture Co. v. Hascall*, 123 Ind. 502; *Wheelock v. Pacific Pneumatic Gas Co.*, 51 Cal. 223; *Butler v. Titus*, 13 Wis. 429; *Byrne v. Weeks*, 4 Abb. App. Dec. (N. Y.) 657; *Merrick v. Gordon*, 20 N. Y. 93; *Ogden v. Codding-ton*, 2 E. D. Smith (N. Y.) 317. But see *Barker v. Knickerbocker L. Ins. Co.*, 24 Wis. 630.

In an action by a common carrier for freight on a cargo of wine, where the defendant sets up a counterclaim for loss by leakage of the casks, and there is no evidence that the loss occurred before the commencement of the voyage, it is error in the court to reject evidence of the value of the wine at the port of destination. *Krohn v. Oechs*, 48 Barb. (N. Y.) 127.

In an action for rent a cause of action for taking defendant's goods and holding them for, or apply-

demand for services or for a breach of contract, may be set up in an action for the negligent or wrongful performance thereof.¹

Demands arising out of matters only incidentally connected with the transaction set forth in the complaint, however, and constituting no part of, and not inseparable from it, are not proper subjects of counterclaim,² and a personal tort, or a wrong caused by acts of violence or fraud, is not a transaction.³ Contrary causes of action for tort cannot be said to arise out of the same

ing them on the rent sued for, is to be deemed as arising out of the same transaction, within the rule as to counterclaim. *Littman v. Coulter*, 23 Abb. N. Cas. (N. Y.) 60.

1. *Griffin v. Moore*, 52 Ind. 295; *Judah v. Vincennes University*, 16 Ind. 56; *Sponenbarger v. Lemert*, 23 Kan. 55; *Kilpatrick v. Dean*, 3 N. Y. Supp. 60; *Starbird v. Barrows*, 43 N. Y. 200; *Lapham v. Osborne*, 20 Nev. 168.

Opposing demands on contract and for tort may arise out of the same transaction. *Bitting v. Thaxton*, 72 N. Car. 541.

A defendant may set up as a counterclaim, the plaintiff's indebtedness to him for board, etc., in an action against him for a loss of goods of the defendant upon his liability as a boarding house or hotel keeper. *Harris v. Curet*, 9 Abb. Pr. N. S. (N. Y.) 199.

Set Off of Part of Demand.—Where stock is held as collateral security for a loan and divided into several lots, one of which is separately converted, in an action for the conversion, the pledgee may set off against the plaintiff's claim, a portion of the debt bearing the same proportion to the whole debt, as the part converted bears to the value of all the stock pledged. *New York, etc., R. Co. v. Davies*, 38 Hun (N. Y.) 477.

2. See *Sharp v. Kinsman*, 18 S. Car. 108; *Gallup v. Albany R. Co.*, 7 Lans. (N. Y.) 471; *Barker v. Platt* (Supreme Ct.), 1 N. Y. Supp. 416; *Elwell v. Skiddy*, 8 Hun (N. Y.) 73; *Mayor, etc., of N. Y. v. Parker Vein Steamship Co.*, 12 Abb. Pr. (N. Y.) 300; 21 How. Pr. (N. Y.) 289; *Brugman v. Burr*, 30 Neb. 406; *Drake v. Cockroft*, 4 E. D. Smith (N. Y.) 34; *Dole v. McGraw*, 71 Mich. 106; *Hiner v. Newton*, 30 Wis. 640; *Mulberger v. Koenig*, 62 Wis. 558.

Damages for an alleged illegal attachment are in no way connected with the transaction set forth in the complaint in the action in which the attachment was issued. *Nolle v. Thomp-*

son, 3 Metc. (Ky.) 121; *Wangenheim v. Graham*, 39 Cal. 169; *Heinbrock v. Stark*, 53 Mo. 588; *Reed v. Chubb*, 9 Iowa 178; *Carver v. Shelly*, 17 Kan. 472; *Powell v. Geisendorff*, 23 Kan. 538; *Kramer v. Thomson-Houston Electric Light Co.*, 95 N. Car. 277. But see *Town v. Bringolf*, 47 Iowa 133.

Such damages may be set off if the attachment amounts to a breach of the contract sued upon. *Wangenheim v. Graham*, 39 Cal. 169.

In an action on a *quantum meruit* for personal services, the defendant cannot set off damages arising from his being compelled to surrender to his landlord his lease of the premises on which the plaintiff had been engaged to work, because the latter had violated his contract, such damage not being a direct consequence of the plaintiff's violation of his contract. *Hartman v. Rogers*, 69 Cal. 643.

3. *Barhyte v. Hughes*, 33 Barb. (N. Y.) 320; *Rothschild v. Whitman*, 57 Hun (N. Y.) 135; *People v. Denison*, 84 N. Y. 272; *Schnaderbeck v. Worth*, 8 Abb. Pr. (N. Y.) 37; *Fellerman v. Dolan*, 7 Abb. Pr. (N. Y.) 395, note; *Ward v. Blackwood*, 48 Ark. 396; *MacDougall v. Maguire*, 35 Cal. 274; 95 Am. Dec. 98; *Waugenheim v. Graham*, 39 Cal. 169; *Steinhart v. Pitcher*, 20 Minn. 102; *Marks v. Tompkins* (Utah, 1891), 27 Pac. Rep. 6; and see *Kilpatrick v. Dean*, 3 N. Y. Supp. 60; *Levy v. Bend*, 1 E. D. Smith (N. Y.) 169; *Lovejoy v. Robinson*, 8 Ind. 399; *Humphrey v. Merritt*, 51 Ind. 197.

In an action against a railroad company for negligently running over and killing plaintiff's cow, damages sustained by the engine on account of striking the cow cannot be pleaded as a counterclaim, on the theory that plaintiff negligently permitted the cow to go on the track, since the negligence of the defendant and that of the plaintiff are independent torts, and do not grow out of the same "transaction."—*Lake Shore, etc., R. Co. v. Van Auken* (Ind. 1891), 27 N. E. Rep. 119.

transaction,¹ and the fact that one tort may be consequent upon another does not so connect them that they may be blended in the same action.²

Where the cause of action in favor of the defendant clearly arises out of the transaction which was the foundation of the plaintiff's demand, it may be set up as a counterclaim, irrespective of the form of action adopted by the plaintiff.³

c. CAUSES OF ACTION CONNECTED WITH THE SUBJECT OF THE ACTION.—In actions in which either a contract or a transaction which is not a contract, is set forth as the foundation of the plaintiff's claim, counterclaims may be interposed which neither arise out of the same contract nor out of the same transaction, if they are connected with the subject of the action.⁴ The subject of an action is either the property which is thereby sought

1. *Askins v. Hearn*, 3 Abb. Pr. (N. Y.) 184; *Carpenter v. Manhattan L. Ins. Co.*, 22 Hun (N. Y.) 52; *Murden v. Priment*, 1 Hilt. (N. Y.) 75; *Schnaderbeck v. Worth*, 8 Abb. Pr. (N. Y.) 37; *Barhyte v. Hughes*, 33 Barb. (N. Y.) 320; *Henry v. Henry*, 3 Robt. (N. Y.) 614; 17 Abb. Pr. (N. Y.) 411; *Fellerman v. Dolan*, 7 Abb. Pr. (N. Y.) 395, note; *MacDougall v. Maguire*, 35 Cal. 274; 95 Am. Dec. 98; *Keller v. Goodrich Co.*, 117 Ind. 556; *Conner v. Winton*, 7 Ind. 523; *Slayback v. Jones*, 9 Ind. 470; *Shelly v. Vanarsdell*, 23 Ind. 543; *Roback v. Powell*, 36 Ind. 515; *Lapham v. Osborne*, 20 Nev. 168; and see *Hess v. Young*, 59 Ind. 379; *Front v. Hardin*, 56 Ind. 165; 26 Am. Rep. 18.

A counterclaim for damages arising from a personal tort cannot be sustained. *Conner v. Winton*, 7 Ind. 523.

The defendant's cause of action does not arise out of the plaintiff's cause of action, when it cannot even exist consistently with it. *Woodruff v. Garner*, 27 Ind. 4; 89 Am. Dec. 477.

In *Kentucky*, however, it has been held that in an action for an assault and battery the defendant may be the party most aggrieved, and the one that is actually entitled to relief. If so, he can maintain an action against the plaintiff, and, having been sued by him, has a right to seek redress against him by his cross-action in the form of a counterclaim. *Slone v. Slone*, 2 Metc. (Ky.) 339.

2. *Lovejoy v. Robinson*, 8 Ind. 399; *Terre Haute, etc., R. Co. v. Pierce*, 95 Ind. 495; *MacDougall v. Maguire*, 35 Cal. 274; 95 Am. Dec. 98. But see to the contrary, *Heigle v. Willis*, 50 Hun (N. Y.) 588; *McArthur v. Green Bay*,

etc., Canal Co., 34 Wis. 139; *Walsh v. Hall*, 66 N. Car. 233. And see *Simkins v. Columbia, etc., R. Co.*, 20 S. Car. 258; 19 Am. & Eng. R. Cas. 467; *Terre Haute, etc., R. Co. v. Pierce*, 95 Ind. 495; *Tarwater v. Hannibal, etc., R. Co.*, 42 Mo. 193.

In *Pacific Express Co. v. Malin*, 132 U. S. 531, it was held that a counterclaim in an action for tort which is founded on the converse of the same cause of action as that counted on by the plaintiff may be allowed.

In an action against a tenant for carrying away certain articles, forming part of the property leased, a counterclaim for the value of articles owned by the defendant, but which plaintiff refused to allow him to remove when he surrendered possession of the premises, is good. *Vilas v. Mason*, 25 Wis. 310.

3. *Ritchie v. Hayward*, 71 Mo. 500; *McAdow v. Ross*, 53 Mo. 199; *Thompson v. Kessel*, 30 N. Y. 383; *Chamboret v. Cagney*, 2 Sweeny (N. Y.) 378.

A contract may be the foundation of the plaintiff's claim, although the action does not arise on the contract, and in all such cases a counterclaim, whether it be a cause of action legal or equitable, arising out of the same contract, may be set up by the defendant. *Xenia Bank v. Lee*, 2 Bosw. (N. Y.) 694.

4. *Xenia Bank v. Lee*, 2 Bosw. (N. Y.) 694; *Chamboret v. Cagney*, 2 Sweeny (N. Y.) 378; *Lawrence v. Bank of the Republic*, 3 Robt. (N. Y.) 142; *Carpenter v. Manhattan L. Ins. Co.*, 22 Hun (N. Y.) 49; *Sigler v. Hidy*, 56 Iowa 504; *Barker v. Walbridge*, 14 Minn. 469.

In *Indiana*, it is held that a counterclaim may be maintained where it

to be recovered or alleged to be injured,¹ or a violated right or the right, to enforce or maintain which, the action is brought.² The words "subject of action" should be construed to refer to the origin and ground of the plaintiff's right to recover or obtain the relief sought, rather than as relating to the thing itself, about which the controversy has arisen.³

The relation to or connection with the subject of the action must be immediate and direct, and something that the parties can be assumed to have contemplated in their dealings with each

reaches the object of the action. *Tabor v. Mackee*, 58 Ind. 290; *Grimes v. Duzan*, 32 Ind. 361; *Emily v. Harding*, 53 Ind. 102; *Standley v. Northwestern Mut. L. Ins. Co.*, 95 Ind. 254; *Gossard v. Ferguson*, 54 Ind. 519; *Stilwell v. Chappell*, 30 Ind. 72; *Woodruff v. Garner*, 27 Ind. 4; 89 Am. Dec. 477.

1. *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226; *Mayor, etc., of N. Y. v. Parker Vein Steamship Co.*, 12 Abb. Pr. (N. Y.) 300; *Carpenter v. Manhattan L. Ins. Co.*, 93 N. Y. 552; *McAdow v. Ross*, 53 Mo. 199; *Jones v. Moore*, 42 Mo. 413; *Davis v. Davis*, 9 Mont. 267; *Thompson v. Kessel*, 30 N. Y. 383; *Adams v. Loomis*, 54 Hun (N. Y.) 638; *Grange v. Gilbert*, 10 Civ. Pro. Rep. (N. Y.) 98; *Cornelius v. Kessel*, 58 Wis. 237.

A subject is that on which any operation, mental or material, is performed. *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226.

In an action to set aside a deed of real property, the subject of the action is the real estate in question. *Barnes v. Gilmore*, 6 Civ. Pro. (N. Y.) 286.

In an action for the foreclosure of a junior mortgage, the subject of the action is the mortgage and the property covered by it, which embraces that covered by the senior mortgage, and the purpose of the action is to foreclose the mortgage and sell the property. *Metropolitan Trust Co. v. Tonawanda, etc., R. Co.*, 43 Hun (N. Y.) 521.

2. *Pomeroy on Rem.* (2d ed.) 819, § 775; *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226; *Mayor, etc., of N. Y. v. Parker Vein Steamship Co.*, 12 Abb. Pr. (N. Y.) 300.

The subject of an action by a landlord against a tenant to recover rent, is the rent or money due upon the contract of hiring; the compensation for the use and occupation. An interference with the possession and eviction, total or partial and unlawful injury to

the premises in violation of the agreement of letting, would give the defendant a claim for damages connected with the subject of the action, so as to constitute a counterclaim, but a mere trespass by the landlord is not thus connected with the subject of the action. *Drake v. Cockroft*, 4 E. D. Smith (N. Y.) 34.

In an action by a wife for divorce, and to be protected in her rights to land, the husband cannot, by cross-petition, ask to have the deed of the land, which was made to the wife and her bodily heirs, reformed in favor of the husband and his child by former marriage, such relief must be through counterclaim. *Grimes v. Grimes*, 88 Ky. 20.

3. *Collier v. Erwin*, 3 Mont. 142; *Bazemore v. Bridgers*, 105 N. Car. 191; *Barker v. Platt* (Supreme Ct.), 1 N. Y. Supp. 416; *Grange v. Gilbert*, 10 Civ. Pro. Rep. (N. Y.) 98; *R. F. H. v. S. H.*, 40 Barb. (N. Y.) 9; and see *Edgerton v. Page*, 20 N. Y. 281; *O'Brien v. Garniss*, 25 Hun (N. Y.) 446.

The subject of an action is the facts constituting the cause of action. *Chamboret v. Cagney*, 2 Sweeny (N. Y.) 378; *Lehmair v. Griswold*, 40 N. Y. Super. Ct. 100; and see *Standley v. Northwestern Mut. L. Ins. Co.*, 95 Ind. 254.

The subject of the action is the plaintiff's main primary right which has been broken, and by means of whose breach a remedial right arises. *Pomeroy on Rem.* (2d ed.) 1890, § 775.

Where the plaintiff's claim is for rent accruing during the pendency of an injunction, to keep the plaintiff out of possession, any interference by plaintiff, which renders the defendant's possession less profitable, is a ground of counterclaim arising out of the transaction and connected with the plaintiff's cause of action, though it may amount to a trespass or other tort. *Tinsley v. Tinsley*, 15 B. Mon. (Ky.) 454.

other,¹ and such that it would be just and equitable that the controversy between the parties as to the matters alleged in the complaint and in the counterclaim should be settled in one action by one litigation, and that the claim of the one should be offset against or applied upon the claim of the other.²

It is not enough that the parties are the same, or that the transactions were had on the same day or at the same time.³ There must be some legal relationship between the ground of recovery alleged in the counterclaim, and the matter alleged as a cause of action by the plaintiff.⁴ A separate and distinct violation of the provisions of the contract sued upon,⁵ or a violation of the provi-

1. *Pomeroy on Rem.* (2d ed.) §34, § 794; *Louisville, etc., R. Co. v. Thompson*, 18 B. Mon. (Ky.) 735; *Akerly v. Vilas*, 21 Wis. 88; and see *O'Brien v. Garniss*, 25 Hun (N. Y.) 446.

In *Akerly v. Vilas*, 21 Wis. 88, it was held that the counterclaim must be so connected with the subject of the action that a cross-bill would have been sustained, or a recoupment allowed under the former practice.

In an action brought against a defendant to recover damages for diverting the water of a stream from the plaintiff's land, by cutting ditches on the defendant's land, the defendant cannot set up as a counterclaim a demand for the violation or nonperformance by the plaintiff of an agreement between the parties, relative to the deepening of the channel of the stream through their respective lands, made a long time prior to the alleged diversion of the water by the defendant. *Pattison v. Richards*, 22 Barb. (N. Y.) 143.

2. *Carpenter v. Manhattan L. Ins. Co.*, 93 N. Y. 552; *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226; *Grange v. Gilbert*, 44 Hun (N. Y.) 9; *Moody v. Moody*, 16 Hun (N. Y.) 189; *Metropolitan Trust Co. v. Tonawanda, etc., R. Co.*, 43 Hun (N. Y.) 521; *Lapham v. Osborne*, 20 Nev. 168.

The phrase "connected with the subject of the action" should be liberally construed, in order to prevent multiplicity of litigation. *Lawrence v. Bank of the Republic*, 3 Robt. (N. Y.) 142; *reversed* on other grounds in 35 N. Y. 320; *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226; and see *Shley v. Marshall*, 29 N. Y. 494; *Carpenter v. Manhattan L. Ins. Co.*, 22 Hun (N. Y.) 52; *Lapham v. Osborne*, 20 Nev. 168.

In *Conaway v. Carpenter*, 58 Ind. 477, it was held in a foreclosure action brought to foreclose a mortgage, in form a deed absolute, but given to

secure payment of a debt, that an answer alleging that the defendant had overpaid the indebtedness, and praying judgment for a return of the excess, and that such deed may be declared a mortgage, is sufficient as a counterclaim for the satisfaction of the mortgage; see also *Bernheimer v. Willis*, 11 Hun (N. Y.) 16.

3. *Standley v. Northwestern Mut. L. Ins. Co.*, 95 Ind. 254; *Simkins v. Columbia, etc., R. Co.*, 20 S. Car. 259; 19 Am. & Eng. R. Cas. 467; and see *Latimer v. Sullivan* (S. Car.), 30 S. Car. 111; *Latimer v. Mahaffey*, 30 S. Car. 612.

In an action to have an alleged forged mortgage canceled as a cloud on title, it cannot be set up as a counterclaim, that the money advanced thereon was used to pay off a prior genuine mortgage, and that the defendant should be subrogated to the rights of the first mortgagee; he must resort to a new action. *Byerly v. Humphrey*, 95 N. Car. 151.

4. *Standley v. Northwestern Mut. L. Ins. Co.*, 95 Ind. 254.

In an action for trespass, alleging injury, destruction and carrying away of personal property in aggravation of damages, the defendant cannot set up an equitable counterclaim as owner in common with the plaintiff of the property injured or taken, to have the plaintiff account for the use of defendant's share of the property, and to have the property sold and the proceeds divided between the parties. *Tallman v. Barnes*, 54 Wis. 181.

In an action to enforce a lien against a judgment debtor's heirs at law, a counterclaim for injury to real estate cannot be allowed. *Lee v. Eure*, 93 N. Car. 5.

5. See *Patton v. Royal Baking Powder Co.*, 114 N. Y. 1; *Brown v. Buckingham*, 11 Abb. Pr. (N. Y.) 387; *El-*

sions of a contract collateral to, but inseparably connected with the contract in suit,¹ or a violation of, or an infringement upon the same or reciprocal rights,² or a right or a claim to recover that

well v. Skiddy, 77 N. Y. 280; Bulkly v. Healy, 58 Hun (N. Y.) 608; Nichols v. Townsend, 7 Hun (N. Y.) 375; Dennis v. Belt, 30 Cal. 247; Wheelock v. Pacific Pneumatic Gas Co., 51 Cal. 223; Howe Machine Co. v. Reber, 66 Ind. 498; Stitwell v. Chappell, 30 Ind. 72; Cummings v. Pence (Ind. 1891), 27 N. E. Rep. 631; Love v. Oldham, 22 Ind. 51; Norris v. Tharp, 65 Ind. 47; Kisler v. Tinder, 29 Ind. 270; Mills v. Rosenbaum, 103 Ind. 152; Logan v. Tibbott, 4 Greene (Iowa) 389; Donahue v. Prosser, 10 Iowa 276; Rogers v. Humphrey, 39 Me. 382; Smith v. Steinkamper, 16 Mo. 150; McKinnon v. Morrison, 104 N. Car. 354; Cow Run Co. v. Lehmer, 41 Ohio St. 384; Walling v. Schwarzkopf, 7 N. Y. Wkly. Dig. 439; Gleadell v. Thomson, 56 N. Y. 194; Bruce v. Welch, 6 N. Y. St. Rep. 617; Dounce v. Dow, 57 N. Y. 16; Natural Gas Co. v. Healy, 33 W. Va. 102; Croninger v. Paige, 48 Wis. 229; Hall v. Gale, 14 Wis. 54; Schweickhart v. Stuewe, 71 Wis. 1; Butler v. Titus, 13 Wis. 429; and see Wilson v. Hughes, 94 N. Car. 182; McKinnon v. McIntosh, 98 N. Car. 89; Hurst v. Everett, 91 N. Car. 399.

Such a cause of action also arises out of the transaction which is the foundation of the plaintiff's cause of action. Baker v. Connell, 1 Daly (N. Y.) 469.

In an action upon a promissory note, damages for the conversion by the holder of property pledged to him as security for the payment of the note, may properly be pleaded as a counterclaim. Cass v. Higenbotam, 100 N. Y. 248.

In an action to foreclose a mortgage for purchase money of land, in which a personal judgment is demanded for any deficiency of the proceeds of sale to pay the mortgage, interest, and costs, a breach of the covenant of seisin in plaintiff's deed of the premises to defendant is a proper counterclaim. Merritt v. Gouley, 58 Hun (N. Y.) 372.

1. See Louisville, etc., R. Co. v. Thompson, 18 B. Mon. (Ky.) 735; Carpenter v. Butler, 13 N. Y. Wkly. Dig. 112; Harlock v. LeBaron, Civ. Pro. Rep. (N. Y.) 168; Sandford v. Travers, 40 N. Y. 140; Van Brunt v. Day, 81 N. Y. 251; Lowry v. Hurd, 7

Minn. 356; Allen v. Shackelton, 15 Ohio St. 145; Hill v. Butler, 6 Ohio St. 207; Coy v. Downie, 14 Fla. 544; Howe Machine Co. v. Reber, 66 Ind. 498; Mullendore v. Scott, 45 Ind. 113; Hembrock v. Stark, 53 Mo. 588; Moberly v. Alexander, 19 Iowa 162; Ainsworth v. Bowen, 9 Wis. 348; Racine Co. Bank v. Keep, 13 Wis. 209; Jones v. Keyes, 16 Wis. 562; Peterson v. Johnson, 22 Wis. 21; 94 Am. Dec. 581; Akerly v. Vilas, 15 Wis. 410; Eaton v. Tallmadge, 22 Wis. 526.

In an action for wrongfully taking possession of notes belonging to plaintiff, and wrongfully receiving the money thereon, a counterclaim for services rendered in collecting the notes is proper. Birch v. Hall (Supreme Ct.), 3 N. Y. Supp. 747.*

In an action by a vendor against the vendee to foreclose a mortgage given to secure a balance of purchase money, the vendee may counterclaim for an unpaid assessment which was a lien upon the land at the time of his purchase, and have the amount remaining unpaid with interest deducted from the unpaid purchase money. Craig v. Heis, 30 Ohio St. 550.

2. Vose v. Galpen, 18 Abb. Pr. (N. Y.) 96; Glen, etc., Mfg. Co. v. Hall, 61 N. Y. 226; Leslie v. Leslie, 11 Abb. Pr. N. S. (N. Y.) 311; Snow v. Holmes, 71 Cal. 142; and see Grimes v. Grimes, 88 Ky. 20; Carpenter v. Manhattan L. Ins. Co., 22 Hun (N. Y.) 49.

A cause of action for a breach of the same trust, which the plaintiff alleges the defendant broke, is connected with the subject of the action, and a proper subject for a counterclaim. Vose v. Galpen, 18 Abb. Pr. (N. Y.) 96.

In Glen, etc., Mfg. Co. v. Hall, 61 N. Y. 226, a claim to a right to use a trade name was held to be inseparably connected with a cause of action brought against the party claiming the right by another, to enforce a right to the same name claimed by him, and to restrain its violation.

Divorce.—In an action for divorce, an answer setting up countercharges of the same character in favor of the defendant, sets up a counterclaim requiring a reply. Leslie v. Leslie, 11 Abb. Pr. N. S. (N. Y.) 311; Waltermire v. Waltermire, 110 N. Y. 183; McNamara

which the plaintiff claims to have been injured or trespassed upon,¹ or injuries to property or property rights with respect to which the claim of the plaintiff is asserted,² are sufficiently connected with the subject of the action to constitute a good counterclaim.

v. McNamara, 2 Hilt. (N. Y.) 547; 9 Abb. Pr. (N. Y.) 18; Anonymous, 17 Abb. Pr. (N. Y.) 48; Fullmer *v. Fullmer*, 6 N. Y. Wkly. Dig. 22; Finn *v. Finn*, 62 How. Pr. (N. Y.) 83; *J. W. B. v. F. D. B.*, 11 N. Y. Leg. Obs. 350; Owen *v. Owen*, 51 Ga. 526. But see *R. F. H. v. S. H.*, 40 Barb. (N. Y.) 9, *disapproved* in Finn *v. Finn*, 62 How. Pr. (N. Y.) 83; but charges of adultery are not a good counterclaim in an action for a separation or a limited divorce. *McNamara v. McNamara*, 2 Hilt. (N. Y.) 547; 9 Abb. Pr. (N. Y.) 18; Henry *v. Henry*, 3 Robt. (N. Y.) 614; Burdell *v. Burdell*, 2 Barb. (N. Y.) 473; 3 How. Pr. (N. Y.) 216; Linden *v. Linden*, 36 Barb. (N. Y.) 61; Terhune *v. Terhune*, 40 How. Pr. (N. Y.) 258. But see *Armstrong v. Armstrong*, 27 Ind. 186. Nor are charges of cruelty and a prayer for a limited divorce or a separation, in an action for an absolute divorce. *Diddell v. Diddell*, 3 Abb. Pr. (N. Y.) 167.

1. See *Whitlock v. Redford*, 82 Ky. 390; *Jeffersonville, etc., R. Co. v. Oyler*, 60 Ind. 383; *Hampson v. Fall*, 64 Ind. 382; *Winslow v. Winslow*, 52 Ind. 8; *Gossard v. Ferguson*, 54 Ind. 520; *Grimes v. Duzan*, 32 Ind. 361; *Gilpin v. Wilson*, 53 Ind. 443; *McMannus v. Smith*, 53 Ind. 211; *Venable v. Dutch*, 37 Kan. 515; *Jarvis v. Peck*, 19 Wis. 74.

Against a life tenant's permanent improvements, waste may be counterclaimed. *Sherrill v. Connor*, 107 N. Car. 630.

In an action for damages for withholding the possession of real property, if the defendant held, under color of title, in good faith, adversely to the claim of the plaintiff, taxes paid by him upon the property during such withholding are a proper subject of counterclaim. *Neff v. Pennoyer*, 3 Sawy. (U. S.) 495.

Where a claimant lawfully enters upon land, but is kept out by injunction, and the injunction is afterwards dissolved, he does not become entitled to the crop then growing on the land, and the person who planted it may set up a claim therefor as a counterclaim in an action brought by the claimant

for rent. *Tinsley v. Tinsley*, 15 B. Mon. (Ky.) 454.

2. See *McAdow v. Ross*, 53 Mo. 199; *Michel v. Hallheimer*, 56 Hun (N. Y.) 416; *Revere F. Ins. Co. v. Chamberlain*, 56 Iowa 508.

In an action for rent, a mere trespass upon the part of the landlord, or a tort of any character not amounting to eviction in whole or in part, cannot be set up as a defense or a counterclaim. It must appear to create such a defense that the acts of the landlord amount to a breach of a contract of letting, otherwise they are not connected with the subject of the action. *Walker v. Shoemaker*, 4 Hun (N. Y.) 579; *Edgerton v. Page*, 20 N. Y. 181; *Levey v. Bend*, 1 E. D. Smith (N. Y.) 169; *Cram v. Dresser*, 2 Sandf. (N. Y.) 120; *Drake v. Cockroft*, 4 E. D. Smith (N. Y.) 34; *Cushing v. Adams*, 18 Pick. (Mass.) 110; *Rhineland v. Martin*, 23 Abb. N. Cas. (N. Y.) 267; *Boreel v. Lawton*, 90 N. Y. 293; 43 Am. Rep. 170; *Wilkerson v. Farnham*, 82 Mo. 672; *New York Ice Co. v. Parker*, 8 Bosw. (N. Y.) 300; *Willis v. Branch*, 91 N. Car. 143; *Casad v. Hughes*, 27 Ind. 141; *Goebel v. Hough*, 26 Minn. 252; and see *Walker v. Gilbert*, 2 Robt. (N. Y.) 214; *Galup v. Albany Ry. Co.*, 65 N. Y. 1. But the lessee may counterclaim damages for a breach of the lessor's agreement to repair. *Cook v. Soule*, 56 N. Y. 420; *Myers v. Burns*, 35 N. Y. 269; *Wilkerson v. Farnham*, 82 Mo. 672; *Block v. Ebner*, 54 Ind. 544; *Orton v. Noonan*, 30 Wis. 611. But see *Gager v. Small*, 19 Abb. L. J. 400; or for damages for a breach by the lessor of an express or implied covenant for quiet enjoyment. *Mayor, etc., of N. Y. v. Mabie*, 13 N. Y. 151; 64 Am. Dec. 538; *Walker v. Shoemaker*, 4 Hun (N. Y.) 579; *Orton v. Noonan*, 30 Wis. 611; *Staples v. Anderson*, 3 Robt. (N. Y.) 327; *Schemerhorn v. Anderson*, 2 Barb. (N. Y.) 584; *McCullough v. Cox*, 6 Barb. (N. Y.) 386; *Goebel v. Hough*, 26 Minn. 252; or for damages for an eviction from a part of the demised premises. *Morgan v. Smith*, 5 Hun (N. Y.) 220; *Le Farge v. Halsey*, 1 Bosw. (N. Y.) 171; 4 Abb. Pr. (N. Y.) 397; or for an

But where the causes of action exist independently of each other, and the only remote connection between them is that one caused the other, or the attempted enforcement of one gave rise to the other,¹ or a demand arising out of transactions concerning the same property, but had at a different time and under different circumstances,² is not allowable as a counterclaim; and in actions to recover the possession of specific chattels, no counterclaim is possible, unless perhaps equitable relief may be demanded under

unlawful distress for rent. *Littman v. Coulter*, 7 N. Y. Supp. 1.

A partial eviction may be shown by way of counterclaim in an action to recover possession of premises for non-payment of rent. *Blair v. Claxton*, 18 N. Y. 529.

Removal of Fixtures.—In *Grand Lodge v. Knox*, 20 Mo. 433, it was held that one who is sued for the purchase money of land may recoup damages arising from the removal of fixtures by the seller.

1. *Rothschild v. Whitman*, 57 Hun (N. Y.) 135; *Ferris v. Armstrong Mfg. Co.*, 57 Hun (N. Y.) 592; *Ferris v. New Haven Webb. Co.*, 57 Hun (N. Y.) 592; *Heidelbach v. Kilpatrick*, 3 Cir. Pro. Rep. (N. Y.) 209; *Nolle v. Thompson*, 3 Metc. (Ky.) 121; *Noonan v. Orton*, 30 Wis. 356; *Gelshenen v. Harris*, 26 Fed. Rep. 680. But see *Wangenheim v. Graham*, 39 Cal. 169.

The fact that the commencement of a suit against a city for services rendered it by plaintiff, prevents the city from negotiating its bonds, does not entitle the city to counterclaim such damages against plaintiff. *McGregor v. Cook* (Tex. 1890), 16 S. W. Rep. 936.

In an action of trespass for damages, benefits growing out of the act constituting the trespass cannot be set up as a counterclaim. *Bazemore v. Bridgers*, 105 N. Car. 191.

In *Lowe v. Hyde*, 39 Wis. 345, it was held that a defendant in ejectment cannot, as a general rule, set up a counterclaim resting on his legal title, for a release of plaintiff's claim of title, which the answer alleges to be void on its face, and without color of right.

In *Moyle v. Porter*, 51 Cal. 639, it was held that in an action by one in possession of real estate to quiet the title, an answer setting up facts essential to a complaint in ejectment against the plaintiff, and asking that the possession of the premises be awarded to him, does not contain a counterclaim.

Where the subject of the action is hay and grain, which the defendants

had converted, a counterclaim for plaintiff's breach of the conditions of the lease under which they were grown, is not connected with the subject of the action. *Adams v. Loomis*, 54 Hun (N. Y.) 638.

In *Hewser v. U. S.*, 13 Ct. of Cl. 284, however, in which a deposit with a collector of internal revenue for a special purpose had been improperly paid by him into the United States treasury on account of a tax subsequently assessed, it was held that though the collector's act was wrongful, yet in an action brought by the depositor for the recovery of the money, the government could set up such tax by way of counterclaim.

2. See *Meeks v. Berry* (Supreme Ct.), 3 N. Y. Supp. 840; *Bradhurst v. Townsend*, 11 Hun (N. Y.) 104; *Finkelmeier v. Bates*, 48 N. Y. Super. Ct., 433; *affirmed*, 92 N. Y. 172; *Devries v. Warren*, 82 N. Car. 356; *Simkins v. Columbia, etc., R. Co.*, 20 S. Car. 259; 19 Am. & Eng. R. Cas. 467; *Sharp v. Kinsman*, 18 S. Car. 108.

In A's action to recover of B for two organs sold and delivered, B cannot counterclaim for breach of warranty of other organs, delivered under a prior sale. *Needham v. Pratt*, 40 Ohio St. 186.

Where a credit had been allowed for a shortage in the weight of coal purchased by the plaintiff of the defendant, and several years afterwards plaintiff brought suit against defendant for breach of a contract for the purchase of a cargo of iron, the defendant cannot reopen the allowance for the shortage, on the ground of fraud and plead it as a counterclaim. *Roberts v. Benjamin*, 124 U. S. 64.

A counterclaim for slander of title in respect to land, or for malicious prosecution of a suit in respect to such land, cannot be interposed as a counterclaim in an action for the recovery of the purchase money of such land. *Akerly v. Vilas*, 21 Wis. 88; *Briggs v. Seymour*, 17 Wis. 255.

exceptional circumstances;¹ though it has been held that all the claims of either party against the other arising out of the transaction set forth in the complaint may be determined in such an action as well as in actions technically upon contract.²

Where the cause of action in favor of the defendant is connected with the subject of the action, his right to counterclaim is perfect, irrespective of the form of the action.³

5. Parties Between Whom Counterclaims May be Allowed.—A counterclaim must be a cause of action existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action.⁴ A demand against a plaintiff

In an action for a trespass upon land, the defendant cannot avail himself of a counterclaim for taxes paid thereon by him while in possession, believing himself to be the owner, such counterclaim being given only in actions of ejectment in *Wisconsin*. *Davidson v. Rountree*, 69 Wis. 655.

1. *Pomeroy on Rem.* (2d ed.) 806, § 767; *Lovensohn v. Ward*, 45 Cal. 8; *Muir v. Miller* (Iowa, 1891), 47 N. W. Rep. 1011; *DeLeyer v. Michaels*, 5 Abb. Pr. (N. Y.) 203; *Moffatt v. Van Doren*, 4 Bosw. (N. Y.) 609; *Williams v. Irby*, 15 S. Car. 458; *Talbott v. Padgett*, 30 S. Car. 167.

Defendant's claim for damages for the detention of property during the pendency of an action of replevin, is not a counterclaim, and need not be answered. *Ward v. Anderberg*, 36 Minn. 300.

2. *Brown v. Buckingham*, 11 Abb. Pr. (N. Y.) 387; *Walsh v. Hall*, 66 N. Car. 233; *Wilson v. Hughes*, 94 N. Car. 182; but see to the contrary, *Gottler v. Babcock*, 7 Abb. Pr. (N. Y.) 392, note; *Moffatt v. VanDoren*, 4 Bosw. (N. Y.) 609.

In *Deford v. Hutchinson*, 45 Kan. 318, it was held that a mortgagor may, in replevin by the mortgagee, plead as a counterclaim, the breach of a contract by the mortgagee to buy the goods and pay the difference between the amount of the mortgage and the agreed price of the goods.

A counterclaim arising out of the transaction set forth in the complaint, or connected with the cause of action, may be set up in an action for the recovery of real property. *Venable v. Dutch*, 37 Kan. 515.

3. *Chamboret v. Cagney*, 2 Sweeny (N. Y.) 378; *Xenia Bank v. Lee*, 2 Bosw. (N. Y.) 694; 7 Abb. Pr. (N. Y.) 372; *Brown v. Buckingham*, 11 Abb.

Pr. (N. Y.) 387; 21 How. Pr. (N. Y.) 190; *Carpenter v. Manhattan L. Ins. Co.*, 22 Hun (N. Y.) 49.

4. *National F. Ins. Co. v. McKay*, 21 N. Y. 191; *Mynderse v. Snook*, 1 Lans. (N. Y.) 488; *Parsons v. Nash*, 8 How. Pr. (N. Y.) 454; *Chamboret v. Cagney*, 2 Sweeny (N. Y.) 378; *Bathgate v. Haskin*, 59 N. Y. 533; *Metropolitan Trust Co. v. Tonawanda, etc.*, R. Co., 43 Hun (N. Y.) 521; *Western Bank v. Sherwood*, 29 Barb. (N. Y.) 383; *Perry v. Chester*, 53 N. Y. 240; *Shipman v. Lansing*, 25 Hun (N. Y.) 290; *Folsom v. Carli*, 6 Minn. 420; 80 Am. Dec. 456; *McAdow v. Ross*, 53 Mo. 199; *Holzbauer v. Heine*, 37 Mo. 473; *Jones v. Moore*, 42 Mo. 413; *Lawrence v. Vilas*, 20 Wis. 381; *Matteson v. Ellsworth*, 28 Wis. 254; *Resch v. Senn*, 31 Wis. 138.

The principle that a counterclaim must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, applies only to the plaintiff on the record. *Spencer v. Babcock*, 22 Barb. (N. Y.) 326.

That a joint judgment may be given does not exclude the allowance of a counterclaim, when a several judgment might also be had between the parties. *Bathgate v. Haskin*, 59 N. Y. 533.

A defendant cannot set up as a counterclaim, allegations of such a character that if they were in the form of a complaint in a separate action, another person, not a party to the pending suit, would be a necessary party to such separate action. *McConihe v. Hollister*, 19 Wis. 269; *Coursen v. Hamlin*, 2 Duer (N. Y.) 513; *Hicks v. Sheppard*, 4 Lans. (N. Y.) 335; *Pennoyer v. Allen*, 50 Wis. 308; and see *Cummings v. Morris*, 25 N. Y. 625; *Goodwin v. Conklin*, 6 N. Y. Wkly. Dig. 131.

In *Kentucky* a counterclaim is required to be a cause of action in favor

cannot be allowed as a counterclaim, however, when he has no actual interest in the demand sued upon, and is the nominal plaintiff only;¹ but so much of a demand against the person for whose benefit the action is brought as will satisfy the plaintiff's demand, must be allowed as a counterclaim, if it might have been so allowed in an action brought by the person beneficially interested.²

a. WHO MAY INTERPOSE A COUNTERCLAIM.—A demand which is not due to a defendant, or which he is not entitled to enforce, cannot be claimed by him, or interposed as a counterclaim in an action against him.³ In an action against two or more persons or partners, a claim in favor of one or more, or of any

of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contract or transaction set forth in the petition, as the foundation of the plaintiff's claim, or connected with the subject of the action. *Nolle v. Thompson*, 3 Metc. (Ky.) 121, citing *Kentucky Civil Code*, § 126.

In Iowa if any one defendant, where there are more than one, holds a cause of action, arising out of the contract or transactions set forth in the plaintiff's petition as his cause of action, or connected with the subject of the action, it may be pleaded as a counterclaim against the plaintiff, or against any one of them, if there are more than one. *Musselman v. Galligher*, 32 Iowa 383, citing *State Bank v. Morris*, 13 Iowa 136; *Briggs v. Briggs*, 30 Barb. (N. Y.) 477; *Tinsley v. Tinsley*, 15 B. Mon. (Ky.) 460.

Under the *Indiana Code*, in all actions upon contract against several defendants, any one of whom is principal and the others sureties therein, any claim upon contract in favor of the principal defendant and against the plaintiff, or any other holder of the contract, may be pleaded as a set-off by the principal or any other defendant. *Knour v. Dick*, 14 Ind. 20.

1. See *Wells v. Stewart*, 3 Barb. (N. Y.) 40; *Pendergast v. Greenfield*, 40 Hun (N. Y.) 494; *Pittman v. Mayor*, etc., of N. Y., 3 Hun (N. Y.) 370; *affirmed* 62 N. Y. 637; *Challiss v. Wylie*, 35 Kan. 506.

The right of set-off exists against the person who is the equitable owner of the claim. *Miller v. Florer*, 15 Ohio St. 148.

Although it is error to strike out a counterclaim against a third person alleged to be the real party in interest, if the jury find the plaintiff to be the real

party in interest, the error will be held to be immaterial. *Challiss v. Wylie*, 35 Kan. 506.

2. *Pendergast v. Greenfield*, 40 Hun (N. Y.) 494; *In re Van Allen*, 37 Barb. (N. Y.) 225; *Lathrop v. Godfrey*, 6 Thomp. & C. (N. Y.) 96; *Moorehead v. Hyde*, 38 Iowa 382.

So held where it appeared that the demand in suit had been assigned to the plaintiff by the party against whom the counterclaim existed, fraudulently and collusively, and for the purpose of preventing the interposition of the counterclaim in *Lathrop v. Godfrey*, 6 Thomp. & C. (N. Y.) 96.

In an action by the administrator of an insolvent estate, no counterclaim will be allowed beyond the defendant's ratable proportion of the assets. *State v. Oliver*, 104 N. Car. 458.

3. *Gillespie v. Torrance*, 25 N. Y. 306; 82 Am. Dec. 355; *Beers v. Waterbury*, 8 Bosw. (N. Y.) 396; *Boyd v. Foot*, 5 Bosw. (N. Y.) 110; *Burroughs v. Garrison*, 15 Abb. Pr. N. S. (N. Y.) 144; *Campbell v. Genet*, 2 Hilt. (N. Y.) 290; *Hurlbut v. Post*, 1 Bosw. (N. Y.) 28; *Peabody v. Bloomer*, 5 Duer (N. Y.) 678; 3 Abb. Pr. (N. Y.) 253; 6 Duer (N. Y.) 53; *Pinckney v. Keyler*, 4 E. D. Smith (N. Y.) 469; *Tyler v. Willis*, 33 Barb. (N. Y.) 327.

Where a claim offered as a set-off belonged to all the defendants jointly at the commencement of the suit, it is no objection that one of the defendants has derived his title by assignment from a co-defendant. *Bell v. Davis*, 8 Barb. (N. Y.) 210.

Parties.—Neither the law which gave the right of set-off, nor which secures to a defendant defenses legal and equitable as well those which are personal to the party to the record, as those which exist against the demand in the

number less than all of them, cannot be set up and enforced as a counterclaim.¹ And where a defendant is sued upon an individual liability, he cannot set up as a counterclaim a demand which he holds jointly with others against the plaintiff;² one of two or more joint defendants not being permitted to interpose a counterclaim in an action, unless under the pleadings a several judgment could be rendered against him.³ In an action against several defendants, however, who are jointly and severally liable, either may avail himself of an individual claim against the plain-

hands of the plaintiff as an assignee or otherwise, makes any change in the law relating to the necessary parties to an action. *Cummings v. Cummings*, 25 N. Y. 625.

1. *Baldwin v. Briggs*, 53 How. Pr. (N. Y.) 80; *Hurlbut v. Post*, 1 Bosw. (N. Y.) 28; *Mott v. Burnett*, 2 E. D. Smith (N. Y.) 50; *Peabody v. Beach*, 6 Duer (N. Y.) 53; 3 Abb. Pr. (N. Y.) 353; *St. Michael's, etc., Church v. Behrens*, 10 Civ. Pro. Rep. (N. Y.) 181; *Campbell v. Sherman*, 29 N. Y. St. Rep. 156; *Perry v. Chester*, 12 Abb. Pr. N. S. (N. Y.) 131; *Pinckney v. Keyler*, 4 E. D. Smith (N. Y.) 469; *Griffin v. Cox*, 30 Ind. 242; *Corbett v. Hughes*, 75 Iowa 281; *Musselman v. Gallagher*, 32 Iowa 383; *Harris v. Rivers*, 53 Ind. 216; *Booe v. Watson*, 13 Ind. 387; *Collier v. Irvin*, 3 Mont. 142; *Davis v. Notware*, 13 Nev. 421; *Ernst v. Kunkle*, 5 Ohio St. 521; *Wilson v. Runkel*, 38 Wis. 526; *Coleman v. Elmore*, 31 Fed. Rep. 391; and see *Perry v. Chester*, 53 N. Y. 240; *Coffin v. McLean*, 80 N. Y. 560.

In *Tilden v. Washburn*, 6 N. Y. Supp. 556, which was an action upon partnership notes, in which only one of the defendants appeared and answered, setting up a counterclaim in his favor, it was held that though the liability was joint, the defendant who appeared could avail himself of the counterclaim for fraudulent representation made in the sale of the business for which the notes were given, so far as to defeat the plaintiff's recovery.

A plaintiff who has made two persons defendants is in no situation to deny a counterclaim, on the ground that it did not accrue to both, when he had always treated the deal as with both. *Drew v. Edmunds*, 60 Vt. 401.

Where the person in whose favor a counterclaim is shown to exist is the principal debtor, and the other defendants are his sureties, it is probable that in equity he would be allowed to

set off his demand, though not due to him and his sureties. *Parsons v. Nash*, 8 How. Pr. (N. Y.) 454.

2. *Baldwin v. Briggs*, 53 How. Pr. (N. Y.) 80; *Hopkins v. Lane*, 87 N. Y. 501; *Bockover v. Harris*, 43 N. Y. Super. Ct. 548; *Cummings v. Morris*, 25 N. Y. 625; *Kiersted v. West*, 13 N. Y. Wkly. Dig. 106; *Baldwin v. Berrian*, 53 How. Pr. (N. Y.) 81; *Compton v. Green*, 9 How. Pr. (N. Y.) 228; *Campbell v. Genet*, 2 Hilt. (N. Y.) 290; *National State Bank v. Boylan*, 2 Abb. N. Cas. (N. Y.) 216; *Gordon v. Swift*, 46 Ind. 208; *Blankenship v. Rogers*, 10 Ind. 333; *Corwin v. Ward*, 35 Cal. 195; 95 Am. Dec. 93; *Weil v. Jones*, 70 Mo. 560; *Lamb v. Brolaski*, 38 Mo. 51; *Stearns v. Martin*, 4 Cal. 227; *Great Western Ins. Co. v. Peirce*, 1 Wyoming 45.

Where, in an action against a partnership, one of the partners appears and admits the co-partnership, he can set up in his separate answer, a counterclaim in favor of the firm. *Elliott v. Espenhain*, 54 Wis. 231.

In Iowa, a firm, upon being sued in its firm name, may set up a claim growing out of transactions had nominally between plaintiffs and said firm and certain others, when it appears that such others, though their names were not set out in that of the firm, were in fact interested in and really members thereof, and as such interested in the transactions which formed the basis of the plaintiff's claim. *Bird v. McCoy*, 22 Iowa 549.

3. *National State Bank v. Boylan*, 2 Abb. N. Cas. (N. Y.) 216; *Bockover v. Harris*, 43 N. Y. Super. Ct. 548.

Where plaintiff sues for the breach of a joint contract made by eleven defendants, and the answer of three denies the making of the contract alleged, but avers that it was made with the three defendants, these three may set up counterclaims. *Clegg v. Cramér*, 66 How. Pr. (N. Y.) 411.

tiff by way of counterclaim,¹ a counterclaim on behalf of one or more of several defendants being permitted where a several judgment might be had in the action between the plaintiff and one or more of the defendants.²

One sued as a surety cannot set up an independent cause of action, existing in favor of his principal against the plaintiff, as a counterclaim,³ and in an action between co-sureties for contribution, a defendant cannot avail himself of an indebtedness of the plaintiff to the principal as a defense.⁴ But where the principal and surety are sued together, a successful recoupment by the former will inure to the benefit of the latter.⁵

1. *Briggs v. Briggs*, 20 Barb. (N. Y.) 477; *affirmed* in 15 N. Y. 471; *Parsons v. Nash*, 8 How. Pr. (N. Y.) 454; *Bockover v. Harris*, 43 N. Y. Super. Ct. 548; *Perry v. Chester*, 12 Abb. Pr. N. S. (N. Y.) 131; *Newell v. Salmons*, 22 Barb. (N. Y.) 647; *Clegg v. American Newspaper Union*, 60 How. Pr. (N. Y.) 498; *Cornell v. Donovan*, 14 Daly (N. Y.) 295; *Stadler v. Parmalee*, 16 Iowa 23; *Atwater v. Spader*, 12 N. Y. St. Rep. 506; *Mortland v. Holton*, 44 Mo. 58; *Conway v. Smith*, 13 Wis. 125; *Lawrence v. Vilas*, 20 Wis. 381.

In *Missouri*, where suit is brought against several defendants on a contract executed by them jointly, a debt due from plaintiff to one of the defendants can be offset to the claim sued on. By the statutes of *Missouri*, contracts, which by the common law are joint only, are construed to be joint and several. *Mortland v. Holton*, 44 Mo. 58.

Under the *New York* Code of Procedure, the plaintiff in an action on an alleged joint contract against two defendants, may have judgment against the one against whom he establishes a cause of action, although he does not show that the other defendant is liable. *McKensie v. Farrell*, 4 Bosw. (N. Y.) 192.

2. *Newell v. Salmons*, 22 Barb. (N. Y.) 647; *Bathgate v. Haskin*, 59 N. Y. 533; *Lawrence v. Vilas*, 20 Wis. 381; and see *City Nat. Bank v. National Park Bank*, 32 Hun (N. Y.) 105.

In *Eyre v. Cook*, 10 Iowa 586, it was held that when defendants sued jointly on an account, plead a joint set-off to the plaintiff's action, which is admitted by the replication, a judgment may be rendered for the plaintiff and against one or more of the defendants, on the cause of action set up in the petition, and also against the plaintiff and in favor of all the defendants on the joint set-off.

3. *Lasher v. Williamson*, 55 N. Y. 619; *Gillespie v. Torrance*, 25 N. Y. 306, 82 Am. Dec. 355; *Emery v. Baltz*, 22 Hun (N. Y.) 434; *Henry v. Daley*, 17 Hun (N. Y.) 210; *Putnam v. Schuyler*, 4 Hun (N. Y.) 166; *Lewis v. McMillen*, 41 Barb. (N. Y.) 420; *La Farge v. Halsey*, 1 Bosw. (N. Y.) 171; 4 Abb. Pr. (N. Y.) 397; *East River Bank v. Rogers*, 7 Bosw. (N. Y.) 493; *Delano v. Rawson*, 10 Bosw. (N. Y.) 286; *Burroughs v. Garrison*, 15 Abb. Pr. N. S. (N. Y.) 144; *Morgan v. Smith*, 7 Hun (N. Y.) 244; *Hiner v. Newton*, 30 Wis. 640; and see *Scott v. Timberlake*, 83 N. Car. 282; *Harris v. Hammond*, 18 How. Pr. (N. Y.) 123; *Coffin v. McLean*, 80 N. Y. 560.

The cases in which a surety has been permitted to set up as a defense matters personal to his principal, are such as show that the contract never had a valid existence, or that the liability created by it has been extinguished in whole or in part. *Henry v. Daley*, 17 Hun (N. Y.) 210. See *Putnam v. Schuyler*, 4 Hun (N. Y.) 166; *Morse v. Hovey*, 9 Paige (N. Y.) 197; *Parshall v. Lamoreaux*, 37 Barb. (N. Y.) 189; *Strong v. Grannis*, 26 Barb. (N. Y.) 122; *Sawyer v. Chambers*, 43 Barb. (N. Y.) 622; *Osborne v. Robbins*, 36 N. Y. 365.

4. *Davis v. Toulmin*, 77 N. Y. 280; *O'Brien v. Karing*, 57 N. Y. 650; and see *Springer v. Dwyer*, 50 N. Y. 19; *Lasher v. Williamson*, 55 N. Y. 619; *Schmidt v. Coutler*, 6 Minn. 492.

If a co-surety suing for contribution has received any money or property as payment or security from the principal, he will be obliged to account for the same, but a simple indebtedness to the principal cannot be availed of by the defendant. *Davis v. Toulmin*, 77 N. Y. 280.

5. *Springer v. Dwyer*, 50 N. Y. 19; *Burroughs v. Garrison*, 15 Abb. Pr. N.

(1) *Assignees*.—A debtor may, in good faith, purchase any valid claim against his creditor, and use it as a counterclaim when sued by him, a demand held by assignment being as available as a counterclaim as an original demand;¹ but it must appear that such assignment was made before the commencement of the action.² And if the action is upon an assigned demand, and the counterclaim is a demand against the plaintiff's assignor, it must appear that the defendant took his assignment before notice of the assignment to the plaintiff.³

S. (N. Y.) 144; *Coffin v. McLean*, 80 N. Y. 560; *Newell v. Salmons*, 22 Barb. (N. Y.) 647; *O'Brien v. Karing*, 57 N. Y. 649; *Cornell v. Donovan*, 14 Daly (N. Y.) 295; *Slayback v. Jones*, 9 Ind. 470; *Knour v. Dick*, 14 Ind. 20; *Tinsley v. Tinsley*, 15 B. Mon. (Ky.) 454.

In *Turner v. Simpson*, 12 Ind. 413, it was held in a suit upon a promissory note, in which one of the defendants was principal and another surety, the defendants having set up as a counterclaim an indebtedness of the plaintiff to the principal, that the plaintiff may, in order to meet the demand, set up in reply, any indebtedness from the principal to himself or to any former holder of the demand, which is a legitimate subject of set-off, and that the excess only of the defendant's claim shall go in bar of the action.

Under *North Carolina Code of Civ. Pro.* the relief formerly obtained by a decree for specific performance of a covenant not to sue, restraining the collection of any amount from other principal obligors, that would subject the covenantor to an action for contribution, may be had by counterclaim so as to put the judgment in the form of a separate one against such other principals, for such an amount of the debt as would not give them a right of action against the covenantor. *Russell v. Aderton*, 64 N. Car. 417; *Harshaw v. Woodfin*, 64 N. Car. 568.

1. *Faulknor v. Swart*, 55 Hun (N. Y.) 261; *Everit v. Strong*, 5 Hill (N. Y.) 163; *Robinson v. Howes*, 20 N. Y. 84; *Cornell v. Donovan*, 13 N. Y. St. Rep. 704; *Naglee v. Minturn*, 8 Cal. 541; and see *Knapp v. Burnham*, 11 Paige (N. Y.) 330.

A demand assigned to the defendant before the commencement of the suit, may be set off, though he has not actually paid for it, but has merely agreed to do so. *Everit v. Strong*, 5 Hill (N. Y.) 163. But the rule is different with reference to an assignment not

based upon a proper consideration. *Robinson v. Howes*, 20 N. Y. 84.

Where a city becomes liable for certain debts of a county under special statutes, it becomes entitled to all the rights and defenses which the county then had. *Taylor v. Mayor, etc., of N. Y.*, 82 N. Y. 10.

2. *Heidenheimer v. Wilson*, 31 Barb. (N. Y.) 636; *Mayo v. Davidge*, 44 Hun (N. Y.) 342; *Moody v. Steele*, 11 Civ. Pro. Rep. (N. Y.) 205; *Knapp v. Burnham*, 11 Paige (N. Y.) 330; *Chapman v. Plummer*, 36 Wis. 262; and see *Chambers v. Lewis*, 11 Abb. Pr. (N. Y.) 210; *Van Valen v. Lapham*, 5 Duer (N. Y.) 689.

In *Indiana*, the statutory rule is, that when cross-demands have existed between persons under such circumstances, that one could be pleaded as a counterclaim or set-off in an action brought upon the other, neither can be deprived of the benefit thereof by the assignment or death of the other, and the two demands must be deemed compensated so far as they equal each other. *Schoonover v. Quick*, 17 Ind. 196; citing *Indiana*, 2 Rev. Stat., § 61, p. 41.

3. *Sayres v. Linkhart*, 25 Ind. 145; *Martine v. Willis*, 2 E. D. Smith (N. Y.) 524; *Van Valen v. Lapham*, 5 Duer (N. Y.) 689; *Perry v. Chester*, 53 N. Y. 240; *Roberts v. Carter*, 38 N. Y. 107; *Robinson v. Howes*, 20 N. Y. 84; *Diven v. Phelps*, 34 Barb. (N. Y.) 224.

As the averment is a negative one, the burden of showing notice of assignment is on the plaintiff. *Sayres v. Linkhart*, 25 Ind. 145.

If an assignee of a claim desires to protect himself against the purchase by the debtor of claims against the assignor, he has only to give notice of the assignment to the debtor. *Faulknor v. Swart*, 55 Hun (N. Y.) 261.

A debtor, who, with full knowledge of the fact that his creditor has filed a pe-

(2) *Persons Sued in a Representative Capacity*.—A person sued in a representative capacity may set forth as a counterclaim, a demand belonging to the person whom he represents, where the person so represented would have been entitled to set it forth in an action against him.¹ But a person thus sued cannot interpose a claim owned by him individually as a counterclaim in such an action;² and a defendant sued in his individual capacity cannot set up as a counterclaim a cause of action existing in his favor in his representative capacity.³

b. AGAINST WHOM A COUNTERCLAIM MAY BE PLEADED.—A counterclaim must be a cause of action which is enforceable against the plaintiff, or if there is more than one, against all the plaintiffs.⁴ In an action brought by several plaintiffs, the defendant cannot set up as a counterclaim a cause of action against any

tion in bankruptcy, purchases a claim against him, cannot set it off in an action brought by the assignee in bankruptcy, to recover the original indebtedness. *Smith v. Brinckerhoff*, 8 Barb. (N. Y.) 519; *affirmed* 6 N. Y. 305.

1. *New York Code Civ. Pro.* § 505; *Lerche v. Brasher*, 37 Hun (N. Y.) 385; *Smith v. Randall*, 3 Thomp. & C. (N. Y.) 798; *Schoonover v. Quick*, 17 Ind. 196; and see *Johnson v. Kent*, 9 Ind. 252.

A claim for losses by fire, due from an insurance company, may be set off by the insured against a claim by the insurance company against his assignee in bankruptcy, for moneys deposited with him as a private banker. But a claim for losses by fire, due from an insurance company, cannot be set off by the insured against notes given by him for capital stock of the same company. *Scammon v. Kimball*, 92 U. S. 362.

A public administrator is entitled to offset against a debt due from him to a bank, a demand for deposits in the bank, whether made in his own name or as public administrator. *Miller v. Franklin Bank*, 1 Paige (N. Y.) 444.

2. *Johnson v. Gunter*, 6 Bush (Ky.) 534; *Crews v. Williams*, 2 Bibb (Ky.) 263; 4 Am. Dec. 701; *Carpenter v. Leonard*, 5 Minn. 155; *Quin v. Hill*, 4 Dem. (N. Y.) 69; *Duffy v. Duncan*, 35 N. Y. 186; *Hills v. Tallman*, 21 Wend. (N. Y.) 674; *Dudley v. Griswold*, 2 Bradf. (N. Y.) 24; see also *Miller v. Franklin Bank*, 1 Paige (N. Y.) 444.

The reason for the rule is that if such a demand were allowed it would alter the course of administration. *Hills v. Tallman*, 21 Wend. (N. Y.) 674.

Where a promissory note indorsed in blank by a testator, and deposited in a bank for collection, comes after his death into the possession of his executor, the executor may maintain an action thereon in his own name, or may rely upon it as a defense by way of counterclaim, in an action brought against him in his individual capacity, to enforce a claim for which he is individually liable. *Barlow v. Myers*, 24 Hun (N. Y.) 286.

3. *Blood v. Kane*, 52 Hun (N. Y.) 225; *Barlow v. Myers*, 24 Hun (N. Y.) 286.

Purchase of Claims by Executor.—It would be inconsistent with the principles of sound public policy, to permit an executor to buy up claims against creditors of an estate for the purpose of obtaining a set-off in equity. *Dudley v. Griswold*, 2 Bradf. (N. Y.) 24; *Mead v. Merrick*, 2 Paige (N. Y.) 405; *In re Hill*, 17 Abb. N. Cas. (N. Y.) 273.

4. *McCulloch v. Vibbard*, 51 Hun (N. Y.) 227; *Goodwin v. Conklin*, 6 N. Y. Wkly. Dig. 131; *Boyd v. Foot*, 5 Bosw. (N. Y.) 110; *Duncan v. Stanton*, 30 Barb. (N. Y.) 533; *Weeks v. Pryor*, 27 Barb. (N. Y.) 79; *Tyler v. Willis*, 33 Barb. (N. Y.) 327; *Mynderse v. Snook*, 1 Lans. (N. Y.) 488; *Belknap v. McIntyre*, 2 Abb. Pr. (N. Y.) 366; and see *Truman v. Lorillard*, 61 N. Y. 612; *Tyler v. Willis*, 33 Barb. (N. Y.) 327.

In Iowa, however, a defendant may plead as a set-off or counterclaim against a plaintiff, a claim arising on contract, which would constitute a cause of action in his favor against the plaintiff and others jointly bound with him. *Redman v. Malvin*, 23 Iowa 296;

number less than all of such plaintiffs;¹ nor in an action brought by an individual plaintiff can the defendant set up as a counterclaim a cause of action which he has against this plaintiff, together with some other person who is not a party to the action.²

A defendant upon showing that one of several plaintiffs is the sole party in interest, however, may avail himself of a demand against that plaintiff, in all respects as if the action had been brought in the name of such plaintiff alone.³ Where the rights of the plaintiffs against the defendant are several, the defendant may interpose as a counterclaim a demand against one of the plaintiffs, between whom and himself a separate judgment might be had in the action.⁴

Ryerson v. Hendrie, 22 Iowa 480; *Allen v. Maddox*, 40 Iowa 124; *Sherman v. Hale*, 76 Iowa 383.

1. *McCulloch v. Vibbard*, 51 Hun (N. Y.) 227; *Goodwin v. Conklin*, 6 N. Y. Wkly. Dig. 131; *Harrison v. Vanderbilt*, 9 N. Y. St. Rep. 810; *Johnson v. Kent*, 9 Ind. 252; *Stadler v. Parmelee*, 10 Iowa 23.

A demand against a surviving partner cannot be pleaded as a counterclaim in an action by him upon a demand in favor of the firm, but it might be allowed as a set-off. *Lawrence v. Vilas*, 20 Wis. 381.

In an action by some of the members of a firm and the assignee in bankruptcy of the others a demand in favor of defendants against the members of the firm, would, if properly pleaded, be a good offset, regardless of the want of parties. *McCulloch v. Vibbard*, 51 Hun (N. Y.) 227.

In *Wallenstein v. Selizman*, 7 Bush (Ky.) 175, which was an action commenced by a non-resident against a resident of the State, a demand against one of the plaintiffs was allowed as an equitable set-off or counterclaim, upon the ground that the defendant could not sue upon it in that State.

Where there is a dormant member of a copartnership whose connection with the firm is intentionally concealed, and the partners have induced others to deal with the ostensible partner as if he alone were interested, in a suit brought by all the partners, the defendant may interpose a demand due from the ostensible partner alone, upon the ground that the plaintiffs had led the defendant to believe that such partner was the only person contracted with. *Van Valen v. Russell*, 13 Barb. (N. Y.) 590.

2. *McCulloch v. Vibbard*, 51 Hun (N. Y.) 227; *Mynderse v. Snook*, 1

Lans. (N. Y.) 488; *Ives v. Miller*, 19 Barb. (N. Y.) 196; *Sehubart v. Harteau*, 34 Barb. (N. Y.) 447; *Belknap v. McIntyre*, 2 Abb. Pr. (N. Y.) 366; *Lush v. Adams*, 10 Civ. Pro. Rep. (N. Y.) 60; *Wood v. Brush*, 72 Cal. 224; *Ingols v. Plimpton*, 10 Colo. 535; *Blankenship v. Rogers*, 10 Ind. 333; *Byrd v. Charles*, 3 S. Car. 352; *Lawrence v. Vilas*, 20 Wis. 381.

The contrary is held in *North Carolina*. See *Sloan v. McDowell*, 71 N. Car. 356; *Harris v. Burwell*, 65 N. Car. 548; *Neal v. Lea*, 64 N. Car. 678.

In *England*, if the defendant has a claim connected with the subject of the action against the plaintiff, and another person (*e. g.*, a co-defendant or a stranger), he may set it up by counterclaim. In the latter case the statement of defense has, in addition to the original title of the action, a new title setting forth the names of the persons against whom the counterclaim is set up. If any one of them is not a party to the action, he is served with a copy of the defense, indorsed with a notice to appear, and he is thenceforth in the same position as if he had been sued in an independent action by the defendant. *Rapalje L. Dict.*, tit. Counterclaim.

3. *Cowles v. Cowles*, 9 How. Pr. (N. Y.) 361; *Rosenberg v. Block*, 102 N. Y. 255; and see *Challiss v. Wylie*, 35 Kan. 506.

4. *More v. Rand*, 60 N. Y. 208; *Taylor v. Root*, 4 Keyes (N. Y.) 335; 4 Abb. App. Dec. (N. Y.) 382; *Chamboret v. Cagney*, 2 Sweeny (N. Y.) 378; *City Nat. Bank v. National Park Bank*, 32 Hun (N. Y.) 105; *Howard v. Shores*, 20 Cal. 277; *Stadler v. Parmelee*, 10 Iowa 23.

Where the subject of a counterclaim is a tort, it is no objection that the tort was committed by a firm composed

In an action by a principal upon a contract made by an agent in his own name, without disclosing his agency, the defendant may set off a debt due to him from such agent;¹ but if he knew or had reason to believe that the agent was not the real party in interest, but was acting as agent in the transaction, it will not be allowed.²

(1) *Assignees*.—The assignee of a contract takes it subject to the right of set-off which the debtor had against it at the time of the assignment and notice thereof;³ and if an action is founded

of plaintiff and others not parties to the suit. *Walker v. Johnson*, 28 Minn. 147.

In an action by several plaintiffs, on a contract, for an accounting, if the contract itself divides the fund, and makes a specific share due to each, a cause of action in favor of the defendants against one of the plaintiffs, though it could not be set up to bar the right to an accounting, is a proper counterclaim against the share of the plaintiff whom it affects. *Taylor v. Root*, 4 Abb. App. Dec. (N. Y.) 382.

Surviving Partner.—A several demand against a deceased partner, however, cannot be allowed as a counterclaim in an action brought by a surviving partner upon a demand in favor of the firm. *Lawrence v. Vilas*, 20 Wis. 381.

1. *Pratt v. Collins*, 20 Hun (N. Y.) 126; *Bliss v. Bliss*, 7 Bosw. (N. Y.) 339; *Judson v. Stilwell*, 26 How. Pr. (N. Y.) 513; *Hogan v. Shorb*, 24 Wend. (N. Y.) 458; *McLachlin v. Brett*, 105 N. Y. 391.

In *Bliss v. Bliss*, 7 Bosw. (N. Y.) 339, the rule was laid down that where goods are sold by a broker, without disclosing his principal, the purchaser when sued by the principal for the price, cannot set off a debt due to him from the broker, but that where the sale is made by a factor, the purchaser, as a general rule, may set off a debt due to him from the factor.

2. *Judson v. Stilwell*, 26 How. Pr. (N. Y.) 513; *Pratt v. Collins*, 20 Hun (N. Y.) 126; *Bliss v. Bliss*, 7 Bosw. (N. Y.) 339; *Hogan v. Shorb*, 24 Wend. (N. Y.) 458; *Merrick v. Gordon*, 20 N. Y. 93; *McLachlin v. Brett*, 105 N. Y. 391; and see *Henry v. Marvin*, 3 E. D. Smith (N. Y.) 71; *Browne v. Robinson*, 2 Cal. Cas. (N. Y.) 343.

A right to set off a claim against the agent is lost if the principal is disclosed before the goods are delivered or the payment made when the contract is executory. The vendee is not then acting in the dark, and his liberty

of action remains, at least where his interests may be affected by the change of creditors, and so can have no equity to use the goods of one man to pay the debt of another. *McLachlin v. Brett*, 105 N. Y. 391.

Recoupment by Agent.—An agent who is sued to compel him to pay a claim, for which he has made himself liable, can recoup any claim which his principal would have arising out of the contract, upon which the agent is liable; but he cannot recoup a claim of the principal arising out of another contract. *Elwell v. Skiddy*, 77 N. Y. 282.

3. *Martin v. Kunzmueller*, 37 N. Y. 396; *Myers v. Davis*, 22 N. Y. 489; *Barlow v. Myers*, 64 N. Y. 41; 21 Am. Rep. 582; *Barlow v. Myers*, 24 Hun (N. Y.) 286; *Rothschild v. Mack*, 115 N. Y. 1; *Smith v. Felton*, 43 N. Y. 419; *Chante v. Isaacs*, 5 Paige (N. Y.) 592; *Gay v. Gay*, 10 Paige (N. Y.) 369; *Ogden v. Prentice*, 33 Barb. (N. Y.) 162; *Coffin v. McLean*, 80 N. Y. 560; *Shipman v. Lansing*, 25 Hun (N. Y.) 290; *Thompson v. Sickles*, 46 Barb. (N. Y.) 49; *Robinson v. Howes*, 20 N. Y. 84; *Merrill v. Green*, 55 N. Y. 270; *New Amsterdam Sav. Bank v. Tartter*, 4 Abb. N. Cas. (N. Y.) 215; *Herrick v. Woolverton*, 41 N. Y. 581; 1 Am. Rep. 461; *Western Bank v. Sherwood*, 29 Barb. (N. Y.) 383; *Beckwith v. Union Bank*, 9 N. Y. 211; *Ely v. McKnight*, 30 How. Pr. (N. Y.) 97; *Cavalli v. Allen*, 57 N. Y. 508; *Schieffelin v. Hawkins*, 1 Daly (N. Y.) 289; *Berry v. Brett*, 6 Bosw. (N. Y.) 627; *Soloman v. Holt*, 3 E. D. Smith (N. Y.) 139; *Hobbs v. Duff*, 23 Cal. 596.

A demand maturing after an assignment, but before notice of such assignment, constitutes a valid offset to the debt, in an action against him upon the assigned demand by the assignee. *McCabe v. Grey*, 20 Cal. 509; *Martin v. Pillsbury*, 23 Minn. 175.

Promissory notes and bills of exchange transferred in good faith before maturity are not subject to such equity. *Western Bank v. Sherwood*, 29 Barb.

upon a demand which has been assigned by a party thereto, a demand existing against such party at the time of the assignment and belonging to the defendant, must be allowed as a counterclaim,¹ if it might have been so allowed against the assignor, while the contract belonged to him.²

But an assignee of a chose in action is not liable to be prejudiced by any new dealings between the original parties to the contract,³ and a demand accruing after the assignment cannot be relied upon as a defense, by way of set-off or counterclaim.⁴

(N. Y.) 383; *Linn v. Rugg*, 19 Minn. 181.

The payor of a promissory note, who has a counterclaim or set-off against the payee, is not deprived of the benefit of his counter-claim or set-off by an assignment of the note after maturity. *Norton v. Foster*, 12 Kan. 44; *Kneedler v. Sternbergh*, 10 How. Pr. (N. Y.) 67; *Sherwood v. Barton*, 36 Barb. (N. Y.) 284.

The holder of an overdue negotiable instrument takes it discharged of all independent matters, but subject to such equities as inhere in it or are connected with the note itself. *Richards v. Daily*, 34 Iowa 427; *Barnes v. McMullins*, 78 Mo. 260.

1. *Willover v. First Nat. Bank*, 10 Civ. Pro. Rep. (N. Y.) 80; 40 Hun (N. Y.) 184; *Davidge v. Mayo* (Supreme Ct.), 5 N. Y. Supp. 475; *Beckwith v. Union Bank*, 9 N. Y. 211; *Robinson v. Howes*, 20 N. Y. 84; *Newberger v. Manneck Mfg. Co.*, 10 Daly (N. Y.) 275; *Leavenson v. Lafontaine*, 3 Kan. 522; *Ranson v. McClees*, 64 N. Car. 17; *Ford v. Thompson*, 1 Head (Tenn.) 265. But see *Dillaye v. Niles*, 4 Abb. Pr. (N. Y.) 253.

The right of defense founded in set-off or counterclaim, as against an assignee, is wholly statutory. *Willover v. First Nat. Bank*, 40 Hun (N. Y.) 184; *Wheeler v. Raymond*, 5 Cow. (N. Y.) 231.

2. *Willover v. First Nat. Bank*, 10 Civ. Pro. Rep. (N. Y.) 80; 40 Hun (N. Y.) 184; *Martin v. Kunzmuller*, 37 N. Y. 396; *Pardo v. Osgood*, 2 Abb. Pr. N. S. (N. Y.) 365; *Beckwith v. Union Bank*, 9 N. Y. 211; *Newburger v. Manneck Mfg. Co.*, 10 Daly (N. Y.) 275.

The demand set up as a counterclaim must have belonged in good faith to the defendant, before notice or knowledge of the assignment of the demand upon which the action is brought to the plaintiff. *Himmelmänn v. Reay*, 38 Cal. 163.

Assignment for Security.—In an action against a landlord by a contractor, to recover for repairs on the leased premises which he had previously agreed to pay for to a sub-tenant, under whom the repairs were commenced, he cannot counterclaim rent due him from such sub-tenant, upon the ground that the contractor had taken an assignment of the lease, where it appears that such assignment was made merely as security, and that the entry of the contractor was for the purpose only of making the repairs. *Tallman v. Bresler*, 65 Barb. (N. Y.) 369.

3. *Myers v. Davis*, 22 N. Y. 489; *Martin v. Kunzmuller*, 37 N. Y. 396; *Coster v. Griswold*, 4 Edw. Ch. (N. Y.) 376; *In re Van Allen*, 37 Barb. (N. Y.) 231.

In an action by the assignee of a penal bond, for breach of its condition to make title on payment of purchase money, a note given to one of the parties to induce her to perfect the title by being examined apart and signing, is not a proper counterclaim. *Utey v. Foy*, 70 N. Car. 303.

In an action by a contractor's employé to enforce a mechanics' lien, the owner cannot set off a claim against the contractor not growing out of the contract, acquired after the labor was performed, although acquired before notice that the mechanic's demand had not been paid. *Bullock v. Horn*, 44 Ohio. St. 420.

4. *Lucas v. East Stroudsburg Glass Co.*, 38 Hun (N. Y.) 581; *Willover v. First Nat. Bank*, 10 Civ. Pro. Rep. (N. Y.) 80; 40 Hun (N. Y.) 184; *Lowell v. Lane*, 33 Barb. (N. Y.) 202; *Ogden v. Prentice*, 33 Barb. (N. Y.) 160; *Roberts v. Carter*, 38 N. Y. 107; *Perry v. Chester*, 53 N. Y. 240; *Prouty v. Swift*, 10 Hun (N. Y.) 232; *Martin v. Kunzmuller*, 37 N. Y. 396; *Wells v. Stewart*, 3 Barb. (N. Y.) 40; *Murray v. Deyo*, 10 Hun (N. Y.) 3; *Newcomb v.*

Both debts must have been due and payable at the same time, and before a change in the ownership of either.¹

A mere claim for unliquidated damages is not available as a counterclaim against an assignee.² Where the two claims are connected, however, equity requires that set-off should be compelled, although one is unliquidated, when, by reason of the insolvency of either debtor or creditor, satisfaction cannot be obtained.³

(2) *Persons Suing in a Representative Capacity.*—In order to constitute a valid counterclaim, the two demands must be mutual debts respectively due to and from the plaintiff in the same capacity.⁴ In an action by a receiver, executor, administrator, or

Almy, 96 N. Y. 308; *McIlvaine v. Egerton*, 2 Robt. (N. Y.) 422; *Weeks v. Pryor*, 27 Barb. (N. Y.) 79; *U. S. Trust Co. v. Harris*, 2 Bosw. (N. Y.) 75; and see *Clark v. Brockway*, 1 Abb. App. Dec. (N. Y.) 351. But see *Filkin v. Ferris*, 18 Barb. (N. Y.) 581.

It is not necessary that an assignee should give notice to a judgment creditor of the assignor of the assignment, in order to prevent the creditors from using his judgment as a set-off, or other defense in an action brought by the assignee. *Ogden v. Prentice*, 33 Barb. (N. Y.) 160.

In an action to recover for the use of, and for an injury to, a wagon formerly belonging to the plaintiff's husband, the defendant cannot be allowed, as a counterclaim, a demand existing against plaintiff's husband, on the ground that defendant had no notice of the sale of the wagon to the plaintiff, where it is not shown that the defendant acted on the belief that the husband was the owner. *Sloteman v. Thomas, etc., Mfg. Co.*, 69 Wis. 499.

1. *Taylor v. Mayor, etc.*, of N. Y., 82 N. Y. 10; *Patterson v. Patterson*, 59 N. Y. 574; 17 Am. Rep. 384; *Spencer v. Babcock*, 22 Barb. (N. Y.) 326; *Munger v. Albany City Nat. Bank*, 85 N. Y. 580; *Jordan v. National Shoe, etc., Bank*, 74 N. Y. 467; 30 Am. Rep. 319; *Coffin v. McLean*, 80 N. Y. 560; *Richards v. La Tourette*, 53 Hun (N. Y.) 623; *affirmed* in 119 N. Y. 54; *Lawrence v. Nelson*, 21 N. Y. 158; *Martin v. Kunzmuller*, 37 N. Y. 396; *Murray v. Deyo*, 10 Hun (N. Y.) 3; *Duncan v. Stanton*, 30 Barb. (N. Y.) 533; *Perry v. Chester*, 53 N. Y. 240; *Diven v. Phelps*, 34 Barb. (N. Y.) 224; *Sayres v. Linkhart*, 25 Ind. 145.

A claim existing against the assignor, and in favor of the maker of a promis-

sory note, which was assigned for value before it became due, although with notice of the offset, cannot be set off against the note in the hands of the assignee. *Williams v. Brown*, 4 Abb. App. Dec. (N. Y.) 607. And see *Hicks v. McGrorty*, 2 Duer (N. Y.) 295; *Stanbery v. Smith*, 13 Ohio St. 495.

2. *Frick v. White*, 57 N. Y. 103; *Ferreira v. Depew*, 4 Abb. Pr. (N. Y.) 131; *Allgoever v. Edmunds*, 66 Barb. (N. Y.) 579; *Stoddard v. Treadwell*, 26 Cal. 294.

In an action by the assignee of a jailer for board of prisoners, the county cannot counterclaim for the jailer's official misconduct. *Trotter v. Swain Co. Com'rs*, 90 N. Car. 455.

In an action by a receiver of an insolvent insurance company, a loss occurring before bankruptcy is a credit within the statute of mutual credits, although the loss be not adjusted till after the bankruptcy, and although no extended time of payment be formally asked or given. *Osgood v. DeGroot*, 36 N. Y. 348.

In *Ferreira v. Depew*, 4 Abb. Pr. (N. Y.) 131, it was held that an unsettled demand existing prior to an assignment is not available as a counterclaim in an action by the assignee, but that it is doubtless an equitable defense, the plaintiff having taken the claim subject to the equities existing between the defendant and the assignor.

3. *Littlefield v. Albany Co. Bank*, 97 N. Y. 581.

4. *Patterson v. Patterson*, 59 N. Y. 574; 17 Am. Rep. 384; *In re Hill*, 17 Abb. N. Cas. (N. Y.) 273; *In re Van Allen*, 37 Barb. (N. Y.) 231; *Ballou v. Ballou*, 78 N. Y. 325; *New York Ice Co. v. Parker*, 8 Bosw. (N. Y.) 688; *Quin v. Hill*, 4 Dem. (N. Y.) 69; *Dud-*

trustee therefore, upon a demand due to the estate, or party which he represents, a demand in favor of the defendant against such estate is a good counterclaim.¹ But in an action brought by a plaintiff in his individual capacity, a claim against him in his representative capacity cannot be interposed as a counterclaim;² nor can a claim against a plaintiff in his individual capacity be interposed as a counterclaim in an action brought by him in his representative capacity.³ A demand which can be set off against an executor or administrator, however, in an action brought by

ley *v.* Griswold, 2 Bradf. (N. Y.) 24; Naglee *v.* Palmer, 7 Cal. 543; Lawrence *v.* Vilas, 20 Wis. 381; Pomeroy on Rem. (2d ed.) 793, § 754. But see Kerr *v.* Webb, 9 Rich. Eq. (S. Car.) 369. See also Brandon *v.* Allison, 66 N. Car. 532; McLean *v.* Leach, 68 N. Car. 95.

In an action by an insolvent administrator, to whom a portion of the recovery will belong in his individual capacity, a demand against him individually may be allowed in counterclaim. Carr *v.* Askew, 94 N. Car. 194.

The reasonable and necessary expenses of the interment of the body of a deceased person are a charge against his estate, and constitute a good counterclaim in an action brought by his representative for the recovery of a demand due the estate. Patterson *v.* Patterson, 59 N. Y. 574; 17 Am. Rep. 384.

Demands in reference to offset are considered due from the same person in the same right, where the plaintiff may sue and the defendant be sued in their own names, without specifying any representative character, and where the party to the suit has a lien upon, or a legal right to the application of the fund when collected. Miller *v.* Franklin Bank, 1 Paige (N. Y.) 444.

1. Davis *v.* Stover, 58 N. Y. 473; Pendergast *v.* Greenfield, 40 Hun (N. Y.) 494; Smith *v.* Randall, 3 Thomp. & C. (N. Y.) 798; Miller *v.* Franklin Bank, 1 Paige (N. Y.) 444; Otis *v.* Shantz, 128 N. Y. 45; *In re* Van Allen, 37 Barb. (N. Y.) 231; Isham *v.* Davidson, 52 N. Y. 237; New Amsterdam Sav. Bank *v.* Tartter, 4 Abb. N. Cas. (N. Y.) 215; Finnell *v.* Nesbit, 16 B. Mon. (Ky.) 351; Whedbee *v.* Reddick, 79 N. Car. 521; Hade *v.* McVay, 31 Ohio St. 231; and see Lawrence *v.* Nelson, 21 N. Y. 158; Holbrook *v.* American F. Ins. Co., 6 Paige (N. Y.) 220; Hepburn *v.* Montgomery, 19 N. Y. Wkly. Dig. 26.

Where a receiver represents creditors only, and the action which he brings can only be maintained in the right of the creditors, and not by the corporation for which the receiver was appointed, a demand against such corporation cannot be set up as a counterclaim. Pendergast *v.* Greenfield, 40 Hun (N. Y.) 494. And see Osgood *v.* Ogden, 3 Abb. App. Dec. (N. Y.) 425; Clark *v.* Brockway, 1 Abb. App. Dec. (N. Y.) 351.

The intent of the parties is not the subject of inquiry. An assignment may be held fraudulent as to creditors, and a trust may be created, not by the assignment, but by adjudication by the court as the result of fraud, for the purpose of the remedy in behalf of creditors, and in such case that question cannot be raised in the action for the purpose of the alleged counterclaim. Willover *v.* First Nat. Bank, 40 Hun (N. Y.) 184.

2. Field *v.* Hahn, 65 Mo. 417; Merritt *v.* Seaman, 6 Barb. (N. Y.) 330; reversed on other grounds in 6 N. Y. 168; Mercein *v.* Smith, 2 Hill (N. Y.) 210; Fry *v.* Evans, 8 Wend. (N. Y.) 530; Foster *v.* Coe, 4 Lans. (N. Y.) 53; Brown *v.* Cuming, 2 Cal. (N. Y.) 34.

Where an executor or administrator has sold property of the estate on credit, he may bring an action in his own name to recover the purchase price, and in such an action a debt against the decedent cannot be made the subject of a counterclaim. Thompson *v.* Whitmarsh, 100 N. Y. 35.

3. Gelsheinen *v.* Harris, 26 Fed. Rep. 680; Thompson *v.* Whitmarsh, 100 N. Y. 35; Wakeman *v.* Everett, 41 Hun (N. Y.) 278; Westfall *v.* Dungan, 14 Ohio St. 276.

Under the bankruptcy laws, requiring an equal division of the estate of a bankrupt among all creditors, a debt due to a stockholder for losses sustained by him of properties insured by

him as such, must have been due and payable to the defendant from the decedent in his lifetime;¹ and in a suit by an executor or administrator upon a cause of action which arose after the death of the testator, the defendant cannot set off a demand against the testator or intestate, even though it existed at the time of his death.²

(3) *Government*.—A State or sovereign, by coming into court as a suitor, does not abandon its sovereignty and subject itself to any affirmative judgment which the court may render against it upon a set-off or counterclaim.³ The right of a debtor of the

the company, cannot be set off against his indebtedness to the company for unpaid shares in the capital stock of the company, for the reason that the moneys arising from that source constitute a trust fund for the payment of the creditors. *Sawyer v. Hoag*, 17 Wall. (U. S.) 610; *Scammon v. Kimball*, 92 U. S. 362; and see *U. S. v. Eckford*, 6 Wall. (U. S.) 488.

In *Pendergast v. Greenfield*, 40 Hun (N. Y.) 494, which was an action brought against one as trustee for the recovery of moneys of an insolvent bank, which had come into his hands, and in which the defendant set up as a counterclaim a demand due him from the bank for services rendered by him as its vice-president, it was held that the counterclaim tended in some way to diminish and defeat the plaintiff's recovery, and the demand existed against the person whom the plaintiff represented, or for whose benefit the action was brought, and was properly interposed and should be sustained.

1. *Jordan v. National Shoe, etc., Bank*, 74 N. Y. 467; 30 Am. Rep. 319; *Mercein v. Smith*, 2 Hill (N. Y.) 210; *Patterson v. Patterson*, 59 N. Y. 574; 17 Am. Rep. 384; *Merritt v. Seaman*, 6 N. Y. 168; *Cook v. Lovell*, 11 Iowa 81; *Lawrence v. Vilas*, 20 Wis. 381.

An heir, legatee or next of kin cannot maintain a counterclaim for his share of an estate in an action against him, brought by the administrator to recover a debt due to the estate. *Woodhouse v. Woodhouse*, 11 N. Y. Wkly. Dig. 241; *Lattimer v. Sullivan*, 30 S. Car. 111.

A counterclaim which rests upon alleged tortious acts of executors in the management of the estate which they represent, arises after the death of the decedent, and is not one which belongs to the defendant at the time of his death, and cannot, therefore, be interposed in an action against him by

such executors for the recovery of a demand due the estate. *Wakeman v. Everett*, 41 Hun (N. Y.) 278.

In *Lerche v. Brasher*, 37 Hun (N. Y.) 385, a transaction had, after the death of a decedent, but dated back to a time during his lifetime, was allowed as a counterclaim in an action against his administrator brought by the person thus dating it.

2. *Merritt v. Seaman*, 6 Barb. (N. Y.) 330, reversed on other grounds in 6 N. Y. 168; *Dale v. Cooke*, 4 Johns. Ch. (N. Y.) 13; *Root v. Taylor*, 20 Johns. (N. Y.) 137; *Fry v. Evans*, 8 Wend. (N. Y.) 530; *Mercein v. Smith*, 2 Hill (N. Y.) 210; *Patterson v. Patterson*, 59 N. Y. 574; 17 Am. Rep. 384; *Naglee v. Palmer*, 7 Cal. 543; *Harte v. Houchin*, 50 Ind. 327; *Dayhuff v. Dayhuff*, 27 Ind. 158.

In *Woodward v. Lavery*, 14 Iowa 381, it was held that a debtor of an estate is not permitted to set up as a counterclaim against his debt demands against the estate purchased after the death of the intestate at a discount.

Examination of Party.—The statutory rule that a party cannot be examined as a witness, when the opposite party sues or defends as legal representative of a deceased person, is properly applicable only where the cause of action or matter of defense is one which accrued to the deceased in his lifetime, and not where the legal representative sues upon a chose in action purchased by him, and upon which he could bring a suit in his own name. *Lawrence v. Vilas*, 20 Wis. 381.

3. *People v. Denison*, 84 N. Y. 272; *People v. Corner*, 59 Hun (N. Y.) 299; *Com. v. Rodes*, 5 T. B. Mon. (Ky.) 318; *Raymond v. State*, 54 Miss. 562; 28 Ann. Rep. 382; *State v. Floyd*, 28 La. Ann. 553; *New Orleans v. Davidson*, 30 La. Ann. 541; 31 Am. Rep. 228; *Chevallier v. State*, 10 Tex. 315;

United States government, when sued by it, to interpose a counterclaim or counter-credit, rests upon statutory provisions requiring such counter-credits to be first submitted to the proper accounting officers,¹ upon complying with which a defendant sued by the government may give in evidence any counterclaim or credit which he may have in his own right, and which is a proper subject of set-off, whether arising out of the transaction on which he is sued or an independent transaction.² But such a counterclaim is available only to the extent necessary to defeat the claim of the government, and no judgment can be recovered against the government for the excess, should there be any.³ These principles do not apply to a political division of the State which has not the prerogative of a sovereign.⁴

c. DEMANDS AGAINST CO-DEFENDANTS—(See also CROSS-BILL, vol. 4, p. 905; CROSS-COMPLAINT, vol. 4, p. 906).—In an action against several defendants, the court has power not only to make a complete determination of the action between the plaintiff and the defendants, but also to determine the ultimate rights of two or more of the defendants as between themselves,⁵ in

Com. v. Matlack, 4 Dall. (Pa.) 303; *Treasurers v. Cleary*, 3 Rich. (S. Car.) 372; *Reeside v. Walker*, 11 How. (U. S.) 272; *U. S. v. Giles*, 9 Cranch (U. S.) 228; and see *People v. Brandreth*, 3 Abb. Pr. N. S. (N. Y.) 224; 36 N. Y. 191.

In *Com. v. Todd*, 9 Bush (Ky.) 708, it is held that a counterclaim against the State can be used as a defense, but no further; that as no judicial proceeding can be maintained against a State, no counterclaim is possible beyond defeating the action in which it is interposed. See also *State v. Franklin Bank*, 10 Ohio 91.

No action can be sustained against the government, except by its own express consent, under some special statute allowing it, and to permit a demand set up by way of counterclaim against the government to be proceeded upon to judgment against it would be equivalent to permitting a suit to be prosecuted against it. *People v. Denison*, 84 N. Y. 272; *Reeside v. Walker*, 11 How. (U. S.) 272.

1 *People v. Denison*, 84 N. Y. 272; *U. S. v. Hart* (Arizona, 1888), 19 Pac. Rep. 4; *U. S. v. Giles*, 9 Cranch (U. S.) 212.

They can only be set up in court after having been disallowed by such officers, except in special cases. *People v. Denison*, 84 N. Y. 272.

Authority to render a judgment against the State or government in one

of its own courts, cannot be implied but must be express, nor can it be claimed under general laws in which the State is not named. *People v. Denison*, 84 N. Y. 272; *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 239.

2. *People v. Denison*, 84 N. Y. 272; *U. S. v. Hart* (Arizona, 1888), 19 Pac. Rep. 4; *U. S. v. Wilkins*, 6 Wheat. (U. S.) 135; and see *U. S. v. Robeson*, 9 Pet. (U. S.) 319; *U. S. v. Ringgold*, 8 Pet. (U. S.) 150; *Gratiot v. U. S.*, 15 Pet. (U. S.) 336; *U. S. v. Bank of Metropolis*, 15 Pet. (U. S.) 377; *DeGroot v. U. S.*, 5 Wall. (U. S.) 431; *U. S. v. Eckford*, 6 Wall. (U. S.) 484; *Ware v. U. S.*, 4 Wall. (U. S.) 617; *U. S. v. Prentice*, 6 McLean (U. S.) 65.

3. *People v. Denison*, 84 N. Y. 272; *Reeside v. Walker*, 11 How. (U. S.) 272; *DeGroot v. U. S.*, 5 Wall. (U. S.) 431; *U. S. v. Eckford*, 6 Wall. (U. S.) 484.

Money paid by the United States on a fraudulent voucher may be recovered back on a plea of counterclaim. *Charles v. U. S.*, 19 Ct. of Cl. 316.

4. *Taylor v. Mayor, etc., of N. Y.*, 82 N. Y. 10.

Taxes.—A debt due from a municipal corporation to a citizen, however, cannot be counterclaimed against the amount he owes for taxes. *Gatling v. Carteret Co. Com'rs.*, 92 N. Car. 536.

5. *Smith v. Hilton*, 50 Hun (N. Y.) 236; *Derham v. Lee*, 87 N. Y. 599; *Clegg v. American Newspaper Union*, 60

order to secure a complete determination of the entire controversy arising out of the plaintiff's action.¹

Relief between co-defendants must be based upon the facts involved in and brought out by the litigation and investigation of the claim of the plaintiff.² Distinct and separate causes of action cannot be brought into the case by means of the answer of a defendant, when they are not in any form connected with the subject-matter of the action.³ If no issue with the complaint is made, the equities between the several defendants must be set-

How. Pr. (N. Y.) 498; Metropolitan Trust Co. v. Tonwanda, etc., R. Co., 18 Abb. N. Cas. (N. Y.) 368; 43 Hun (N. Y.) 521; Manning v. Gasharie, 27 Ind. 399. And see Jones v. Grant, 10 Paige (N. Y.) 348; Barry v. Brune, 8 Hun (N. Y.) 405.

Under statutes providing for cross-bills relief may be had against the plaintiff, against co-defendants, and others touching the matter in question in the original bill or complaint. See Kemp v. Mitchell, 36 Ind. 249; Frear v. Bryan, 12 Ind. 343; Fletcher v. Holmes, 25 Ind. 458; Kidder v. Barr, 35 N. H. 235; White v. Buloid, 2 Paige (N. Y.) 164; Ayres v. Carver, 17 How. (U. S.) 591.

The only real difference between a complaint and a cross-complaint, is that the first is filed by the plaintiff and the second by the defendant; both contain a statement of the facts and each demands affirmative relief upon the facts stated. Tippecanoe Co. v. LaFayette, etc., R. Co., 50 Ind. 85; Ewing v. Patterson, 35 Ind. 326.

In *Indiana* an answer seeking affirmative relief should be in the form of a cross-complaint, and where affirmative relief is sought against the plaintiff and the co-defendants, they should be made parties to the cross-complaint. Winslow v. Winslow, 52 Ind. 8.

1. Smith v. Hilton, 50 Hun (N. Y.) 236; Derham v. Lee, 87 N. Y. 599; Ayres v. Carver, 17 How. (U. S.) 591.

The provisions of the *New York* Code, relative to controversies between co-defendants, apply only in case of co-defendants who have appeared in the action. Parker v. Commercial Tel. Co., 3 N. Y. St. Rep. 174.

A defendant in foreclosure setting up that the mortgage is void for usury between plaintiff and a co-defendant, cannot compel an amendment of the complaint for the purpose of setting forth the transaction, but may be protected by litigating the question with his co-

defendant. Newman v. Dickson, 1 Abb. N. Cas. (N. Y.) 307.

2. Kay v. Whittaker, 44 N. Y. 576; Lansing v. Hadsall, 26 Hun (N. Y.) 619; Dusenbury v. Fisher, 47 N. Y. Super. Ct. 482; Elliott v. Pell, 1 Paige (N. Y.) 268; Jones v. Grant, 10 Paige (N. Y.) 350; Frear v. Bryan, 12 Ind. 343; Williams v. Boyd, 75 Ind. 286; Vance v. Evans, 11 W. Va. 376; Ayres v. Carver, 17 How. (U. S.) 591.

In an action for partition and to quiet title, an answer alleging that the ancestors under whom the plaintiff claims, agreed to convey the real estate in question to defendant, and put him in possession, and that he is still in possession, is good as a cross-complaint for the specific performance of the contract. Winslow v. Winslow, 52 Ind. 8.

Where the relief demanded in the complaint is substantially the same as that asked for in the answer of a co-defendant, these rules do not apply. Edwards v. Downs, 13 N. Y. Wkly. Dig. 57.

3. Rafferty v. Williams, 34 Hun (N. Y.) 544; Kay v. Whittaker, 44 N. Y. 565; Smith v. Hilton, 50 Hun (N. Y.) 236; Dusenbury v. Fisher, 47 N. Y. Super. Ct. 487; Tripp v. Vincent, 3 Barb. Ch. (N. Y.) 613; Joyce v. Whitney, 57 Ind. 550; Buffalo v. Buffalo, 2 Ired. Eq. (N. Car.) 113; Vance v. Evans, 11 W. Va. 376.

Where no issue is tendered to the complaint, and the plaintiff is allowed to proceed to judgment, and the cause is retained for the litigation of the rights of the defendants as between themselves, the court may control the application of the proceeds of the action, so as to compel payment thereof to the person finally found to be entitled thereto. Meredith v. Lackey, 16 Ind. 1.

Where the court decides that the plaintiff is not entitled to the relief asked for by him, for the reason that he is not the real party in interest, an adjudication will not be made as to the

tled between them, and they cannot be urged to defeat or delay the plaintiff's right to recover.¹

A defendant who requires such a determination must demand it in his answer, and set forth the facts upon which his right to it is based;² and he must serve a copy of his answer upon the attorney for each of the plaintiffs to be affected by the determination within the time prescribed by law.³

6. Counterclaims in Equity.—The general rule is that equity requires cross-demands to be set off against each other, if, from the nature of the claim or the situation of the parties, justice

rights of the defendants between themselves. *Dusenbury v. Fisher*, 47 N. Y. Supr. Ct. 482.

The complaint of one defendant against another to establish the alleged suretyship of the former, is not a mere cross-complaint, but sets forth a new and original proceeding which cannot be tried upon the summons issued by the plaintiff. *Joyce v. Whitney*, 57 Ind. 550.

1. *Kay v. Whittaker*, 44 N. Y. 565; *Lansing v. Hadsall*, 26 Hun (N. Y.) 619; *Manning v. Gasharie*, 27 Ind. 399; *Meredith v. Lackey*, 16 Ind. 1.

In a foreclosure suit, defendants who do not set up equities as against the plaintiff, should not be allowed to litigate between themselves before judgment, the question of their priorities of right in the fund, or their equity as to the order of sales of parcels of the property, but the plaintiff should have the usual judgment of sale. *Smart v. Bement*, 4 Abb. App. Dec. (N. Y.) 253.

2. *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40; *Kreichbaum v. Melton*, 49 Cal. 50; *Fletcher v. Holmes*, 25 Ind. 458; *Meredith v. Lackey*, 16 Ind. 1.

A cross-complaint to withstand a demurrer for want of facts must, like an ordinary complaint, state facts sufficient to constitute a cause of action. *Shoemaker v. Smith*, 74 Ind. 71.

In a foreclosure action the owner of the equity of redemption must take the initiative if he wishes to question the validity of a junior mortgage, or to oppose any step taken by a junior mortgagee in his controversy with the plaintiff to compel him to so sell the mortgaged premises that a substantial surplus will be realized. *Dobbs v. Neibuhr*, 19 N. Y. St. Rep. 909.

A defendant who has not been served with summons, and who cannot be subjected to the jurisdiction of the court by attachment, cannot be required to

litigate a question with a co-defendant by the latter serving upon him a copy of his answer. *Joy v. White*, 22 Abb. N. Cas. (N. Y.) 304; *Scott v. Wilson*, 2 Bush (Ky.) 603.

3. *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40; *Payn v. Grant*, 11 N. Y. Wkly. Dig. 197; *Meigs v. Willis*, 5 Civ. Pro. Rep. (N. Y.) 106; *Edwards v. Woodruff*, 90 N. Y. 396; *Fletcher v. Holmes*, 25 Ind. 458.

They are likewise entitled to notice of trial of the issues thus raised. *Edwards v. Woodruff*, 90 N. Y. 396.

The provisions of the *New York Code* to this effect confer no new power upon the court, but are simply a regulation of practice. *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40.

An answer by one of several defendants in a foreclosure action, which simply asks that the plaintiff's lien be declared subsequent to his, need not be served on the other defendant. *Bulmore v. Seward*, 15 N. Y. Wkly. Dig. 283.

Disposition of Issues.—In making up the issues and in the trial of questions of fact, the court is governed by the same principles of law and rules of practice in reference to a cross-complaint as in regard to a complaint. *Ewing v. Patterson*, 35 Ind. 326; *Tippecanoe Co. v. La Fayette, etc., R. Co.*, 50 Ind. 85.

Under statutes conferring power upon the courts to determine the rights of the parties on each side of a cause as between themselves, not prescribing the mode of procedure, the rules of practice in the courts of chancery modified by the spirit of the statutes must be resorted to. *Fletcher v. Holmes*, 25 Ind. 458.

A failure to answer a cross-petition cannot be taken advantage of on appeal when the party filing it, instead of asking for a default, proceeds with the trial as though in fact the pleading had

cannot otherwise be done.¹ While, as a general principle, courts of equity follow the rules of law in enforcing set-offs,² they exercise an original jurisdiction over the subject, and, in cases of

been answered. *Hervey v. Savory*, 48 Iowa 313.

1. *Acer v. Hotchkiss*, 97 N. Y. 395; *Coffin v. McLean*, 80 N. Y. 564; *Smith v. Felton*, 43 N. Y. 419; *Bathgate v. Haskin*, 59 N. Y. 533; *Shipman v. Lansing*, 25 Hun (N. Y.) 290; *Lindsay v. Jackson*, 2 Paige (N. Y.) 581; *Richards v. La Tourette*, 119 N. Y. 54; *Seymour v. Dunham*, 24 Hun (N. Y.) 93; *Gay v. Gay*, 10 Paige (N. Y.) 369; *Davidson v. Alfaro*, 80 N. Y. 660; *Tuscumbia, etc., R. Co. v. Rhodes*, 8 Ala. 206; *Chicago, etc., R. Co. v. Field*, 86 Ill. 273; *Quick v. Lemon*, 105 Ill. 587; *Buckmaster v. Grundy*, 8 Ill. 626; *Raleigh v. Raleigh*, 35 Ill. 512; *Pondir v. Cox*, 26 Ga. 485; *Davis v. Milburn*, 3 Iowa 163; *Bettison v. Jennings*, 8 Ark. 287; *Carson v. Carson*, 2 Metc. (Ky.) 97; *Hughes v. McConn*, 3 Bibb (Ky.) 254; *Thrall v. Omaha Hotel*, 5 Neb. 301; 25 Am. Rep. 487; *Russell v. Conway*, 11 Cal. 93; *Hobbs v. Duff*, 23 Cal. 596; *Edminson v. Baxter*, 4 Hayw. (Tenn.) 112; 9 Am. Dec. 751.

Equitable offsets are now undoubtedly embraced in the definition of a counterclaim. *Acer v. Hotchkiss*, 97 N. Y. 395.

Unliquidated Demands.—Where a demand is unliquidated, the right of set-off is not absolute, but must depend upon the circumstances of the case. *In re Van Allen*, 37 Barb. (N. Y.) 231; *Pignolet v. Geer*, 19 Abb. Pr. (N. Y.) 264; *Davis v. Milburn*, 3 Iowa 163.

The equitable right of set-off attaches only in cases where the respective liabilities have been fully ascertained, liquidated and fixed. *Schieffelin v. Hawkins*, 14 Abb. Pr. (N. Y.) 112; *Taylor v. Stowell*, 4 Metc. (Ky.) 175; *Naglee v. Palmer*, 7 Cal. 543. But equity requires that where two claims are connected, although one is unliquidated, set-off should be compelled, when by reason of the insolvency of either debtor, satisfaction cannot be obtained. *Taylor v. Stowell*, 4 Metc. (Ky.) 175; *Littlefield v. Albany Co. Bank*, 97 N. Y. 581; *Davidson v. Alfaro*, 80 N. Y. 660; *Gay v. Gay*, 10 Paige (N. Y.) 369; *Ferreira v. Depew*, 4 Abb. Pr. (N. Y.) 131; *Barber v. Spencer*, 11 Paige (N. Y.) 517; *Knapp v. Burnham*, 11 Paige (N. Y.) 333.

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And where no other special equities intervene, the court will allow the complainant to have the damages ascertained, and when so done will order the same to be set off against the judgment which a non-resident and insolvent defendant has against him. *Davis v. Milburn*, 3 Iowa 163. But the line is drawn at uncertain damages, such as rest in the sound discretion of a jury. *Davidson v. Alfaro*, 54 How. Pr. (N. Y.) 481.

2. *Bathgate v. Haskin*, 59 N. Y. 533; *Armstrong v. McKelvey*, 39 Hun (N. Y.) 213; *Jordan v. National Shoe, etc., Bank*, 74 N. Y. 467; 30 Am. Rep. 319; *Lindsay v. Jackson*, 2 Paige (N. Y.) 581; *Jennings v. Webster*, 8 Paige (N. Y.) 503; 35 Am. Dec. 722; *Mills v. Lampkin*, 1 Ga. 511; 44 Am. Dec. 677; *Naglee v. Palmer*, 7 Cal. 543; *Davis v. Milburn*, 3 Iowa 163.

Where there are cross-demands between two parties of such a nature that if both were recoverable at law, they would be subjects of legal set-off, then if either of the demands is matter of equitable jurisdiction only, the set-off may be enforced in equity. *Gay v. Gay*, 10 Paige (N. Y.) 369; *Naglee v. Palmer*, 7 Cal. 543.

Equity does not allow a set-off or a stoppage, unless there is a recognized rule of law, or an equitable reason requiring it. It does not interfere to declare either a set-off or a stoppage, unless there is one debt contracted on the faith of another, or an agreement between the parties that one should be discounted from the other; or there is a rule of law on which to base its action, or some intervening equity that renders the interposition of the court necessary for the protection of the demand. *Munger v. Albany City Nat. Bank*, 85 N. Y. 589.

Courts of equity following the law will not allow a set-off of a joint debt against a separate debt, or of a separate debt against a joint debt, nor will such courts allow a set-off of debts accruing in different rights, except under various special circumstances, and where the proofs are clear and the equity very strong. *Scammond v. Kimball*, 92 U. S. 362, citing 2 Story's Eq. Jur. (6th ed.), § 1437. And see *In re Van Allen*, 37 Barb. (N. Y.)

peculiar equity and under special circumstances, will enforce a counterclaim, though not within the letter of the statute.¹

The insolvency of one of the parties, rendering the other unable to obtain satisfaction upon a direct proceeding for the recovery of his debt, frequently gives rise to the right of set-off, and furnishes a decisive reason for the interposition of a court of equity.²

231; *Barber v. Spencer*, 11 Paige (N. Y.) 517.

1. *Bathgate v. Haskin*, 59 N. Y. 533; *Armstrong v. McKelvey*, 39 Hun (N. Y.) 213; *Jordan v. National Shoe, etc., Bank*, 74 N. Y. 467; 30 Am. Rep. 319; *Lindsay v. Jackson*, 2 Paige (N. Y.) 581; *Smith v. Felton*, 43 N. Y. 419; *Perry v. Chester*, 12 Abb. Pr. N. S. (N. Y.) 131; *Davidson v. Alfaro*, 54 How. Pr. (N. Y.) 481.

The mere fact that a set-off would be in conformity with the principles of natural equity and justice is not sufficient in itself to bring it within the jurisdiction of a court of equity. *Davis v. Milburn*, 3 Iowa 163.

The allowance as an equitable offset to reduce the demand in suit of an item which cannot be allowed as a legal offset or counterclaim is only proper where the equity invoked is entirely clear and certain, and where other remedies are impossible, and where the demand allowed is put beyond reasonable doubt. *Armstrong v. McKelvey*, 104 N. Y. 179.

Where a debtor has a set-off equally applicable to two demands against him, it is not for him to elect which of the demands he will satisfy; but the court will direct the application according to the equities between the parties. *Tallmadge v. Fishkill Iron Co.*, 4 Barb. (N. Y.) 382; *Collins v. Allen*, 12 Wend. (N. Y.) 356; 27 Am. Dec. 130.

2. *Rothschild v. Mack*, 115 N. Y. 1; *Bathgate v. Haskin*, 59 N. Y. 533; *Coffin v. McLean*, 80 N. Y. 560; *Smith v. Felton*, 43 N. Y. 419; *Shipman v. Lansing*, 25 Hun (N. Y.) 290; *Jordan v. National Shoe, etc., Bank*, 74 N. Y. 467; 30 Am. Rep. 319; *Littlefield v. Albany Co. Bank*, 97 N. Y. 581; *Lindsay v. Jackson*, 2 Paige (N. Y.) 581; *Gay v. Gay*, 10 Paige (N. Y.) 369; *Simson v. Hart*, 14 Johns. (N. Y.) 63; *Munger v. Albany City Nat. Bank*, 85 N. Y. 580; *Davidson v. Alfaro*, 80 N. Y. 660; *Zogbaum v. Parker*, 55 N. Y. 120; *Perry v. Chester*, 12 Abb. Pr. N. S. (N. Y.) 131; *Wolcott v. Sullivan*, 1 Edw. Ch. (N. Y.) 403; *Holbrook*

v. American F. Ins. Co., 6 Paige (N. Y.) 220; *Pond v. Smith*, 4 Conn. 302; *Goodwin v. Keney*, 49 Conn. 563; *Hobbs v. Duff*, 23 Cal. 628; *Russell v. Conway*, 11 Cal. 102; *Marye v. Jones*, 9 Cal. 335; *Keightley v. Walls*, 24 Ind. 205; *Collins v. Farquar*, 4 Litt. (Ky.) 153; *Robbins v. Holley*, 1 T. B. Mon. (Ky.) 194; *Ball v. Townsend*, Litt. Sel. Cas. (Ky.) 325; *Prior v. Richards*, 4 Bibb (Ky.) 356; *Merrill v. Souther*, 6 Dana (Ky.) 306; *Taylor v. Stowell*, 4 Metc. (Ky.) 175; *Davis v. Milburn*, 3 Iowa 163; *Levy v. Steinbach*, 43 Md. 212; *Marshall v. Cooper*, 43 Md. 46; *Foulks v. Rhodes*, 12 Neb. 225; *Ford v. Thornton*, 3 Leigh (Va.) 695; *In re Voetter*, 4 Fed. Rep. 632. See also *Greene v. Darling*, 5 Mason (U. S.) 201.

The equity which will justify the interference of the court in case of insolvency, is of greater force when the party opposing it is already in court seeking relief. *Goodwin v. Keney*, 49 Conn. 563, citing *Pond v. Smith*, 4 Conn. 297; *Bowen v. Bowem*, 20 Conn. 127; *Rowan v. Sharp's Rifle Mfg. Co.*, 29 Conn. 282; *Lindsay v. Jackson*, 2 Paige (N. Y.) 581; *Foot v. Ketcham*, 15 Vt. 258; 40 Am. Dec. 678; *Blake v. Langdon*, 19 Vt. 485; 47 Am. Dec. 701; *Chamberlain v. Stewart*, 6 Dana (Ky.) 32.

In *Russell v. Conway*, 11 Cal. 93, in which the claim against the party praying for a set-off was not a personal claim, but a judgment *in rem* against property belonging to him, while his claim against the other party was on a judgment, it was held that his insolvency was a sufficient ground for the assumption of equitable jurisdiction.

An allegation that the debtor has parted with some of his property, and threatens to put the rest of it out of his hands, so as to deprive the creditor of the power of collecting anything, is not equivalent to a charge of insolvency, and is not sufficient to authorize the setting up of an unliquidated claim as a set-off, in a case in which a set-off would not be allowed at law. *Jennings*

Thus, a demand against an insolvent may be set off against a claim in his favor, even though the claim in favor of the insolvent be not yet due and payable,¹ and the fact that the demand in favor of the insolvent is not due at the time of his assignment does not affect the right of set-off.² And though one of the parties seeking the set-off be a surety for the other, equity will adjudge it in favor of both against a demand collectible of both.³

But where the cross-demand against the insolvent is not due, no set-off can be allowed against him, as he is entitled to the full period of credit,⁴ and if before the demand of the party claiming the set-off against the insolvent becomes mature, the opposite

v. Webster, 8 Paige (N. Y.) 505; 35 Am. Dec. 722; and see *Watham v. Chamberlin*, 8 Dana (Ky.) 164; *Irving v. DeKay*, 10 Paige (N. Y.) 319.

1. *Myers v. Davis*, 22 N. Y. 493; *Seymour v. Dunham*, 24 Hun (N. Y.) 93; *Lindsay v. Jackson*, 2 Paige (N. Y.) 581; *Chance v. Isaacs*, 5 Paige (N. Y.) 592; *Richards v. La Tourette*, 119 N. Y. 54; *Munger v. Albany City Nat. Bank*, 85 N. Y. 580; *Davidson v. Alfaro*, 16 Hun (N. Y.) 359; *Smith v. Fox*, 48 N. Y. 674; *Bradley v. Angel*, 3 N. Y. 475; *Shipman v. Lansing*, 25 Hun (N. Y.) 290; *Berry v. Brett*, 6 Bosw. (N. Y.) 627; *Colyer v. Craig*, 11 B. Mon. (Ky.) 73; *Martin v. Pillsbury*, 23 Minn. 176.

Setting up a demand not yet due is a waiver by the debtor of any defense upon the ground that the debt is not mature, and such a waiver of the right to demand the full time in which to pay a debt can lawfully and properly be made by the debtor. *Rothschild v. Mack*, 115 N. Y. 1; *Lindsey v. Jackson*, 2 Paige (N. Y.) 581; *Smith v. Felton*, 43 N. Y. 419.

2. *Rothschild v. Mack*, 115 N. Y. 1; *Richards v. La Tourette*, 119 N. Y. 54; *Chance v. Isaacs*, 5 Paige (N. Y.) 592; *Smith v. Felton*, 43 N. Y. 419; *Barber v. Spencer*, 11 Paige (N. Y.) 517; *Gay v. Gay*, 10 Paige (N. Y.) 369; *Thompson v. Van Vechten*, 6 Bosw. (N. Y.) 409; *Berry v. Brett*, 6 Bosw. (N. Y.) 627.

Assignment of Mutual Debt.—Even where there are mutual debts which may be set off in equity, the right of set-off is extinguished by a *bona fide* assignment of one of the debts. *Davis v. Milburn*, 3 Iowa 163; *Howe v. Sheppard*, 2 Sumn. (U. S.) 411. But courts of equity will set off mutual judgments when one of them has been assigned fraudulently by the party in whose favor it was rendered for the purpose of

preventing such a set-off. *Hurst v. Sheets*, 14 Iowa 322.

3. *Coffin v. McLean*, 80 N. Y. 560; *Bathgate v. Haskin*, 59 N. Y. 533. And see *Gay v. Gay*, 10 Paige (N. Y.) 369; *Davis v. Toulmin*, 77 N. Y. 280; *East River Bank v. Rogers*, 7 Bosw. (N. Y.) 493; *Coster v. Griswold*, 4 Edw. Ch. (N. Y.) 374; *Holbrook v. American F. Ins. Co.*, 6 Paige (N. Y.) 220; *Davis v. Milburn*, 3 Iowa 163; *Greene v. Darling*, 5 Mason (U. S.) 209; *Jackson v. Robinson*, 3 Mason (U. S.) 138.

In *Hiner v. Newton*, 30 Wis. 640, it was suggested that in an action by a payee against an accommodation indorser of a note, if the answer should allege that the maker is insolvent, and that it is necessary for the protection of the defendant to have the benefit of a counterclaim for damages arising out of the defective construction of machinery, for which the note in suit was given, the court might order the maker to be brought in for the purposes of adjudicating such counterclaim.

There are instances in which equity will undoubtedly relieve the surety, when the principal debtor is insolvent and holds valid claims against the plaintiff which he might assert, but such equitable relief would not be in the form of a counterclaim. It would be defensive merely, and would not include any recovery against the plaintiff by the surety. *Pomeroy on Rem.* (2d ed.) 789, § 750. And see *Coffin v. McLean*, 80 N. Y. 560.

4. *Schreffelin v. Hawkins*, 14 Abb. Pr. (N. Y.) 112; *Lindsey v. Jackson*, 2 Paige (N. Y.) 581; *Chance v. Isaacs*, 5 Paige (N. Y.) 592; *Keep v. Lord*, 2 Duer (N. Y.) 78; *Wells v. Stewart*, 3 Barb. (N. Y.) 40; *Spencer v. Barber*, 5 Hill (N. Y.) 569; *Graves v. Woodbury*, 4 Hill (N. Y.) 559; *Pardo v. Osgood*, 2 Abb. Pr. N. S. (N. Y.) 365;

claim has been assigned, the right of set-off no longer exists.¹ If, on equitable principles, the equities of the creditors or others are superior to those of the defendant, he is not entitled to an allowance of the set-off.²

So though, as at law, the debts or credits are required to be mutual, a joint demand not being permitted to be set off against a separate claim, nor a separate demand against a joint one,³ where the one demand is contracted upon the faith of the other,⁴ or where there is an agreement or intention between the parties that the one demand shall be discounted from the other,⁵

In re Van Allen, 37 Barb. (N. Y.) 231; *Hicks v. McGorty*, 2 Duer (N. Y.) 295; *Newcomb v. Almy*, 96 N. Y. 308; *Gordon v. Lewis*, 2 Sumn. (U. S.) 633.

In *Chance v. Isaacs*, 5 Paige (N. Y.) 592, it was held that, although a demand against the insolvent was not due at the time of the assignment, yet as it would become due long before the creditor's notes were payable, an equitable right of set-off would have then existed, which it would have been unconscientious on the part of the insolvent to deprive him of by assigning his notes to other creditors.

1. *Myers v. Davis*, 22 N. Y. 493; *Bradley v. Angel*, 3 N. Y. 475; *Seymour v. Dunham*, 24 Hun (N. Y.) 93; *Keep v. Lord*, 2 Duer (N. Y.) 78; *Munger v. Albany City Nat. Bank*, 85 N. Y. 580; *Martin v. Kunzmüller*, 37 N. Y. 403; *Pardo v. Osgood*, 2 Abb. Pr. N. S. (N. Y.) 365. But see *Maas v. Goodman*, 2 Hilt. (N. Y.) 275.

In *Morrow v. Bright*, 20 Mo. 298, which was an action by assignees of an insolvent to recover a debt due the assignor, the defendant was allowed to set up as an equitable defense or set-off the amount of the note paid by him, after the assignment as security for the assignor, upon a note which was under protest at the date of the assignment.

2. *Coffin v. McLean*, 80 N. Y. 560; *Davidson v. Alfaro*, 80 N. Y. 660. See *Dorsey v. Reese*, 14 B. Mon. (Ky.) 127.

In setting off judgments against each other, the costs in one suit will not be allowed in set-off to the prejudice of the attorney in such suit; nor where the costs were unliquidated at the time the right of set-off attached. *Ainslie v. Boynton*, 2 Barb. (N. Y.) 258. And see *Mackey v. Mackey*, 43 Barb. (N. Y.) 58.

Although while a judgment is held by an assignee, having a lien thereon, the right of the debtor on recovering a

cross-demand against the original creditor to claim a set-off, is to that extent suspended, on the satisfaction of the lien claimed by the third person, the right of set-off again arises, even though the latter judgment was recovered after the assignment was made. *Stilwell v. Carpenter*, 2 Abb. N. Cas. (N. Y.) 238.

3. *Peabody v. Bloomer*, 3 Abb. Pr. (N. Y.) 353; *Murray v. Toland*, 3 Johns. Ch. (N. Y.) 574; *Dale v. Cooke*, 4 Johns. Ch. (N. Y.) 14; *Davidson v. Alfaro*, 54 How. Pr. (N. Y.) 484; *Collins v. Butler*, 14 Cal. 223; *Davis v. Milburn*, 3 Iowa 163; *Kinney v. Robinson* (Mich. 1886), 5 West. Rep. 773; *Collier v. Erwin*, 3 Mont. 142; *Howe v. Sheppard*, 2 Sumn. (U. S.) 409; *Jackson v. Robinson*, 3 Mason (U. S.) 138.

In *Pardo v. Osgood*, 2 Abb. Pr. N. S. (N. Y.) 365, it was said that mutual debts have been defined to be those existing contemporaneously in favor of each party against the other in the same capacity, citing *Murray v. Toland*, 3 Johns. Ch. (N. Y.) 569; *Dale v. Cooke*, 4 Johns. Ch. (N. Y.) 11. Mutual credits where each party has trusted the other, or given him or them credit, citing *Dale v. Cooke*, 4 Johns. Ch. (N. Y.) 11; *Duncan v. Lyon*, 3 Johns. Ch. (N. Y.) 351; 8 Am. Dec. 513; *Jones v. Robinson*, 26 Barb. (N. Y.) 310; *In re Van Allen*, 37 Barb. (N. Y.) 229.

4. *Seymour v. Dunham*, 24 Hun (N. Y.) 23; *Hatch v. Mayor*, etc., of N. Y., 11 N. Y. Wkly. Dig. 135; *Davis v. Milburn*, 3 Iowa 163; *Taylor v. Stowell*, 4 Metc. (Ky.) 175.

It must also appear that the plaintiff is insolvent, or that for some reason the defendant is in danger of losing his demand. *Howard v. Shores*, 20 Cal. 277.

5. *Seymour v. Dunham*, 24 Hun (N. Y.) 23; *In re Van Allen*, 37 Barb. (N.

a set-off in equity will be declared; and where the plaintiff is insolvent, equity will allow a counterclaim held by one of two jointly indebted defendants to be set up and to operate in favor of both defendants.¹

7. How Pleaded—(See also PLEADING, vol. 18, p. 467; ANSWER, vol. 1, p. 599).—A counterclaim should be set up in the answer in the action.² It is in effect a complaint in a cross-action, and the general rules governing the statement of the cause of action in a complaint applies to the statement of the facts constituting the counterclaim.³ No particular form of words is neces-

Y.) 225; *Hatch v. Mayor, etc.*, of N. Y., 11 N. Y. Wkly. Dig. 135; *Davis v. Stover*, 16 Abb. Pr. N. S. (N. Y.) 225; *Davis v. Milburn*, 3 Iowa 163; *Lansdale v. Mitchell*, 14 B. Mon. (Ky.) 281; *Howe v. Sheppard*, 2 Sumn. (U. S.) 412. And see *Crennan v. Underhill*, 13 N. Y. Wkly. Dig. 432; *Schmitz v. Langhaar*, 88 N. Y. 503.

One who has taken a transfer of the property of a firm, and promised to pay its debts, including certain promissory notes not due, may set off a claim against one who held the notes at the time of his promise, in an action upon it by an indorsee before maturity of the notes. *Barlow v. Meyers*, 64 N. Y. 41; 21 Am. Rep. 582.

Non-residence.—In *Keightley v. Walls*, 24 Ind. 205, non-residence was suggested as a proper cause for the offset of one claim against another. See also *Davis v. Milburn*, 3 Iowa 163; *Taylor v. Stowell*, 4 Metc. (Ky.) 175.

Waiver.—In an action upon a note for the purchase price of property, the defendant pleaded by way of counterclaim a debt due him, alleging that the creditor had agreed to allow it to be set off against the claim in suit. It was held that by the execution of the note for the debt in suit, the agreement to allow the set-off was waived. *Dayhuff v. Dayhuff*, 27 Ind. 158.

1. *Perry v. Chester*, 12 Abb. Pr. N. S. (N. Y.) 131; *Davis v. Milburn*, 3 Iowa 163; *Fulkerson v. Davenport*, 70 Mo. 541; and see *Collier v. Erwin*, 3 Mont. 142.

Where two parties, one of whom is insolvent, hold a judgment against a third who has a judgment against the insolvent, a court of equity will ascertain the interest of the insolvent plaintiff in the former judgment, and set off the judgment against him against his interest. *Faulkerson v. Davenport*, 70 Mo. 541.

Where the parties to two judgments are not the same, a court of common-law jurisdiction cannot set off one against the other, but a court of equity will look beyond the nominal to the real parties in interest, and adjudicate the rights of the parties accordingly. *Hobbs v. Duff*, 23 Cal. 596.

2. *Apperson v. Triplett* (Ky. 1890), 13 S. W. Rep. 791; *Union Nat. Bank v. Carr*, 49 Iowa 359; *Town v. Brinkgolf*, 47 Iowa 133; *Williams v. Irby*, 15 S. Car. 458; *Pinckney v. Keyler*, 4 E. D. Smith (N. Y.) 469; *Beers v. Waterbury*, 8 Bosw. (N. Y.) 396; and see *Read v. Nicholas*, 5 Hun (N. Y.) 646; *Foulks v. White*, 21 N. Y. St. Rep. 970; *Kellogg v. Aherin*, 48 Iowa 299.

In an action against a collecting agent for money had and received, he may be allowed his reasonable expenses, although he sets up no counterclaim in his answer. *Dennis v. Graf*, 31 Wis. 105; and see *Charley v. Watson*, 23 N. Y. Wkly. Dig. 189; *Lubert v. Chauviteau*, 3 Cal. 458; 58 Am. Dec. 415.

A counterclaim cannot be asserted for the first time on appeal. *Muldoon v. Blackwell*, 84 N. Y. 946; *Acer v. Hotchkiss*, 97 N. Y. 395.

Nor will an amendment setting up a counterclaim be allowed. *Beardsley v. Storer*, 7 How. Pr. (N. Y.) 294.

In an action for goods sold and delivered, where no counterclaim is set up in the answer, on the ground that the goods did not conform to sample, evidence of that fact is not admissible. *O'Neill v. Crotty*, 12 N. Y. Supp. 280. And see *Ball v. Consolidated Franklinite Co.*, 32 N. J. L. 102.

3. *McKensie v. Farrell*, 4 Bosw. (N. Y.) 192; *Allen v. Douglass*, 29 Kan. 412; *Wright v. Bacheller*, 16 Kan. 259; *Quin v. Smith*, 49 Cal. 163; *Warfield v. Gardner*, 79 Ky. 583; *Chambers v. Lewis*, 28 N. Y. 454; *Bloom v. Leh-*

sary to make a pleading a counterclaim.¹ The ordinary and most satisfactory form of intimating an intention to make a personal claim against the plaintiff, is by a statement that the pleading is a counterclaim,² or by a prayer for affirmative

man, 27 Ark. 489; *Hudson v. Snipes*, 40 Ark. 78; *Quinn v. Smith*, 49 Cal. 163; *Campbell v. Routt*, 42 Ind. 410; *Bennett v. McCrocklin*, 3 Metc. (Ky.) 322; *Baylie's Code*. Pl. 280; and see *Campbell v. Routt*, 42 Ind. 410; *Wythe v. Myers*, 3 Sawy. (U. S.) 595; *Neff v. Pennoyer*, 3 Sawy. (U. S.) 495; *Patton v. Camplin*, 63 Ind. 512; *Rucker v. Steelman*, 73 Ind. 396; *Holgate v. Broome*, 8 Minn. 243; *Read v. Nicholas*, 5 Hun (N. Y.) 646; *Rhineland v. Martin*, 23 Abb. N. Cas. (N. Y.) 267; *Camp v. Redmond*, 59 Hun (N. Y.) 377; *Schley v. Marshall*, 29 N. Y. 494; *Clute v. McCrea*, 12 N. Y. St. Rep. 647; *Nosler v. Hunt*, 18 Iowa 212.

The facts constituting the demand must be stated. Pleading a conclusion of law is fatal. *Chauvran v. Maillard* (Supreme Ct.), 4 N. Y. Supp. 126; *Holgate v. Broome*, 8 Minn. 243; *Branham v. Johnson*, 62 Ind. 259; *Smith v. Standard Laundry Mach. Co.*, 11 Daly (N. Y.) 154; *Smith v. McGregor*, 96 N. Car. 101.

A counterclaim should not only present a defense, but should present a cause of action in favor of the defendant. *Bowen v. Sebre*, 2 Bush (Ky.) 112.

Where no objection is made to an imperfectly pleaded counterclaim, the court on appeal will consider the issues which were tried in the court below. *Smith v. McGregor*, 96 N. Car. 101.

A defendant, setting up in his answer, by way of counterclaim, the liability of the plaintiff as a stockholder, under the general manufacturing act, must aver that the plaintiff held an amount of stock in the company equal to the amount of the debt of the defendant, for which the plaintiff is sought to be held personally liable. *Chambers v. Lewis*, 28 N. Y. 454.

A counterclaim for delay, in an action on contract for stone supplied, need not aver that defendant was ready to receive and pay for them at the proper time. *Schweickhart v. Stuewe*, 71 Wis. 1.

Amendment by Adding Counterclaim.

—A defendant may be permitted to amend his answer by inserting as a new defense his counterclaim against

the plaintiff, upon payment of plaintiff's costs of preparing for trial, and the costs of opposing the motion for the amendment, if such a course would be in furtherance of justice. *Beardsley v. Stover*, 7 How. Pr. (N. Y.) 294.

Bill of Particulars.—Where a plaintiff sued to recover the proceeds of goods sold by the defendant, and the defendant set up a counterclaim for commissions upon other sales under the same contract, and the plaintiff replied that the goods referred to in the counterclaim were sold under other contracts, the plaintiff is not entitled to a bill of particulars of such other contracts, and of the goods furnished under them, such contracts and such sales being no part of defendants cause of action or defense. *John S. Way Mfg. Co. v. Corn*, 66 How. Pr. (N. Y.) 152.

1. *Bates v. Rosekrans*, 37 N. Y. 409; 4 Abb. Pr. N. S. (N. Y.) 276.

The *New York Code* prescribes no rule by which to determine the sufficiency of an answer containing a counterclaim, except that it must state facts enough to constitute a good cause of action in favor of the defendant, and against the plaintiff, and that it is to be one of the several causes of action therein defined. *Allen v. Haskins*, 5 Duer (N. Y.) 332; *Spencer v. Babcock*, 22 Barb. (N. Y.) 326; *Merritt v. Millard*, 5 Bosw. (N. Y.) 645.

2. *Bates v. Rosekrans*, 37 N. Y. 409; 4 Abb. Pr. N. S. (N. Y.) 276; *Burrall v. De Groot*, 5 Duer (N. Y.) 379; *Brannan v. Paty*, 58 Cal. 330; and see *Voechting v. Grau*, 55 Wis. 312.

A pleading setting up a counterclaim, and filed as the answer and cross-petition of the defendants, although signed and verified by a person not a party to the suit, must be regarded as such and cannot be treated as a mere answer. *Lyle v. Poynter*, 1 Duv. (Ky.) 358.

A defendant is not required to denominate his answer a counterclaim, when the facts as presented constitute a cause of action against the plaintiff, arising out of the transaction set forth in the petition, "with an appropriate prayer for relief." But it must contain all the requisites of a petition

relief;¹ and the better practice, which should be universal, is to use both of these characteristic marks.² Where the pleader himself characterizes his pleading as a defense, he is bound by the choice which he deliberately makes, and cannot afterwards claim that it is a counterclaim;³ and if he fails to claim damages, or other affirmative relief, he cannot recover either by way of counterclaim, recoupment, or set-off,⁴ and where an answer does not in form set up a counterclaim, but contains allegations sufficient to constitute either

founded on the same cause of action. *Hutchings v. Moore*, 4 Metc. (Ky.) 110.

1. *Bates v. Rosekrans*, 37 N. Y. 409; 4 Abb. Pr. N. S. (N. Y.) 476; *Metropolitan Trust Co. v. Tonawanda, etc.*, R. Co., 18 Abb. N. Cas. (N. Y.) 368; *Brannan v. Paty*, 58 Cal. 330; *Campbell v. Routt*, 42 Ind. 410; *Hutchings v. Moore*, 4 Metc. (Ky.) 110.

A demand in a pleading for relief, which cannot be granted in the action, furnishes no ground for striking out the allegations upon which the demand is founded, when they are otherwise appurtenant to the case. *State v. Smith*, 14 Wis. 564.

2. *Pomeroy on Rem.* (2d ed.) 787, § 748.

A counterclaim cannot be pleaded by a mere allegation, following a general denial, that defendant "also sets up a counterclaim against the plaintiff for the sum of," etc. *Fox v. Turner* (Supreme Ct.), 2 N. Y. Supp. 164.

3. *Acer v. Hotchkiss*, 97 N. Y. 395; *Equitable L. Assur. Soc. v. Cuyler*, 75 N. Y. 511; *Bates v. Rosekrans*, 37 N. Y. 409; 4 Abb. Pr. N. S. (N. Y.) 476; *Wright v. Delafield*, 25 N. Y. 266; *Burke v. Thorne*, 44 Barb. (N. Y.) 363; *Simmons v. Kayser*, 43 N. Y. Supr. Ct. 131; *Beers v. Waterbury*, 8 Bosw. (N. Y.) 396; *Pinckney v. Keyler*, 4 E. D. Smith (N. Y.) 469; *Ferreira v. Depew*, 4 Abb. Pr. (N. Y.) 131; *Clough v. Murray*, 19 Abb. Pr. (N. Y.) 97; *Carpenter v. Hewel*, 67 Cal. 589; *Brannan v. Paty*, 58 Cal. 330; *McAbee v. Randall*, 41 Cal. 136; *Humbert v. Brisbane*, 25 S. Car. 506; *Stowell v. Eldred*, 39 Wis. 614; *Kenyon v. Kenyon*, 72 Wis. 234; *Resch v. Senn*, 31 Wis. 138. But see *Fuller v. Curtis*, 100 Ind. 237; 50 Am. Rep. 786; *Clarine v. Nelson*, 15 Neb. 440.

An answer setting forth a demand in favor of the defendant, and averring an intention to recoup the amount of such demand against any liability that

might be established against him, is not a counterclaim, and requires no reply. *Cockerill v. Loonam*, 36 Hun (N. Y.) 353, n.; *Van DeSande v. Hall*, 13 How. Pr. (N. Y.) 458. But see *Wilder v. Boynton*, 63 Barb. (N. Y.) 547; and the same rule applies to an answer setting up a demand, and asking that the amount thereof may be set off against any sum that may be allowed to the plaintiff. *American Dock, etc., Co. v. Staley*, 40 N. Y. Super. Ct. 539.

An allegation of damages sustained by defendant, "which he demands to recover from the plaintiff to the destruction of plaintiff's claim in the action," and to recover the balance, is insufficient to charge plaintiff with notice that a counterclaim is intended. *Morris v. Chamberlin* (Supreme Ct.), 14 N. Y. Supp. 702.

The breach of a parol agreement collateral to the one sued on, however, is available, although not in terms set up as a counterclaim where the facts were alleged and no objection to the proof offered was made, upon the ground that the pleading was defective. *Van Burt v. Day*, 81 N. Y. 251.

4. *Shute v. Hamilton*, 3 Daly (N. Y.) 476; *Read v. Nicholas*, 5 Hun (N. Y.) 646, *affirmed* 67 N. Y. 182; *Garvey v. Jarvis*, 54 Barb. (N. Y.) 179, *affirmed* in 46 N. Y. 310; *Wright v. Delafield*, 25 N. Y. 266; *Brannan v. Paty*, 58 Cal. 330; *Boyle v. Wilcox*, 59 Iowa 466; and see *Dewey v. Hoag*, 15 Barb. (N. Y.) 365; *Cochran v. Webb*, 4 Sandf. (N. Y.) 653.

A defendant is as much concluded by the amount of damages he claims in his counterclaim, as a plaintiff would be by the damages claimed in his complaint. *Annis v. Upton*, 66 Barb. (N. Y.) 370; and see *Babbett v. Young*, 51 Barb. (N. Y.) 466.

In *Davis v. Davis*, 9 Mont. 267, it was held that though the prayer of defendant's answer is that he be dis-

a defense or a counterclaim, it should be construed as a defense alone.¹ Nor can a defendant afterwards call that a defense which he has deliberately designated as a counterclaim.² Where an answer sets out facts sufficient to constitute a counterclaim, however, and demands a positive judgment thereon, and it is treated by the parties as a counterclaim, the omission to designate it as such is supplied;³ and it has been held that it is the facts set up in a pleading which makes it a defense or a counterclaim, whatever the parties may have called it, and that its character will be determined therefrom by the court.⁴

Where a cause of action upon contract is set up in an action upon an independent contract, the fact that the demand constituting the counterclaim was due and owing from the plaintiff to the

charged, relief may be given thereon as a counterclaim. And in *Wilson v. Fairchild*, 45 Minn. 203, it was held that when matter is pleaded in an answer as a counterclaim, the defendant must have such relief, though not specifically demanded, as the facts proved within its allegations show him entitled to.

In equity under a prayer for general relief, any relief consistent with the allegations of the pleading may be granted. *Pond v. Waterloo Agricultural Works*, 50 Iowa 596. And see *Acer v. Hotchkiss*, 97 N. Y. 395.

1. *McConihe v. Hollister*, 19 Wis. 269; *Baker v. Knickerbocker L. Ins. Co.*, 24 Wis. 630; *Gunn v. Madigan*, 28 Wis. 159; *Resch v. Senn*, 31 Wis. 138; *Lawrence v. Vilas*, 20 Wis. 381; *Burke v. Thorne*, 44 Barb. (N. Y.) 363; *Bates v. Rosekrans*, 37 N. Y. 409; 23 How. Pr. (N. Y.) 98; *Burrall v. De Groot*, 5 Duer (N. Y.) 379; *Green v. Waite*, 33 Hun (N. Y.) 191; *Beers v. Waterbury*, 8 Bosw. (N. Y.) 396; *Ward v. Comegys*, 2 How. Pr. N. S. (N. Y.) 428.

An answer so inartificially drawn that it cannot be determined whether it is intended as a plea of set-off or whether the matters alleged are merely intended to add weight to the prayer with which the plea concludes, is demurrable. *Sample v. Griffith*, 5 Iowa 376.

2. *Tuckerman v. Corbin*, 66 How. Pr. (N. Y.) 404; *Ferreira v. Depew*, 4 Abb. Pr. (N. Y.) 131; *McAbee v. Randall*, 41 Cal. 136; *Wilson v. Carpenter*, 62 Ind. 495; *Miller v. Roberts*, 106 Ind. 63; *Campbell v. Routt*, 42 Ind. 410. But see *Lash v. McCormick*, 17 Minn. 403.

In *Washburn v. Dosch*, 68 Wis. 436;

60 Am. Rep. 873, it was held that the objection that matter pleaded as a counterclaim is not a proper subject of counterclaim, will not lie if it constitutes a defense to the action, and if, after an affirmative verdict in favor of defendant, the court strikes out the excess in defendant's favor, and gives judgment of dismissal and for costs only.

In *Lawrence v. Vilas*, 20 Wis. 381, it was held that matters pleaded as a counterclaim may be sustained as a set-off, if proven at the trial, and the demand of the answer for judgment as upon a counterclaim may be rejected, or it may be corrected by amendment.

3. *Selleck v. Griswold*, 49 Wis. 39; *Voechting v. Grau*, 55 Wis. 312; and see *Born v. Schrenkeisen*, 110 N. Y. 55.

The omission to designate a counterclaim as such will not sustain the trial court in excluding evidence under it where it is objected to solely on other grounds. *Van Brunt v. Day*, 81 N. Y. 251.

In *Iowa*, while no affirmative relief can be afforded a defendant, unless it is claimed in his cross-petition, where such relief has been granted in the court below without objection, the decree will not be reversed upon appeal for that reason. *Kellogg v. Aherin*, 48 Iowa 299.

4. *Holmes v. Richet*, 56 Cal. 307; *Hutchins v. Moore*, 4 Metc. (Ky.) 110; *True v. Triplett*, 4 Metc. (Ky.) 57; *Union Nat. Bank v. Carr*, 49 Iowa 359; *Wiswell v. First Cong. Church*, 14 Ohio St. 31; *Wilder v. Boynton*, 63 Barb. (N. Y.) 547. So held where the demand was to recoup the defendant's damages against the plaintiff's claim in *Wilder v. Boynton*, 63 Barb. (N. Y.) 547.

defendant, at the time of the commencement of the action, must be pleaded.¹ And unless both causes of action arise upon contract, it must be averred that the demand constituting the counterclaim arose out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or is connected with the subject of the action;² the facts connecting the transaction stated in the complaint with the supposed cause of action stated in the answer, as distinguished from a mere assertion of the connection, being required to be pleaded.³

A counterclaim setting up a cause of action held by assignment must show that the assignment was made before the commencement of the action;⁴ and when a demand against an assignor is interposed in an action brought by the assignee, the counterclaim must show that the claim which the defendant seeks to set off belonged to him before he had notice of the assignment to the plaintiff of the demand on which the action is brought.⁵

In actions brought by or against persons in a representative capacity, a counterclaim must show that the demand set up in

If an answer presents matter of defense only, it cannot be treated as a set-off or counterclaim, even though it be so called by the defendant. *True v. Triplett*, 4 Metc. (Ky.) 57.

1. *Rice v. O'Connor*, 10 Abb. Pr. (N. Y.) 362; *Van Valen v. Lapham*, 5 Duer (N. Y.) 689; *Heidenheimer v. Wilson*, 31 Barb. (N. Y.) 636; *Gannon v. Dougherty*, 41 Cal. 661; *McGuire v. Lamb* (Idaho, 1888), 17 Pac. Rep. 749.

A counterclaim is bad on demurrer, where on its face it appears that it arose after the commencement of the action. *Russell v. Davis*, 104 N. Car. 237.

The breach of an agreement not to sue cannot be set up as a counterclaim in an action brought in violation thereof, the cause of action for such breach not existing in favor of the defendant until the suit is actually brought. *Newkirk v. Neild*, 19 Ind. 194; 81 Am. Dec. 383.

The fact that a plaintiff has sold the leased premises since the commencement of the action, is not a valid reply to a counterclaim for a breach of a covenant for quiet enjoyment, and to repair, in an action for rent. *Orton v. Noonan*, 30 Wis. 611.

2. *Hinkley v. Troy, etc., R. Co.*, 42 Hun (N. Y.) 281; *Bell v. Lesbini*, 66 How. Pr. (N. Y.) 385; *Fellerman v. Dolan*, 7 Abb. Pr. (N. Y.) 395, note; *Rhineland v. Martin*, 23 Abb. N. Cas. (N. Y.) 267; *Thompson v. Toohey*, 71 Ind. 296; *Fallon v. Stahl*,

17 Mo. App. 475; *Gordon v. Bruner*, 49 Mo. 570.

Refusal to allow an amendment to connect the counterclaim with the plaintiff's cause of action is within the unreviewable discretionary powers of the court. *Russell v. Davis*, 104 N. Car. 237.

3. *Brown v. Buckingham*, 21 How. Pr. (N. Y.) 190; 11 Abb. Pr. (N. Y.) 387; *Fellerman v. Dolan*, 7 Abb. Pr. (N. Y.) 395, note; *Gilpin v. Wilson*, 53 Ind. 443; *Splahn v. Gillespie*, 48 Ind. 397.

Where it appears, from the facts alleged in an answer, that it contains a statement of new matter arising out of or connected with the cause of action, which might be the subject of an action in favor of the defendant, it need not be directly averred, to constitute a counterclaim. *Gilpin v. Wilson*, 53 Ind. 443.

4. *Mayo v. Davidge*, 44 Hun (N. Y.) 342; *Heidenheimer v. Wilson*, 31 Barb. (N. Y.) 636; *Van Valen v. Lapham*, 5 Duer (N. Y.) 689; *Chambers v. Lewis*, 11 Abb. Pr. (N. Y.) 210; *Moody v. Steele*, 11 Civ. Pro. Rep. (N. Y.) 205; *Chapman v. Plummer*, 36 Wis. 262.

As the right of set-off or counterclaim as against an assignee is wholly statutory, the allegations in support of it must in express terms bring it within the statute. *Willover v. First Nat. Bank*, 40 Hun (N. Y.) 184.

5. *Venable v. Harlin*, 1 Civ. Pro. Rep. (N. Y.) 215; *Soloman v. Holt*, 2 E. D. Smith (N. Y.) 139; *Sayres v.*

opposition to the claim set forth in the complaint is due to or from such persons in the same capacity;¹ and it must appear that a demand sought to be set off in an action brought by the personal representatives of a deceased person, as such, had become due and payable, or recoverable from the decedent in his lifetime.²

A defendant may interpose as many defenses or counterclaims as he may have,³ and the objection of inconsistency between them is not available;⁴ but each answer must of itself be a complete answer to the whole complaint as perfectly as if it stood alone.⁵ Each must be tested as a pleading by its own matter, unless in terms it adopts or refers to matters contained in some

Linkhart, 25 Ind. 145. And see Robinson v. Howes, 20 N. Y. 84; Parker v. Turner, 8 N. Y. St. Rep. 500.

1. Pendergast v. Greenfield, 40 Hun (N. Y.) 494.

Joint Parties.—An answer in an action setting up as a set-off a note made by the plaintiff jointly with others, is not good unless it shows that the plaintiff is the principal debtor. Durbon v. Kelley, 22 Ind. 183.

2. Jordan v. National Shoe, etc., Bank, 74 N. Y. 467; 30 Am. Rep. 319.

3. Bruce v. Burr, 67 N. Y. 237; Gage v. Angell, 8 How. Pr. (N. Y.) 335; Curran v. Curran, 40 Ind. 473; McAdow v. Ross, 53 Mo. 199; Jones v. Moore, 42 Mo. 413.

A defendant may in his answer allege matters that will be a defense or counterclaim to any cause of action which the plaintiff may prove and recover for within the allegations, although such cause of action may not be of the precise character indicated by all those allegations, and although such matter might not be a defense or counterclaim if all such allegations should be proved. Smalley v. Isaacson, 40 Minn. 450.

Although matter set up in an answer may be a complete defense to the cause of action alleged in the complaint, it may also be pleaded as a counterclaim, if it constitutes a cause of action in favor of defendant against the plaintiff, and is a proper subject of counterclaim. Griffin v. Jorgenson, 22 Minn. 92.

Joinder.—Causes of action which cannot be joined in a complaint, cannot be joined in a counterclaim. Woodruff v. Garner, 27 Ind. 4; 89 Am. Dec. 477.

4. Bruce v. Burr, 67 N. Y. 237; Goodwin v. Wertheimer, 99 N. Y. 149;

and see Ranney v. Smith, 6 How. Pr. (N. Y.) 420; Ross v. Duffy, 12 N. Y. St. Rep. 584.

Claims legal or equitable, or for liquidated or for unliquidated damages on contract, may all be set up in the same answer. Akerly v. Vilas, 21 Wis. 88.

The court has no power to require a defendant to elect upon which of several defenses he will rely, when more than one is set up, and the evidence given tends to prove each of them, unless they are so far inconsistent that both cannot exist in the same transaction. Kelly v. Bernheimer, 3 Thomp. & C. (N. Y.) 140.

A denial of the contract sued upon, and a counterclaim for fraud inducing it, or for a breach of a covenant thereof by the plaintiff, however, cannot be united in the same action. Marx v. Gross, 58 N. Y. Super. Ct. 221; Lewis v. Acker, 11 How. Pr. (N. Y.) 163; Fellerman v. Dolan, 7 Abb. Pr. (N. Y.) 395, note.

5. Baldwin v. U. S. Tel. Co., 54 Barb. (N. Y.) 505; reversed on other grounds in 45 N. Y. 744; 6 Am. Rep. 165; Hammond v. Earle, 58 How. Pr. (N. Y.) 426; Ayrault v. Chamberlain, 33 Barb. (N. Y.) 229; Spencer v. Babcock, 22 Barb. (N. Y.) 326; Kneidler v. Sternbergh, 10 How. Pr. (N. Y.) 67; Xenia Bank v. Lee, 7 Abb. Pr. (N. Y.) 372; Rucker v. Steelman, 73 Ind. 396; Conaway v. Carpenter, 58 Ind. 477.

A counterclaim, in order to be pleadable, however, need not entitle the defendant to an amount of damages equal to the amount of the plaintiff's claim. Allen v. Haskins, 5 Duer (N. Y.) 332.

A counterclaim in an answer, embraced in five different specifications, numbered as five separate defenses, neither of which is alone a defense, is

other answer;¹ and a single pleading cannot be made to perform the double office of a defense and counterclaim.²

8. **Taking Issue on a Counterclaim**—(See also DEMURRER, vol. 5, p. 549; REPLY).—The sufficiency and validity of a counterclaim is a question which should be determined either by demurrer or by motion at the trial,³ and a failure to demur to a counter-

not properly stated. *Spencer v. Babcock*, 22 Barb. (N. Y.) 326.

In an action for partition, a counterclaim setting up title in the defendant to the whole of the land sought to be divided, is a sufficient answer. *Schafer v. Schafer*, 68 Ind. 374.

Where new matter is set forth in an answer, and it is not expressly stated to be a partial defense, it must be assumed that it is pleaded as a complete defense, and if demurred, it must be tested as such. *Thomas v. Halbert*, 109 N. Y. 329. And see *Thompson v. Toohey*, 71 Ind. 296; *Schafer v. Schafer*, 68 Ind. 374; *McClintic v. Cory*, 22 Ind. 170; *Blew v. Hoover*, 30 Ind. 450.

1. *Baldwin v. U. S. Tel. Co.*, 54 Barb. (N. Y.) 505, reversed on other grounds, in 45 N. Y. 744; *Hammond v. Earle*, 58 How. Pr. (N. Y.) 426; *Cragin v. Lovell*, 88 N. Y. 258; *Ayrault v. Chamberlain*, 33 Barb. (N. Y.) 229; *Boyd v. McDonald*, 58 Hun (N. Y.) 609; *Xenia Bank v. Lee*, 7 Abb. Pr. (N. Y.) 372; *Campbell v. Routt*, 42 Ind. 410. And see *Coe v. Lindley*, 32 Iowa 437.

A bill of particulars affixed to the pleadings as a part of it does not aid a defective counterclaim. *Smith v. McGregor*, 96 N. Car. 401.

In a suit for coal sold and delivered at an agreed price, where a counterclaim is made for a breach of a contract to furnish coal during the season, a failure to plead the price at which it was to be furnished cannot be supplied by reference to the complaint, though the answer alleges that the counterclaim arose out of the transaction set forth in it. *Denver, etc., R. Co. v. Hutchins*, 31 Neb. 572.

Where a written contract is set out in a complaint and is the foundation of the action, the defendant, in setting up a counterclaim against the plaintiff upon the same contract, and seeking a judgment thereon in his own favor, must set out in his own pleading, the original or a copy of the contract. *Campbell v. Routt*, 42 Ind. 410.

Where a counterclaim is composed of several demands, however, each de-

mand need not be set up separately, the whole constituting one counterclaim. *Ranney v. Smith*, 6 How. Pr. (N. Y.) 420.

2. *Stockton v. Stockton*, 73 Ind. 510; *Rucker v. Steelman*, 73 Ind. 396; *Hadley v. Prather*, 64 Ind. 137; *Wilson v. Carpenter*, 62 Ind. 495; *Hinkle v. Margerum*, 50 Ind. 240; *Blakely v. Boruff*, 71 Ind. 93; *McCardle v. Barricklow*, 68 Ind. 356; *Schee v. McQuilken*, 59 Ind. 269; *Thompson v. Toohey*, 71 Ind. 296; *Campbell v. Routt*, 42 Ind. 410; *McMannus v. Smith*, 53 Ind. 211; *Indiana State Board v. Gray*, 54 Ind. 91; *Kimble v. Christle*, 55 Ind. 140.

A pleading on the part of a defendant not showing what portions of it are intended as a legal defense, and what portions are intended as a cross-complaint, is bad on demurrer for ambiguity. *O'Connor v. Frasher*, 53 Cal. 435.

3. *Walter v. Fowler*, 85 N. Y. 621; *Fettretch v. McKay*, 47 N. Y. 427; *Collins v. Suau*, 7 Robt. (N. Y.) 94; *Westervelt v. Ackley*, 62 N. Y. 505; *Grange v. Gilbert*, 44 Hun (N. Y.) 9; *Walker v. Johnson*, 28 Minn. 147; *Lace v. Fixen*, 39 Minn. 46.

A counterclaim is not a defense and cannot therefore be stricken out, as sham or irrelevant on motion. *Collins v. Suau*, 7 Robt. (N. Y.) 94; *affirmed*, 7 Robt. (N. Y.) 508; *Fettretch v. McKay*, 47 N. Y. 426; *Briggs v. Bergen*, 23 N. Y. 162; *Thompson v. Erie R. Co.*, 45 N. Y. 468.

Proof of a counterclaim cannot be rejected because it is not stated with sufficient definiteness and certainty. The remedy in such a case is a motion to make it more definite and certain. *Currie v. Cowles*, 6 Bosw. (N. Y.) 452.

The legal rights of the parties are not affected by the fact that an answer containing a counterclaim is interposed merely for delay; such fact being determinable only by trial. *Town v. Bringolf*, 47 Iowa 133.

In Iowa a counterclaim which does not arise out of the contract or transaction

claim, not properly admissible as such, is a waiver of any right to object to the admission of evidence to sustain it, and an agreement to try the merits of the demand.¹ But it is no waiver of the objection that the counterclaim is not one which can be set up in the action,² or one of which the court had no jurisdiction.³

A plaintiff may demur to one or more of the defenses or counterclaims set up in an answer, and reply to the residue of the counterclaims;⁴ and he may demur to one part and reply to another part at the same time.⁵ The particular objection sought to be raised must be specified in the demurrer or it will be disregarded.⁶ Where the demurrer is not only to the answer as a counterclaim but as a defense also, it reaches back in its effect

set forth in the petition and is not connected with the subject of the action, and does not contain new matter constituting a cause of action in favor of all the defendants against all the plaintiffs, may be stricken from the files. *Exline v. Lowrey*, 46 Iowa 556.

In *Indiana* where a set-off is pleaded to a complaint for a tort, an objection to the admission of evidence in support of the set-off, and a motion to strike it out upon the ground that it is incompetent, irrelevant, and immaterial, and supports no proper issue in the cause, should be sustained. *Boil v. Simms*, 60 Ind. 162.

1. *Hammond v. Terry*, 3 Lans. (N. Y.) 186; *Ayres v. O'Farrell*, 10 Bosw. (N. Y.) 143; and see *Taylor v. Stowell*, 4 Metc. (Ky.) 175; *Ruffer v. Lucas*, 101 N. Car. 281.

Where one of two grantors of land sues on a bond given for the purchase money, as sole owner, non-joinder of the other grantor in a counterclaim by defendant for breach of covenant, must be excepted to by reply or demurrer. *Akerly v. Vilas*, 21 Wis. 88.

In *Minnesota*, although the defendant cannot, in an action on contract, set up as a counterclaim an independent cause of action arising in tort; yet, when such counterclaim is litigated by consent of parties upon the merits, it becomes an issue in the action, and it is the duty of the court to make its finding thereon. *Warner v. Foote*, 40 Minn. 176.

2. *Smith v. Hall*, 67 N. Y. 48; *Car-penter v. Manhattan L. Ins. Co.*, 22 Hun (N. Y.) 49; *Burroughs v. Garrison*, 15 Abb. Pr. N. S. (N. Y.) 144; *MacDougall v. Maguire*, 35 Cal. 274; 95 Am. Dec. 98; *Campbell v. Routt*, 42 Ind. 410. But see *Hammond v.*

Terry, 3 Lans. (N. Y.) 186; *Ayres v. O'Farrell*, 10 Bosw. (N. Y.) 147.

The objection that the answer does not state facts sufficient to constitute a counterclaim may be raised at the trial. *Burroughs v. Garrison*, 15 Abb. Pr. N. S. (N. Y.) 144.

Where a defendant prays for no affirmative relief on his counterclaim, the objection that the counterclaim has no connection with the cause of action sued on may be taken by general demurrer to the counterclaim, on the ground of insufficiency, as provided for in Code Civil Pro. *New York*, § 494. *Otis v. Shantz*, 128 N. Y. 45.

3. See *Cragin v. Lovell*, 88 N. Y. 258; *De Bussierre v. Holladay*, 4 Abb. N. Cas. (N. Y.) 111; *Valarino v. Thompson*, 7 N. Y. 576; *Gray v. Ryle*, 5 Civ. Pro. Rep. (N. Y.) 387.

4. *Rice v. O'Connor*, 10 Abb. Pr. (N. Y.) 362; *Latimer v. Sullivan*, 30 S. Car. 111; *Latimer v. Mahaffey*, 30 S. Car. 612.

A counterclaim alleging facts which constitute a valid set-off, but not a cause of action against plaintiff, is not demurrable, although it demands an affirmative judgment. *Schumacher v. Seeger*, 65 Wis. 394.

5. *Latimer v. Sullivan*, 30 S. Car. 111; *Latimer v. Mahaffey*, 30 S. Car. 612.

An improper demand for relief is not a ground of demurrer. *State v. Smith*, 14 Wis. 564.

Defenses and counterclaims set up in the joint answer of joint defendants, which are not available to all of them, are demurrable. *Tailor v. Spaulding*, 12 Civ. Pro. Rep. (N. Y.) 123.

6. *Safford v. Snedeker*, 67 How. Pr. (N. Y.) 264; and see *Grange v. Gilbert*, 10 Civ. Pro. Rep. (N. Y.) 98.

through the whole record, and attaches to any substantial defect in the pleadings;¹ but where the demurrer is merely to the counterclaim which forms no part of a defense set up in the answer, the complaint cannot be attacked;² though a demurrer to an answer to a complaint which clearly contains no cause of action,³ or a cause of action of which the court has no jurisdiction,⁴ cannot be sustained.

Where the facts set up in the answer as a counterclaim are not demurred to, they must be replied to, or they will be taken as true, and the defendant will be entitled to the relief demanded.⁵ By

That matter which constitutes a defense is pleaded as a counterclaim, is not a ground of demurrer. *Wait v. Ferguson*, 14 Abb. Pr. (N. Y.) 379.

The pendency of a prior action for the same cause as that set up as a counterclaim, appearing on the face of the counterclaim is a good ground for demurrer. *Ansorge v. Kaiser*, 22 Abb. N. Cas. (N. Y.) 305.

1. *Dietrich v. Koch*, 35 Wis. 618; *Lowe v. Hyde*, 39 Wis. 345; *Newman v. Livingston Co.*, 1 Lans. (N. Y.) 476; *Fry v. Bennett*, 5 Sandf. (N. Y.) 54; *Noxon v. Bentley*, 7 How. Pr. (N. Y.) 316.

Upon an argument of a demurrer to a counterclaim, the defendant may attack the complaint, but the grounds of the attack to render it successful must be such as would have entitled the defendant to judgment, had he elected to demur instead of answering. *Fry v. Bennett*, 5 Sandf. (N. Y.) 54.

2. *Graham v. Dunnigan*, 6 Duer (N. Y.) 629; and see *Peck v. Brown*, 2 Robt. (N. Y.) 119.

When a defendant to whose pleading a demurrer has been interposed has pleaded a plea such as the general issue going to the whole declaration or to a part of it, he cannot be allowed to go back to the declaration upon a demurrer to another plea, upon the principle that he cannot demur and plead to the same count. *Morey v. Ford*, 32 Hun (N. Y.) 446; *Wheeler v. Curtis*, 11 Wend. (N. Y.) 654.

On demurrer to a counterclaim, the allegations of the complaint not inconsistent with those of the counterclaim, are to be taken as admitted. *Graham v. Dunnigan*, 6 Duer (N. Y.) 629.

3. *Newman v. Livingston Co.*, 1 Lans. (N. Y.) 476; *People v. Booth*, 32 N. Y. 398; *Schwab v. Furniss*, 4 Sandf. (N. Y.) 704; *Fry v. Bennett*, 5 Sandf. (N. Y.) 54; *Noxon v. Bentley*, 7 How. Pr. (N. Y.) 316; *Bur-*

roughs v. Garrison, 15 Abb. Pr. N. S. (N. Y.) 144; *Willover v. First Nat. Bank*, 10 Civ. Pro. Rep. (N. Y.) 80; *Pardo v. Osgood*, 2 Abb. Pr. N. S. (N. Y.) 365; and see *Wright v. Booth*, 69 N. Y. 620; *Gervin v. Hickman*, 58 How. Pr. (N. Y.) 244; *Morey v. Ford*, 32 Hun (N. Y.) 448; *Parker v. Turner*, 8 N. Y. St. Rep. 501; *Gleason v. Youmans*, 9 Abb. N. Cas. (N. Y.) 107.

However defective a counterclaim or a defense may be, it is not subject to demurrer while the pleading which it assumes to answer is too radically insufficient to call for any defense whatever. *Allen v. Malcolm*, 12 Abb. Pr. N. S. (N. Y.) 335.

A demurrer to a counterclaim interposed generally in an action, cannot be supported as a demurrer to a complaint, however, if any one of several counts in the complaint is good. *Noonan v. Orton*, 30 Wis. 356.

4. See *People v. Banker*, 8 How. Pr. (N. Y.) 258.

Where the defendant claims upon demurrer to the answer that the complaint is defective, he must be held to have waived all objections not taken by answer or demurrer, except the question of jurisdiction and the sufficiency of the cause of action. *People v. Banker*, 8 How. Pr. (N. Y.) 258.

5. *Lawrence v. Bank of the Republic*, 3 Robt. (N. Y.) 142; *Scribner v. Levy* (Supreme Ct.), 4 N. Y. Supp. 918; *McKensie v. Farrell*, 4 Bosw. (N. Y.) 192; *Clinton v. Eddy*, 54 Barb. (N. Y.) 54; 1 Lans. (N. Y.) 61; *Randolph v. Mayor, etc., of N. Y.*, 53 How. Pr. (N. Y.) 68; *Birch v. Hall* (Supreme Ct.), 3 N. Y. Supp. 747; *Bernheimer v. Willis*, 11 Hun (N. Y.) 16; *Kelsy v. Tremaine*, 39 How. Pr. (N. Y.) 439; *Isham v. Davidson*, 52 N. Y. 237; *Leslie v. Leslie*, 11 Abb. Pr. N. S. (N. Y.) 311; *Cook v. Grey*, 2 Bush (Ky.) 121; *Taylor v. Stowell*, 4 Metc. (Ky.) 175; *Lyle v. Poynter*, 1 Duv. (Ky.) 357;

failure to support a counterclaim by proof, however, the defendant loses the benefit of an admission by failure to reply,¹ and the objection that the facts set up as a counterclaim do not constitute a cause of action,² or that the cause of action thus set up is one of which the court has no jurisdiction,³ is not waived by a failure to reply. By replying, a defendant waives all objections to the form of the pleading, or to the introduction of evidence to support the counterclaim.⁴

Union Nat. Bank v. Carr, 49 Iowa 359; *Latimer v. Sullivan*, 30 S. Car. 111; *Hubbell v. Courtney*, 5 S. Car. 89; *Resch v. Senn*, 31 Wis. 138. And see *Geenia v. Keah*, 66 Barb. (N. Y.) 245.

The effect of an admission by failure to reply to a counterclaim, is that the amount so counterclaimed may be deducted from the plaintiff's claim, but by such failure the defendant does not concede that the plaintiff is entitled to a recovery of the entire sum demanded in his counterclaim, irrespective of the demand made by the defendant. *Kelsy v. Tremaine*, 29 How. Pr. (N. Y.) 439.

The omission of the plaintiff to reply to such parts of the answer as sets up payments, is not to be considered an admission that such payments were made. *Scott v. Stockwell*, 65 How. Pr. (N. Y.) 249; *Holzbauer v. Heinel*, 37 Mo. 443; *Union Nat. Bank v. Carr*, 49 Iowa 359. And the omission to reply thereto does not admit that the defendant is entitled to the damages he alleges. *McKensie v. Farrell*, 4 Bosw. (N. Y.) 192.

It is too late for a defendant to claim for the first time on appeal that his answer contains a counterclaim which is admitted by not being replied to. It should be insisted upon, and the attention of the court called to it on the trial, and if not allowed, an exception should be taken. *Muldoon v. Blackwell*, 84 N. Y. 646. And see *Westervelt v. Ackley*, 62 N. Y. 505.

1. *Randolph v. Mayor, etc.*, of N. Y., 53 How. Pr. (N. Y.) 68; *Campbell v. Genet*, 2 Hilt. (N. Y.) 295; *McKensie v. Farrell*, 4 Bosw. (N. Y.) 192; *Scribner v. Levy* (Supreme Ct.), 4 N. Y. Supp. 918; *Simson v. Hart*, 14 Johns. (N. Y.) 63; *Slone v. Slone*, 2 Metc. (Ky.) 339; *Tribord v. Chicago, etc., R. Co.* (Iowa, 1891), 48 N. W. Rep. 730.

Where a defendant files a counterclaim, to which no reply is filed, and he fails to move for judgment thereon, he cannot object, on appeal, to the non-allowance thereof. *Winters v. Fain*, 47 Ark. 493.

A set-off relied on in an answer, which is made a cross-petition against other parties who are not in court, cannot be taken as confessed on the plaintiff's failure to reply thereto. And the plaintiff need not reply to the set-off until the defendants in the cross-action are brought before the court, or the cross-action is discontinued as to them. *Scott v. Wilson*, 2 Bush (Ky.) 603.

Burden of Proof.—The burden is on the defendant to prove his counterclaim. *Prentiss v. Sprague*, 1 Hilt. (N. Y.) 428; *Belshaw v. Colie*, 1 E. D. Smith (N. Y.) 213.

2. *Schurmeier v. English* (Minn. 1891), 48 N. W. Rep. 1112; *McCulloch v. Vibbard*, 51 Hun (N. Y.) 227; *Carpenter v. Manhattan L. Ins. Co.*, 22 Hun (N. Y.) 49; *Akerly v. Vilas*, 21 Wis. 88.

Where the action is such that no counterclaim is allowable, a reply is no waiver of objection to one set up therein. *Smith v. Hall*, 67 N. Y. 48. But see *Hammond v. Terry*, 3 Lans. (N. Y.) 186; *Ayres v. O'Farrell*, 10 Bosw. (N. Y.) 143.

A defendant waives the advantage derived from the failure of the plaintiff to reply, if he goes into proof of the counterclaim, and by such proof shows that it could not properly have been set off against the plaintiff's demand. *Randolph v. Mayor, etc.*, of N. Y., 53 How. Pr. (N. Y.) 68.

3. See *People v. Banker*, 8 How. Pr. (N. Y.) 258.

Opening Default in Replying.—A court may open a default and permit the plaintiff to reply to a counterclaim, after the time for a reply has expired. See *Merritt v. Slocum*, 3 How. Pr. (N. Y.) 309; *Greenwood v. Brink*, 1 Hun (N. Y.) 227; *Montecarbole v. Mundel*, 16 How. Pr. (N. Y.) 141.

4. *Ayres v. O'Farrell*, 10 Bosw. (N. Y.) 143; *Roscoe v. Maison*, 7 How. Pr. (N. Y.) 121; *Hammond v. Terry*, 3 Lans. (N. Y.) 186; *Cason v. Cason*, 79 Ky. 558; *Nutter v. Johnson*, 80 Ky.

In effect, a reply is an answer to the cause of action set up by way of counterclaim, and should be pleaded in substantially the same manner as an answer to a cause of action set up in a complaint.¹ It must be distinct and specific, so that it can be clearly seen what is intended to be controverted,² and it may contain a general or specific denial of each material allegation of the counterclaim controverted by the plaintiff;³ or it may set forth in ordinary and concise language, without repetition, new matter not inconsistent with the complaint constituting a defense to the counterclaim,⁴ or

426; *Scheland v. Erpelding*, 6 Oregon 259. And see *Ludington v. Slauson*, 38 N. Y. Super. Ct. 81; *Livingston v. Miller*, 8 N. Y. 283; *Thomas v. Loaners' Bank*, 38 N. Y. Super. Ct. 466.

An objection to a defense pleaded as a counterclaim, but not connected with the note sued on, is waived by replication and issue joined. *Boyd v. Day*, 3 Bush (Ky.) 617.

By replying to a counterclaim, however, the plaintiff does not waive the objection that a counterclaim is not available in the action. *Smith v. Hall*, 67 N. Y. 48.

1. Baylie's Code Pl. 290; 1 Rumsey's Pr. 373; *Risley v. Carll*, 1 N. Y. Law Bull. 52. And see *Croome v. Craig*, 53 Hun (N. Y.) 350.

A reply to the original answer is sufficient as a reply to an amended one, if the latter sets up no issuable facts requiring a reply. *Leslie v. Leslie*, 11 Abb. Pr. N. S. (N. Y.) 311.

Statute of Limitations.—To render the Statute of Limitations available as a bar to a counterclaim, it must be pleaded by way of reply. *Williams v. Willis*, 15 Abb. Pr. N. S. (N. Y.) 11; *Clinton v. Eddy*, 1 Lans. (N. Y.) 61; *Von Sachs v. Kretz*, 10 Hun (N. Y.) 95, affirmed in 72 N. Y. 548. And see *Heath v. Heath*, 31 Wis. 223.

A plaintiff should not be allowed to come in after judgment, not as a right but as a favor, and plead the Statute of Limitations in bar of a counterclaim set up by the defendant in his answer. *Clinton v. Eddy*, 54 Barb. (N. Y.) 55.

In an action brought by an assignee, however, in which a set-off against the plaintiff's assignor is set forth, the plaintiff may raise the objection that the set-off averred in the answer is barred by the Statute of Limitations without pleading it by way of reply. *Thompson v. Sickles*, 46 Barb. (N. Y.) 49.

2. *Risley v. Carll*, 1 N. Y. Law Bull. 52; *Jarvis v. Pike*, 11 Abb. Pr. N. S. (N. Y.) 398. And see *Chawviteau v. Fay*, 54 How. Pr. (N. Y.) 211.

If a reply contain irrelevant matter the remedy is by motion and not by demurrer. *Ludington v. Slauson*, 38 N. Y. Super. Ct. 81.

A reply denying all those allegations, which are contained within certain specified folios is good as general denial. *Gassett v. Crocker*, 9 Abb. Pr. (N. Y.) 39.

3. *Cohn v. Husson*, 66 How. Pr. (N. Y.) 150; *Rider v. Foggan*, 59 Hun (N. Y.) 628; *Ludington v. Slauson*, 38 N. Y. Super. Ct. 81; *Chawviteau v. Fay*, 54 How. Pr. (N. Y.) 211; *Latimer v. Sullivan*, 30 S. Car. 111.

A reply to a set-off, simply denying the correctness of each and every item of defendant's answer and counterclaim, is insufficient, it being too vague and uncertain. *Whitaker v. Sandifer*, 1 Duv. (Ky.) 261. And see *McKinsel v. Farrell*, 4 Bosw. (N. Y.) 192.

A denial in a reply, upon information and belief of allegations in the counterclaim, is insufficient where the facts set up are clearly within the plaintiff's knowledge as appears by the complaint. *Fallon v. Durant*, 60 How. Pr. (N. Y.) 178.

Another Action Pending.—A defendant cannot plead the same counterclaim to several independent actions brought by the same plaintiff; and after the demand has been used as a counterclaim in the one action, the plaintiff may, by way of reply in the other actions, plead in abatement, the fact that such counterclaim has been pleaded in the first action. *Tuckerman v. Corbin*, 66 How. Pr. (N. Y.) 404.

4. *Cohn v. Husson*, 66 How. Pr. (N. Y.) 150; *Rider v. Foggan*, 59 Hun (N. Y.) 628; *Lablanche v. Kirkpatrick*, 8 Civ. Pro. Rep. (N. Y.) 256; *White v. Joy*, 13 N. Y. 83; *Thomas v. Loaners' Bank*, 38 N. Y. Super. Ct. 466; *Barbaroux v. Barker*, 4 Metc. (Ky.) 47; *Latimer v. Sullivan*, 30 S. Car. 111; *Campbell v. Mellen*, 61 Wis. 612; and see *Lewis v. Sheaman*, 28 Ind. 427; *Reilly v. Rucker*, 16 Ind. 303.

both.¹ But a counterclaim to a counterclaim set up by the defendant cannot be pleaded in reply.² New matter which does

The defendant, in an action by a vendor for the purchase money of land, having set up a counterclaim for damages for breach of the plaintiff's covenants, the plaintiff, without having pleaded the facts, may show that the defendant, after his purchase, conveyed the land to another, and that the defendant and his grantee had gone into possession. *Noonan v. Ilsley*, 22 Wis. 27.

Iowa Code, § 2666, requiring a reply to be consistent with the petition, does not apply to an amendment to a petition, after a petition for intervention has been filed, which is in effect an answer to the latter setting out a counterclaim. *Jack v. Des Moines, etc., R. Co.*, 49 Iowa 627.

A new assignment in an action by way of reply, setting forth more particularly the cause of action relied upon in the complaint, is neither necessary nor allowable. *Stewart v. Wallis*, 30 Barb. (N. Y.) 344; *Shull v. Green*, 49 Barb. (N. Y.) 311.

A reply which contains no facts not already stated in the complaint and answer, is demurrable. *Croome v. Craig*, 53 Hun (N. Y.) 350.

1. *Cohn v. Husson*, 66 How. Pr. (N. Y.) 150.

A reply denying the allegations of a counterclaim, does not, by also setting up new matter in avoidance of it, admit them. *Del Valle v. Navarro*, 21 Abb. N. Cas. (N. Y.) 136.

Where the answer admits the contract in suit, but alleges that it contains other provisions which have not been complied with by the plaintiff claiming damages for the non-compliance, and the plaintiff interposes a general denial by way of reply, he may prove without any change in the pleadings that the contract was altered by the defendant after its execution, by the insertion of the clauses referred to. *Wirges v. Baeuerle*, 12 Hun (N. Y.) 134.

There being a general denial to a counterclaim for money paid for plaintiff, however, it is not reversible error to sustain a demurrer to a special reply that the money expended by defendant belonged to plaintiff. *Mason v. Mason*, 102 Ind. 38.

Demurrer to Reply.—In *Thomas v. Loaners' Bank*, 38 N. Y. Super. Ct.

466, it was held that a counterclaim, not being a defense, a reply to it cannot be demurred to, although it may contain new matter, the demurrer being expressly confined to replies to defenses. See also *White v. Joy*, 13 N. Y. 89. But by the *New York Code*, § 493, a demurrer to a reply is now made admissible.

2. *Cohn v. Husson*, 66 How. Pr. (N. Y.) 150; *Hatfield v. Todd*, 13 Civ. Pro. Rep. (N. Y.) 265; *Putnam v. DeForest*, 8 How. Pr. (N. Y.) 146; *White v. Joy*, 13 N. Y. 83; *Hall v. Hall*, 30 How. Pr. (N. Y.) 51; *Breed v. Padgett*, 14 N. Y. Wkly. Dig. 574; *Williams v. Jones*, 1 Bush (Ky.) 621; *Savage v. Aiken*, 21 Neb. 605; *Lillenthal v. Hotaling*, 15 Oregon 371; *Scott v. Bryan*, 96 N. Car. 289; *Boydett v. Vaughan*, 85 N. Car. 363. But see to the contrary, *Miller v. Losee*, 9 How. Pr. (N. Y.) 356.

The contrary rule is adopted in *Indiana*. See *Starke v. Dicks* (Ind. App. 1891), 28 N. E. Rep. 214; *Reilly v. Rucker*, 16 Ind. 303; *Turner v. Simpson*, 12 Ind. 413.

In *Missouri* where contracts by the common law, joint only, are construed to be joint and several, where one of several defendants is permitted to offset the demand of the plaintiff by a debt due to himself separately, the plaintiff may by way of reply to such offset, set up a debt in addition to the one sued on, due from this separate defendant to himself. But the individual claim of the plaintiff is not to be permitted to extinguish any part of such separate defendant's offset intended to be or proper to be applied upon the debt, which formed the basis of plaintiff's demand. *Mortland v. Holton*, 44 Mo. 58.

Where a reply improperly contains counterclaims, the remedy is by motion to strike them out, and not by demurrer. Demurrer is only authorized against new matter not pleaded as a counterclaim. *Hatfield v. Todd*, 13 Civ. Pro. Rep. (N. Y.) 265.

Where a counterclaim is pleaded to a counterclaim without objection, the court will not strike it out when the action has been pending for a long time, but will consider it as an amendment to the complaint. *Scott v. Bryan*, 96 N. Car. 289.

not constitute a counterclaim,¹ or which has not been pleaded as a counterclaim,² does not require a reply.

9. **Disposition of the Issues.**—A demurrer to a counterclaim gives rise to an issue of law, which must be tried by the court.³ An issue of fact arising on a counterclaim must be tried in the same

1. *Devlin v. Bevins*, 22 How. Pr. (N. Y.) 290; *Dambman v. Schulting*, 4 Hun (N. Y.) 50; *Gilbert v. Cram*, 12 How. Pr. (N. Y.) 455; *Argotsinger v. Vines*, 82 N. Y. 308; *Argall v. Jacobs*, 21 Hun (N. Y.) 114; *Bellinger v. Craigie*, 31 Barb. (N. Y.) 534; *Metropolitan L. Ins. Co. v. Meeker*, 85 N. Y. 614; *Barton v. McChesney*, 48 Hun (N. Y.) 443; *Burke v. Thorne*, 44 Barb. (N. Y.) 363; *Marick v. Brooks*, 21 N. Y. St. Rep. 534; *Rogers v. King*, 66 Barb. (N. Y.) 495; *Johnson v. White*, 6 Hun (N. Y.) 587; *Watson v. Johnson*, 33 Ark. 737; *Cannon v. Davis*, 33 Ark. 56; *Van De Sande v. Hall*, 13 How. Pr. (N. Y.) 458; *Nichols v. Boerum*, 6 Abb. Pr. (N. Y.) 290; *Tyler v. Whitney*, 12 Abb. Pr. (N. Y.) 465; *Union Nat. Bank v. Carr*, 49 Iowa 359; *Kirk v. Woodbury Co.*, 55 Iowa 190; *Ward v. Anderberg*, 36 Minn. 300; *First Nat. Bank v. Kidd*, 20 Minn. 234; *Fitzgerald v. Shelton*, 95 N. Car. 519.

in order to put the new matter in issue. *Thompson v. Sickles*, 46 Barb. (N. Y.) 49.

It is not necessary to deny by way of reply, allegations of value or amount of damage in the counterclaim, as such allegations must be proved by the defendant. *McKensie v. Farrell*, 4 Bosw. (N. Y.) 192; *DeLeyer v. Michaels*, 5 Abb. Pr. (N. Y.) 203.

Where it is doubtful whether the answer contains a counterclaim or not, a reply should be served. *Teets v. Throckmorton*, 8 N. Y. St. Rep. 897.

In *Freund v. Paten*, 10 Abb. N. Cas. (N. Y.) 311, it was held that in an action on contract, where the defendant sets up a discharge in bankruptcy, the plaintiff may reply alleging that the debt was fraudulently contracted, though fraud may be proved without a reply for the purpose of avoidance.

2. *Equitable L. Assurance Soc. v. Cuyler*, 75 N. Y. 511; *Acer v. Hotchkiss*, 97 N. Y. 395; *Cragin v. Lovell*, 88 N. Y. 258; *Cockerill v. Loonam*, 36 Hun (N. Y.) 353; *Bates v. Rosekrans*, 37 N. Y. 409; 4 Abb. Pr. N. S. (N. Y.) 276; *American Dock, etc., Co. v. Staley*, 40 N. Y. Super. Ct. 539; *Favilla v. Moretti* (Supreme Ct.), 13 N. Y. Supp. 707; *Duffy v. Duncan*, 35 N. Y. 187; *Burke v. Thorne*, 44 Barb. (N. Y.) 363.

When not so pleaded it will be deemed to be controverted by traverse or avoidance as the case may require. *Favilla v. Moretti* (Supreme Ct.), 13 N. Y. Supp. 707; *Union Nat. Bank v. Carr*, 49 Iowa 359; *Davis v. Payne*, 45 Iowa 194.

Where a reply is interposed to an answer which does not set up a counterclaim, a motion to set it aside for alleged irregularity in the verification will be denied because the irregularity complained of is of no consequence. *Silliman v. Eddy*, 8 How. Pr. (N. Y.) 122.

3. *New York Code Civ. Proc.*, §§ 964, 969; *California Code Civ. Proc.* §§ 589, 591; *Laws Oregon*, § 172; 3 Bl. Com. 314; 3 Stephen's Com. 572.

Where the trial court holds that a counterclaim is not allowable, without stating the ground of such ruling, it is

Not only is a reply unnecessary where the new matter set up in the answer does not constitute a counterclaim, but no reply will be allowed. *Devlin v. Bevins*, 22 How. Pr. (N. Y.) 290. And if interposed without permission of the court, it will be stricken out. *Dillon v. Sixth Ave. R. Co.*, 46 N. Y. Super. Ct. 21; *Avery v. New York, etc., R. Co.*, 20 N. Y. St. Rep. 918.

In an action by a patentee against a licensee for royalties, a counterclaim charging false representations and tricks and devices, without particularizing them, requires no reply. *Smith v. Standard Laundry Machinery Co.*, 11 Daly (N. Y.) 154.

In an action to recover possession of a chattel, an answer which merely sets up a lien upon the chattel, under which the defendant claims to hold it, demanding judgment for its return with damages for taking and retention, does not set up a counterclaim, and no reply is required. *DeLeyer v. Michaels*, 5 Abb. Pr. (N. Y.) 203.

An answer in an action upon a promissory note alleging a set-off against the plaintiff's assignor, does not contain a counterclaim requiring a reply

manner as if it arose in an action brought by the defendant against the plaintiff for the cause of action stated in the counterclaim and demanding the same judgment.¹ Where issues are raised in the counterclaim which are triable in a different court, or by a different tribunal from those raised in the complaint, the issues of each may be tried in the appropriate court.²

The right of the plaintiff to a trial by a jury of a legal cause of action is not taken away by the interposition of an equitable counterclaim,³ but where a counterclaim for legal relief, asking an affirmative judgment for money, is interposed in an equitable

presumed that the ruling was against the allowance in any view of the evidence; and if in one view of the evidence it was allowable, such ruling is error. *International Bank v. Monteath*, 39 N. Y. 297.

Where a demurrer to several defenses is good as to one defense and bad as to another, it should be sustained as to the one and overruled as to the other, and costs should not be allowed to either party. *Hollingshead v. Woodward*, 35 Hun (N. Y.) 410; *Grange v. Gilbert*, 44 Hun (N. Y.) 9.

Proceedings on demurrer to a counterclaim are not stayed merely because an appeal is pending from an order striking out some other portion of the answer. *Noonan v. Orton*, 30 Wis. 356.

That a counterclaim is interposed merely for delay, and not in good faith, if there are no other means of determining that the defense is frivolous than by trial, does not affect the legal rights of the parties. *Town v. Bringolf*, 47 Iowa 133.

1. *Mackellar v. Rogers*, 109 N. Y. 468; *Colville v. Chubb*, 26 Abb. N. Cas. (N. Y.) 372; *Post v. Moran*, 10 Daly (N. Y.) 502; *Du Pont v. Davis*, 35 Wis. 630; *Hegar v. Chicago, etc.*, R. Co., 26 Wis. 624.

When defendants are entitled to recoup, the amount of damages should be found by the jury, and not by the court. *Haldeman v. Berry*, 74 Mich. 424.

Where an answer which does not controvert any of the material allegations of the complaint is controverted by the reply, the only issue is upon the counterclaim, and the defendant is entitled to open and close the argument to the jury, and this right will not be affected by the fact that another issue is made by the reply. *Bonnell v. Jacobs*, 36 Wis. 59.

Though failure to reply, where a reply is necessary, does not prevent

the party from bringing his cause on for trial, a motion by plaintiff to place the cause on the special circuit calendar should be denied, because the counterclaim being admitted, there is no issue, the only question being as to the amount of damages. *Adams v. Roberts*, 62 How. Pr. (N. Y.) 253.

2. *Du Pont v. Davis*, 35 Wis. 631; *Hegar v. Chicago, etc.*, R. Co., 26 Wis. 624; *Gunn v. Madigan*, 28 Wis. 158; *Jones v. Moore*, 42 Mo. 413; *Peyton v. Rose*, 41 Mo. 261; *Colville v. Chubb*, 26 Abb. N. Cas. (N. Y.) 372; *Sturm v. Atlantic Mut. Ins., Co.*, 38 N. Y. Super. Ct. 281, *affirmed* 63 N. Y. 77; *Colman v. Dixon*, 50 N. Y. 572. See *Dice v. Morris*, 32 Ind. 283.

In an action on an insurance policy, the orderly conduct of the case requires that the trial at circuit of the issues raised by the plaintiff be stayed until the trial of the issues under a counterclaim for the reformation of the policy has been had at a special equity term. *Colville v. Chubb*, 26 Abb. N. Cas. (N. Y.) 372. And see *Du Pont v. Davis*, 35 Wis. 630; *Martin v. Zillerbach*, 38 Cal. 319; 99 Am. Dec. 365.

Where an answer sets up more than one defense, and one of them is held bad on demurrer, the plaintiff can have an order that the judgment shall be entered in his favor, unless the defendant shall succeed upon the issues joined, only. An absolute judgment for the plaintiff on demurrer is improper. *Bellknap v. McIntyre*, 2 Abb. Pr. (N. Y.) 366; *Murphy v. Allerton*, 7 Hun (N. Y.) 650; *Sutherland v. Tyler*, 11 How. Pr. (N. Y.) 251.

3. *Colville v. Chubb*, 26 Abb. N. Cas. (N. Y.) 372; *Cook v. Jenkins*, 79 N. Y. 575.

Where a counterclaim is proved without contradiction, the court should direct defendant's damages to be as-

action, the defendant is not entitled to a trial by jury as of course.¹ If he desires such a trial, he must apply to the court, upon notice, for an order directing all the questions at issue to be stated for trial.² The granting or refusing of such an application is discretionary with the court.³

10. Judgment on Counterclaim.—If both the cause of action set forth in the complaint and that alleged in the counterclaim are established, judgment is only rendered against one or the other of the parties to the extent that the demand against him as established by the judgment of the court exceeds the one in his favor.⁴ If the damages found in favor of the defendant are equal to the demand of the plaintiff, judgment should be rendered for the defendant for the dismissal of the action;⁵ but if the defendant, is found entitled to an amount less than that due to the plaintiff

sessed, rather than leave it to the jury to pass upon, if so requested. *Ayres v. O'Farrell*, 4 Robt. (N. Y.) 668.

1. *Mackellar v. Rogers*, 109 N. Y. 468; *Cook v. Jenkins*, 79 N. Y. 575. And see *People v. Le Farge*, 3 Cal. 130; *Bodley v. Ferguson*, 30 Cal. 511.

In an action which involves the examination of a long account, thus authorizing a compulsory reference, the interposition of a counterclaim for legal relief does not prevent a reference or entitle the defendant to demand a jury trial. *Brooklyn, etc., R. Co. v. Reid*, 21 Hun (N. Y.) 273.

2. *Mackellar v. Rogers*, 109 N. Y. 468.

The time in which to make the application begins to run after the service of the reply, even though the issues raised by the counterclaim are not to be so tried. *Rutley v. Person*, 12 Abb. N. Cas. (N. Y.) 352.

3. See *Du Pont v. Davis*, 35 Wis. 630; *Mackellar v. Rogers*, 109 N. Y. 468; *Cook v. Jenkins*, 79 N. Y. 575.

New Trial.—In an action of ejectment where the answer set up an equitable counterclaim, which was dismissed upon trial of the issues thereon at an equity term of the court, and subsequently the other issues were tried before a jury, who found a verdict for the plaintiff, it was held that the defendant was not entitled upon payment of the costs to a new trial of the equitable issue on the counterclaim, but only to a second trial of the other issues. *Post v. Moran*, 10 Daly (N. Y.) 502.

Judgment.—Upon overruling a demurrer to a counterclaim, no judgment should be entered, until all the issues are disposed of. *Bucking v. Hauselt*, 9

Hun (N. Y.) 633; *Oesterriches v. Jones*, 45 Hun (N. Y.) 246.

Appeal.—In North Carolina, when a counterclaim is stricken out, the defendant cannot appeal, but must note his exception and bring the point up for review on appeal from the final judgment. *Knott v. Burwell*, 96 N. Car. 272.

4. *Davidson v. Remington*, 12 How. Pr. (N. Y.) 310; *Kelsy v. Tremaine*, 29 How. Pr. (N. Y.) 439; *Patterson v. Patterson*, 59 N. Y. 574; 17 Am. Rep. 384; *Norton v. Foster*, 12 Kan. 44; *Gordon v. Bruner*, 49 Mo. 570; *Hay v. Short*, 49 Mo. 139; and see *Deer v. Stubbs*, 83 N. Car. 539; *New York, etc., R. Co. v. Davis*, 38 Hun (N. Y.) 477.

The one judgment is allowed to cancel the other. *Davidson v. Remington*, 12 How. Pr. (N. Y.) 310.

Judgment cannot be rendered against a person not a plaintiff, on a counterclaim or cross-petition. *Wells v. Boyd*, 1 Duv. (Ky.) 366.

Damages.—Where a counterclaim can be maintained, a recovery upon it can be had only for damages which are the natural and proximate consequences of the act complained of. *Pacific Express Co. v. Malin*, 132 U. S. 531. See also *Stoddard v. Treadwell*, 26 Cal. 294.

5. *Moore v. Caruthers*, 17 B. Mon. (Ky.) 669; *Clarkson v. Manson*, 60 How. Pr. (N. Y.) 45.

A judgment will not be reversed where the court fails to give nominal damages on a counterclaim, if such omission did not affect the costs or other rights of the defendants. *Hill v. Butler*, 6 Ohio St. 207.

Where the answer admits plaintiff's

credit should be given for the amount due the defendant and judgment rendered to the plaintiff for the remainder.¹ And where the damages of a defendant exceed the amount due to the plaintiff, the defendant has judgment for the excess, or so much thereof as is due from the plaintiff.² If the plaintiff's recovery is wholly defeated, the defendant may recover judgment for the whole, or a part of the amount demanded in his counterclaim;³ and if the defendant should be found to be

cause of action, and sets up a counterclaim, which is admitted by a failure to reply, there is no issue to try, and judgment should be ordered on the pleadings. *Schurmeier v. English* (Minn. 1891), 48 N. W. Rep. 1112.

Production of Securities.—Where a counterclaim is interposed for money lent, for which a note has been given, the defendant cannot recover upon it without producing the note and canceling it upon the trial; a subsequent production of the note after trial, does not aid the defense, or operate to deprive the plaintiff of his right to have the note upon which the counterclaim was founded produced by defendant, and canceled upon the allowance of the counterclaim. *Hoag v. Wade*, 2 Hilt. (N. Y.) 114. And see *Racine Co. Bank v. Keep*, 13 Wis. 209; *Clarke v. Frinnell*, 16 B. Mon. (Ky.) 329.

1. *Moore v. Caruthers*, 17 B. Mon. (Ky.) 669; *Hall v. Clayton*, 42 Iowa 526; *Clarkson v. Manson*, 60 How. Pr. (N. Y.) 45; *Randolph v. Mayor, etc.*, of N. Y., 53 How. Pr. (N. Y.) 68; *Greve v. Schweitzer*, 36 Wis. 554; *Branger v. Buttrick*, 30 Wis. 665.

Costs.—Where the amount found due on a counterclaim is less than the plaintiff's claim, and judgment is rendered in favor of the plaintiff for the balance, the defendant is liable for costs of the commencement of the action, and of entering judgment, but the plaintiff should pay all the costs incurred in the determination of the counterclaim. *Hall v. Clayton*, 42 Iowa 526.

Amount of Offset.—In an action by plaintiff on a contract to construct a canal for defendant, part of which was left unfinished, defendant can set off against the amount due under the contract only the actual cost of completing the canal, and cannot deny plaintiff's claim to the extent of the incomplete portion without showing the cost of completion. *Price v. Kearney Canal, etc., Co.*, 29 Neb. 33.

And when a note is purchased for the purpose of using it as a set-off, only the amount paid can be set off. *Nichols v. Martin*, 21 N. Y. Wkly. Dig. 20.

2. *Clarkson v. Manson*, 60 How. Pr. (N. Y.) 45; *Ogden v. Coddington*, 2 E. D. Smith (N. Y.) 317; *Davidson v. Remington*, 12 How. Pr. (N. Y.) 310; *Tuckerman v. Corbin*, 66 How. Pr. (N. Y.) 404; *Clark v. Story*, 29 Barb. (N. Y.) 295; *Hay v. Short*, 49 Mo. 139; *Bloom v. Lehman*, 27 Ark. 489; *Mason v. Heyward*, 3 Minn. 182; *Moore v. Caruthers*, 17 B. Mon. (Ky.) 669; and see *Great Western Ins. Co. v. Pierce*, 1 Wyoming Ter. 45.

A defendant who sets up by way of counterclaim to an action brought for purchase money, a cause of action based upon the covenants in a deed is entitled to recover the same damages as he would have recovered if he had brought a separate action on those covenants. *Akerly v. Vilas*, 21 Wis. 88.

Where the amount claimed by the plaintiff in his petition is admitted, and the only issues in the case arise on the defendant's counterclaim, the jury may, subject to the direction of the court, in assessing damages on the counterclaim, deduct the amount admitted to be due the plaintiff. If they make such deduction, their verdict ought to show it, and if the deduction is not made by the jury, it will be made by the court in rendering the judgment. *Brainard v. Lane*, 26 Ohio St. 632.

In *Kentucky*, double the value of property unlawfully taken may be recovered or pleaded in set-off, if such taking comes within the act of 1864, "to provide a civil remedy for injuries done by disloyal persons," so far as guerrillas and others not acting under color of military authority, are concerned. *Haddix v. Wilson*, 3 Bush (Ky.) 523.

3. *Clarkson v. Manson*, 60 How. Pr. (N. Y.) 45; *Moore v. Caruthers*, 17 B.

entitled to nothing, the plaintiff may have judgment for his whole claim.¹

Where the answer does not deny the plaintiff's claim, but sets up a counterclaim for a less amount, judgment may be rendered for the amount so admitted to be due, and the action may be continued as to the counterclaim or amount in dispute.² When a counterclaim consisting of a demand against an assignor exceeds the demand sued upon, judgment can be rendered against the assignee to the extent of the extinguishment of his demand only;³ and a counterclaim against a trustee consisting of a demand against the person whom he represents can be allowed only

Mon. (Ky.) 660; *Lapham v. Osborne*, 20 Nev. 168. And see *Kelsy v. Tremaine*, 29 How. Pr. (N. Y.) 439.

A separate judgment in favor of one of several defendants may be rendered on a counterclaim, showing a separate cause of action in favor of such defendant. *Plyer v. Parker*, 10 S. Car. 464.

Where, pending trial, the plaintiff, who alone began the suit, amends his pleadings so as to admit a co-plaintiff, seeking a recovery in favor of both, if the verdict be against them, the recovery on the defendant's counterclaim will go against both the plaintiffs. *Mack v. Sloteman*, 21 Fed. Rep. 109.

Form of Verdict.—A verdict signed by the foreman: "We, the jury, find a verdict for H. A. Pierce for the sum of one thousand one hundred and fifty-eight dollars and five cents," is insufficient, although a defendant named H. A. Pierce had answered setting forth a counterclaim. *Great Western Ins. Co. v. Pierce*, 1 Wyoming Ter. 45.

Costs.—Where the plaintiff fails to recover, and the defendant recovers judgment on his counterclaim, the defendant is the prevailing party upon the issues raised, and is entitled to costs. *Lapham v. Osborne*, 20 Nev. 168.

1. *Moore v. Caruthers*, 17 B. Mon. (Ky.) 669.

Defendant appealed from an order granting to the plaintiff a new trial, stipulating that, if the order should be affirmed, judgment absolute should be rendered against him. The order was affirmed, and judgment ordered. Upon a reference to ascertain the amount due to the plaintiff, a balance was found to be due to the defendant upon a counterclaim. It was held that no affirmative relief could be granted to the defendant, his right being lost by the judgment entered upon his stipulation.

Rust v. Hauselt, 8 Abb. N. Cas. (N. Y.) 148.

Where a complaint sets forth a single cause of action, and the answer sets up by way of counterclaim that there had been a partnership between the parties which had been dissolved, and there were unsettled accounts between the partners, and a balance in favor of the defendant demanding judgment for such balance, and upon an accounting, a balance is shown in favor of plaintiffs, they may have judgment for the amount thereof, although it exceeds the amount claimed in the complaint, such enhancement of the plaintiff's claim not being inconsistent with the plaintiff's complaint. *Rider v. Foggan*, 59 Hun (N. Y.) 628.

2. *Moore v. Woodside*, 26 Ohio St. 537; *Baker v. Nussbaum*, 1 Hilt. (N. Y.) 549; *Meyers v. Trimble*, 1 Abb. Pr. (N. Y.) 220; 3 E. D. Smith (N. Y.) 607; *Guiet v. Murphy*, 18 How. Pr. (N. Y.) 411. And see *Weaver v. Carnahan*, 37 Ohio St. 363.

Where the plaintiff admits the defendant's counterclaim, and takes judgment for the balance, judgment may be entered up without notice of assessment of damages. *Robbins v. Watson*, 22 How. Pr. (N. Y.) 293.

Upon Failure of Plaintiff to Reply.—

If a defendant admits the plaintiff's claim or puts it in issue by his answer, he must for the purposes of a motion for judgment for the excess of his demand over that of the plaintiff, be considered as conceding the plaintiff's right of recovery to the amount of his claim. *Kelsy v. Tremaine*, 29 How. Pr. (N. Y.) 439.

3. See *Brown v. Coleman*, 55 Hun (N. Y.) 501; *Norton v. Foster*, 12 Kan. 44; *Leavenson v. Lafontane*, 3 Kan. 522; *Casad v. Hughes*, 27 Ind. 141; *Kneedler v. Sternbergh*, 10 How. Pr. (N. Y.) 67.

to the extent of satisfying the plaintiff's claim.¹ Where affirmative relief is demanded by one defendant against another, the judgment may determine their ultimate rights as between themselves,² and if the plaintiff's cause of action or counterclaim is for the recovery of some specific relief, legal or equitable, other than a money judgment, the judgment rendered must be according to the circumstances of the case.³

11. Effect of Counterclaim (See also RES JUDICATA)—*a*. **WHEN PLEADED.**—A counterclaim which has been considered and acted upon in a former suit is extinguished as a cause of action;⁴ and though it was used merely as a defense and no affirm-

The payor of a promissory note is not deprived of the benefit of a counterclaim by an assignment of the note after maturity, but he is entitled to have the one demand satisfy the other up to the amount of the smaller demand only, and is not entitled to have an affirmative judgment against the assignee for any excess of his demand, over and above the amount of the note. *Norton v. Foster*, 12 Kan. 44.

1. See *Pendergast v. Greenfield*, 40 Hun (N. Y.) 494.

2. See *Price v. Holman* (Supreme Ct.), 2 N. Y. Supp. 184; *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40; *Manning v. Gasharie*, 27 Ind. 399.

Judgment may be given for or against one or more plaintiffs, or for or against one or more defendants. *Price v. Holman* (Supreme Ct.), 2 N. Y. Supp. 184; citing *New York Code Civ. Proc.*, § 1204.

3. *Pomeroy on Rem.* (2d ed.), 844, § 805. And see *Ogden v. Coddington*, 2 E. D. Smith (N. Y.) 317.

Where in an action for waste in demised premises, a counterclaim setting up an agreement for the sale of the premises by the lessor to the lessee demanding specific performance by the plaintiff is set up, the judgment for specific performance may provide that the amount of a mortgage upon the property be deducted from the purchase money, and that the defendant pay interest on the purchase money, and the plaintiff interest on the mortgage; that taxes confirmed after the time when the deed should have been delivered be paid by the defendant, and that the plaintiff account for the rents and profits from that time, and that if the defendant fail to complete the purchase within a specified time, his counterclaim shall be dismissed, and the plaintiff have judgment against him for treble damages

for the injuries to the property. *Lazarus v. Heilman*, 11 Daly (N. Y.) 189.

Judgment, by Whom Rendered.—A judge at chambers has no power to render a judgment for the defendant, on the ground that the plaintiff has not replied to the answer. Judgment can be rendered only by the court when sitting as such. *Aymar v. Chace*, 12 Barb. (N. Y.) 301.

4. *Jones v. McGee*, 7 N. Y. Wkly. Dig. 97; *Fabricotti v. Launitz*, 1 Code Rep. N. S. (N. Y.) 121; *Hatch v. Benton*, 6 Barb. (N. Y.) 28; *Ives v. Goddard*, 1 Hilt. (N. Y.) 434; *Gillespie v. Torrance*, 25 N. Y. 306; 82 Am. Dec. 355; *Davis v. Tallcott*, 12 N. Y. 184; *Irwin v. Knox*, 10 Johns. (N. Y.) 365; *Morris v. Floyd*, 5 Barb. (N. Y.) 130; *Naylor v. Schenck*, 3 E. D. Smith (N. Y.) 135; *Harris v. Hammond*, 18 How. Pr. (N. Y.) 123; *Miller v. Freeborn*, 4 Robt. (N. Y.) 608; *Costa v. Llorens*, 10 N. Y. Wkly. Dig. 461; *Lowell v. Lane*, 33 Barb. (N. Y.) 292; *Union R., etc., Co. v. Traube*, 59 Mo. 355; *Britton v. Turner*, 6 N. H. 481; 26 Am. Dec. 713; and see *Curtis v. Groat*, 6 Johns. (N. Y.) 168; 5 Am. Dec. 204.

A defendant cannot use the same defense first as a shield and then as a sword. *O'Connor v. Barney*, 10 Gray (Mass.) 231; *Sawyer v. Woodbury*, 7 Gray (Mass.) 499; 66 Am. Dec. 518; *Sargeant v. Fitzpatrick*, 4 Gray (Mass.) 511; *Burnett v. Smith*, 4 Gray (Mass.) 50; *Inslee v. Hampton*, 11 Hun (N. Y.) 156.

The fact that an appeal has been brought does not affect the conclusive nature of the judgment appealed from as a bar, while it remains unreversed. *Harris v. Hammond*, 18 How. Pr. (N. Y.) 123.

Where, in an action on an express contract, the defendant sets up a counterclaim founded on alleged failure by

ative relief was asked, no recovery for the excess over the plaintiff's demand can be afterwards had.¹ Where the counterclaim is withdrawn or stricken out, before trial, however, and no litigation upon it is had, a subsequent action will not be barred;² and where it affirmatively appears that the demand interposed as a counterclaim in the former action could not have been legally allowed, the case will be taken out of the operation of the general rule.³

plaintiff to perform the contract, he thereby consents to put in issue all the equities between the parties upon the contract, and he bars himself from claiming that the plaintiff cannot maintain his action because of such failure. *Mason v. Heyward*, 3 Minn. 182.

Persons Not Parties.—A recovery of judgment on a note or other demand, does not extinguish it as to any persons' liability thereon who are not parties to the action, and it is a good subject of counterclaim as against such persons. *Kelsey v. Bradbury*, 21 Barb. (N. Y.) 531; and see *Cornell v. Donovan*, 14 N. Y. St. Rep. 687; *Lowell v. Lane*, 33 Barb. (N. Y.) 292; *Ives v. Goddard*, 1 Hilt. (N. Y.) 434.

1. *Inslee v. Hampton*, 11 Hun (N. Y.) 156; *Bellinger v. Craigie*, 31 Barb. (N. Y.) 534; *Lawrence v. Houghton*, 5 Johns. (N. Y.) 129; *Brockway v. Kinney*, 2 Johns. (N. Y.) 210; *M'Lean v. Hugarin*, 13 Johns. (N. Y.) 184; *Davidson v. Alfaro*, 6 N. Y. Wkly. Dig. 455; *O'Connor v. Varney*, 10 Gray (Mass.) 231; *Britton v. Turner*, 6 N. H. 481; 26 Am. Dec. 713. And see *Mount v. Ellingwood*, 2 Thomp. & C. (N. Y.) 527; *Draper v. Stouvenel*, 38 N. Y. 219.

A judgment or decree of a court having jurisdiction of the subject-matter and of the parties is, as a general rule, final and conclusive as to the matters actually litigated and decided, and also as to the matters necessarily involved in the litigation, under the pleadings and issues made. *Dunham v. Bower*, 77 N. Y. 76; 33 Am. Rep. 570; *Embury v. Conner*, 3 N. Y. 511; 53 Am. Dec. 325; *Barth v. Burt*, 17 Abb. Pr. (N. Y.) 349; *Collins v. Bennett*, 46 N. Y. 490; *Burdick v. Post*, 12 Barb. (N. Y.) 168; *Covington*, etc., *Bridge Co. v. Sargent*, 27 Ohio St. 233; *Swensen v. Cresop*, 28 Ohio St. 668.

Where a counterclaim is embraced in the issue at the time of final submission and judgment, the plaintiff is entitled to immunity from any further

action thereon. *Gunsaulis v. Cadwallader*, 48 Iowa 48.

In *Platner v. Best*, 11 Johns. (N. Y.) 530, it was held that an action cannot be maintained to recover an item omitted by mistake in giving judgment on the trial of another cause in which it was admitted or proven.

2. *Watson v. Cowdrey*, 23 Hun (N. Y.) 169; *Ives v. Goddard*, 1 Hilt. (N. Y.) 434.

Even where an answer amounting to a counterclaim has been filed in an action to foreclose a mortgage, such action may, before it is called for trial, be dismissed, without prejudice to a future action. The defendant has, however, the right to proceed to a trial of his claim, notwithstanding the dismissal. *Amos v. Humboldt Loan Assoc.*, 21 Kan. 474.

Proceeding Without Objection.—In *King v. Fuller*, 3 Cal. (N. Y.) 152, it was held that where a claim is pleaded and not objected to, and passed upon by the jury, whether it could be legally set off or not, the consent of the parties thus to be implied will take away the error, and it then becomes a bar to a subsequent suit.

3. *Hatch v. Benton*, 6 Barb. (N. Y.) 28; *Bates v. Cobb*, 5 Bosw. (N. Y.) 29; *Bull v. Hopkins*, 7 Johns. (N. Y.) 22; *McGuinty v. Herrick*, 5 Wend. (N. Y.) 240; *Beebe v. Bull*, 12 Wend. (N. Y.) 504; 27 Am. Dec. 150; *Wolfe v. Washburn*, 6 Cow. (N. Y.) 261; *People v. Denison*, 84 N. Y. 272; *Compton v. Green*, 9 How. Pr. (N. Y.) 228; and see *Jones v. Underwood*, 35 Barb. (N. Y.) 211.

If the same question is submitted to a jury in a first action, and the evidence in the last, if it had been given in the first, would have been equally available as in the last to entitle the party to recover, then the verdict and judgment are an absolute bar. But where from the number of plaintiffs or defendants in the first suit, the testimony relied on in the second is sufficient to authorize a recovery in such

Where a defendant moves for and obtains a non-suit as to the plaintiff's cause of action, he, in effect, submits to a non-suit as to his own cause of action, pleaded as a counterclaim;¹ but as a plaintiff may take a voluntary non-suit, so a defendant may decline to submit a counterclaim for adjudication, and in either case a subsequent action may be brought upon the defendant's demand;² though where the defendant has procured the dismissal of the complaint, the plaintiff has a right to insist that the counterclaim shall be passed upon, and that the defendant shall not be allowed to withdraw it, so as to reserve the right of bringing a new action thereon.³

Any material fact or allegation of a cause of action admissible as a counterclaim, which is expressly or impliedly involved in the judgment in the former action, however, is merged in it, and cannot be again litigated, whether the cause of action was set up as a counterclaim or not.⁴ An offer of judgment made and accepted

second action, but could not have produced a different result in the first, the failure of the plaintiffs in the one suit, is no bar to their recovery in the other, although it is for the same cause of action for which they attempted to recover in the first suit. *Hatch v. Benton*, 6 Barb. (N. Y.) 28; *Miller v. Manice*, 6 Hill (N. Y.) 114.

1. *Mayor, etc. v. Ketchum*, 67 How. Pr. (N. Y.) 161; and see *Slocum v. Minneapolis Millers' Assoc.*, 33 Minn. 438.

In *North Carolina* a nonsuit is not permitted when a counterclaim arising out of the transaction set forth in the complaint as the foundation of the action is set up by the defendant. *Purnell v. Vaughan*, 80 N. Car. 46; *Whedbee v. Leggett*, 92 N. Car. 469.

2. *Mayor, etc. v. Ketchum*, 67 How. Pr. (N. Y.) 161; *Foster v. Milliner*, 50 Barb. (N. Y.) 385.

In a proceeding before a referee, a counterclaim set up in the defendant's answer may be withdrawn at any time during the course of the trial; the defendant, as to such withdrawal, occupying the position of a plaintiff who sustains a nonsuit upon his claim. *Brown v. Butler*, 58 Hun (N. Y.) 511.

An agreement that a withdrawal of a counterclaim is to be "without prejudice to the defendant's right to maintain an action thereon against the plaintiffs, and the same is not to be affected by the future litigation of the action," is admissible in evidence, in an action arising upon such counterclaim, to show that the action is not barred by the record of the former action.

Foster v. Milliner, 50 Barb. (N. Y.) 385.

3. *Miller v. Freeborn*, 4 Robt. (N. Y.) 608.

The dismissal, *sua sponte*, by the court, of a counterclaim, without prejudice to the bringing of a new action upon it, although error under the *Ohio* Code, § 119, does not affect the judgment rendered upon the cause of action set forth in the petition. Such judgment may be affirmed and the cause remanded to try the counterclaim. *Nulsen v. Wagner*, 2 Cin. (Ohio) 258.

Defendant will be permitted to withdraw a counterclaim where he will be precluded on the trial from offering any evidence to sustain it because of his inability to comply with an order directing him to furnish plaintiff with a bill of particulars. *Knauth v. Wertheim*, 26 Abb. N. Cas. (N. Y.) 369.

In a suit for an accounting, where defendant has set up a counterclaim, based upon transactions directly involved in such accounting, he should not be permitted to withdraw it after the testimony is all in. *Whitman v. Horton*, 46 N. Y. Super. Ct. 531.

4. *Dunham v. Bower*, 77 N. Y. 76; 33 Am. Rep. 570; *Bellinger v. Craigie*, 31 Barb. (N. Y.) 534; *Davis v. Tallcott*, 12 N. Y. 184; *Gates v. Preston*, 41 N. Y. 113; *Blair v. Bartlett*, 75 N. Y. 150; 31 Am. Rep. 455; *Collins v. Bennett*, 46 N. Y. 490; and see *Pacific Express Co. v. Malin*, 122 U. S. 531.

In an action for the recovery of freight, a claim for non-delivery or failure to transport the goods would be barred by a recovery in the action

after a counterclaim has been pleaded, extinguishes the cause of action therein set forth.¹ So the pendency of a prior action upon the same cause of action as that set up as a counterclaim, for which affirmative judgment is demanded, is a defense to the counterclaim;² but where no judgment has been pronounced, the pendency of a prior action for the same cause does not prevent a defendant from using his demand as a set-off, or by way of recoupment;³ though where a cause of action has been used as a set-off, or by way of recoupment, and the defendant afterwards sues upon it during the pendency of the former action, he will be required to elect in which action he will insist upon it.⁴

or an admission of the claim. But where the plaintiff performed the contract to carry, and the goods reached their destination, he has thus performed the condition on which his right to freight depended, and the owner of the injured goods may then pay the freight and sue for damages, or, refusing to pay, submit to suit and set up his damages by way of counterclaim, or bring a cross-action. *Schwinger v. Raymond*, 83 N. Y. 192; 38 Am. Rep. 415.

1. *Miller v. Freeborn*, 4 Robt. (N. Y.) 608; *Schneider v. Jacobi*, 1 Duer (N. Y.) 694.

But a voluntary compromise of a claim, in an action embracing only part of the entire demand, does not necessarily merge the whole demand. *O'Beirne v. Lloyd*, 43 N. Y. 248.

Presumption of Extinguishment.—Where a judgment recites that a counterclaim was set up, and adjudges that the plaintiff recover a sum less than the excess of his claim over the amount of the counterclaim, it must be assumed that the counterclaim was allowed by the jury, and this amount deducted from that otherwise found due the plaintiff. *Branger v. Buttrick*, 30 Wis. 665.

2. *Ansorge v. Kaiser*, 22 Abb. N. Cas. (N. Y.) 305; *Tuckerman v. Corbin*, 66 How. Pr. (N. Y.) 404; *Collyer v. Collins*, 17 Abb. Pr. (N. Y.) 467. See *Louisville, etc., R. Co. v. Thompson*, 18 B. Mon. (Ky.) 735.

The objection of the pendency of a prior action upon the cause set up as a counterclaim may be raised by way of demurrer, if it appears upon the face of the counterclaim. If not it should be taken by way of reply. *Ansorge v. Kaiser*, 22 Abb. N. Cas. (N. Y.) 304.

Where a plaintiff brings several actions against the same defendant, who has a demand against the plaintiff, he

may protect himself by setting up his counterclaim in one of them, and moving to consolidate the actions or to stay the others, until the action in which he has set up the counterclaim is disposed of. *Tuckerman v. Corbin*, 66 How. Pr. (N. Y.) 404.

3. *Naylor v. Schenck*, 3 E. D. Smith (N. Y.) 135; *Lightbody v. Potter*, 10 Wend. (N. Y.) 534; *Harris v. Hammond*, 18 How. Pr. (N. Y.) 123; *Compton v. Green*, 9 How. Pr. (N. Y.) 228; *Bell v. Cowgell*, 1 Ashm. (Pa.) 7; *Stroh v. Ulrich*, 1 W. & S. (Pa.) 57; *Lindsay v. Stewart*, 72 Cal. 540.

Where the same counterclaim is interposed in two different actions, its satisfaction by settlement in one action amounts to its withdrawal in the other. *Matthews v. Davis*, 39 Ohio St. 54.

That a verdict has been rendered, or that the plaintiff has paid the money into court in the former action, does not deprive the defendant of his right to use the cause of action as a set-off, or by way of recoupment. *Naylor v. Schenck*, 3 E. D. Smith (N. Y.) 135.

A party who prosecutes a demand, and is afterwards sued by his adversary, and pleads his original cause of action by way of counterclaim, is not prosecuting two actions, one of which abates the other. *Naylor v. Schenck*, 3 E. D. Smith (N. Y.) 137; *Tuckerman v. Corbin*, 66 How. Pr. (N. Y.) 404. And see *Lindsay v. Stewart*, 72 Cal. 540.

4. *Farmers' L. & T. Co. v. Hunt*, 1 Code Rep. N. S. (N. Y.) 1; *Fabricotti v. Launitz*, 1 Code Rep. N. S. (N. Y.) 121; *Hammond v. Baker*, 1 Code Rep. N. S. (N. Y.) 105; *Wiltzie v. Northam*, 3 Bosw. (N. Y.) 162; *Fuller v. Read*, 15 How. Pr. (N. Y.) 236; *Collyer v. Collins*, 17 Abb. Pr. (N. Y.) 468; *Halsey v. Carter*, 1 Duer (N. Y.) 667. But see *Wright v. Delafield*, 11 How. Pr. (N. Y.) 465.

Where the defendant, after setting

As a general proposition, the right of a plaintiff to discontinue his suit at his pleasure, and of course, is undoubted;¹ but the right is not absolute. It must depend upon equitable considerations addressed to the discretion of the court,² and where the defendant has interposed a counterclaim, he has a right to proceed with the action for the purpose of trying the issue joined upon it, independently of the question whether the plaintiff chooses to maintain his cause of action or not.³

up new matter in an answer, brought a cross-action against the plaintiff founded on the same matter as that set forth in his answer, and the plaintiff moved in the first action that the defendant should be required to elect either to abandon his answer or his cross-action, it was held that the motion should have been made in the cross-action. *Farmers' L. & T. Co. v. Hunt*, 1 Code Rep. N. S. (N. Y.) 1.

In *Tuckerman v. Corbin*, 66 How. Pr. (N. Y.) 404, it was held that a party who has brought an action is not precluded from setting up the same matter as a counterclaim in a cross-action; but will be compelled to elect between his own suit and the recoupment claimed; and if he elects the latter, his suit will be stayed.

1. *Young v. Bush*, 36 How. Pr. (N. Y.) 240; *Cooke v. Beach*, 28 How. Pr. (N. Y.) 358; *Oaksmith v. Sutherland*, 1 Hilt. (N. Y.) 265; *Moyle v. Porter*, 51 Cal. 639; *James v. Center*, 53 Cal. 31; *Conaway v. Carpenter*, 58 Ind. 477; *Amos v. Humboldt Loan Assoc.*, 21 Kan. 474; *Holcomb v. Holcomb*, 23 Fed. Rep. 781; and See DISCONTINUANCE, vol. 5, p. 674.

2. *Young v. Bush*, 36 How. Pr. (N. Y.) 240; *Merchants' Bank v. Schulenberg*, 54 Mich. 49. And see *Van Buren v. Fort*, 4 Wend. (N. Y.) 209; *Ludlow v. Hackett*, 18 Johns. (N. Y.) 252; *Collins v. Evans*, 6 Johns. (N. Y.) 333; *Smith v. Skinner*, 1 How. Pr. (N. Y.) 122; *Park v. Moore*, 4 Hill (N. Y.) 592; *Sunney v. Roach*, 4 Abb. Pr. (N. Y.) 16.

Where a plaintiff has entered upon the trial of an action and occupied the time of the court, he will not be permitted to discontinue the action by the entry of an *ex parte* order, without the leave of the court, and an order thus rendered will be set aside on motion. *Wilder v. Boynton*, 63 Barb. (N. Y.) 547.

Withdrawal by Defendant.—Where a defendant has set up a counterclaim

based on transactions directly involved in an accounting, for which the action is brought, the court may refuse to allow him to withdraw it, at the close of the testimony. *Whitman v. Horton*, 46 N. Y. Super. Ct. 531.

3. *Gwathney v. Chatham*, 21 Hun (N. Y.) 576; *Van Allen v. Schermerhorn*, 14 How. Pr. (N. Y.) 287; *Cockle v. Underwood*, 3 Duer (N. Y.) 676; 1 Abb. Pr. (N. Y.) 1; *Rees v. Van Patten*, 13 How. Pr. (N. Y.) 258; *Douthitt v. Smith*, 69 Ind. 463; *Tabor v. Mackee*, 58 Ind. 290; *Conaway v. Carpenter*, 58 Ind. 477; *Gilpin v. Wilson*, 53 Ind. 443; *Venable v. Dutch*, 37 Kan. 515; *Amos v. Humboldt Loan Assoc.*, 21 Kan. 474; *Robinson v. Placerville, etc.*, R. Co., 65 Cal. 263; *Bank v. Weyand*, 30 Ohio St. 126; *Sigler v. Hidy*, 56 Iowa 504; *Sigler v. Shields*, 56 Iowa 768; *Purnell v. Vaughan*, 80 N. Car. 46; *Francis v. Edwards*, 77 N. Car. 271; *Riley v. Carter*, 3 Humph. (Tenn.) 230; *Thomas v. Hill*, 3 Tex. 269; *Bradford v. Hamilton*, 7 Tex. 55; *Holcomb v. Holcomb*, 23 Fed. Rep. 781; *Griffin v. Jorgenson*, 22 Minn. 92; *McNeill v. Lawton*, 97 N. Car. 16; *Bynum v. Powe*, 97 N. Car. 374; *Gatewood v. Leak*, 99 N. Car. 363.

Where a defendant interposes a counterclaim in an action and asks for affirmative relief, and issue is joined upon his claim, he becomes an actor in the case and may proceed in it as if he were in fact a plaintiff. *Livermore v. Bainbridge*, 43 How. Pr. (N. Y.) 272; *Venable v. Dutch*, 37 Kan. 515; *Bennett v. McCorklin*, 3 Mete. (Ky.) 322.

The right of a plaintiff to discontinue after an answer containing a counterclaim is a qualified one. The court has then the right to control its own orders, and may exercise its discretion in respect to the terms upon which parties shall be permitted to discontinue. *Wilder v. Boynton*, 63 Barb. (N. Y.) 547. And the plaintiff cannot discontinue except by leave of the court granted on show-

But the court will not refuse leave to a plaintiff to discontinue his action, even though a counterclaim has been interposed by the defendant, unless it appears that the counterclaim will be jeopardized by the discontinuance,¹ or that the defendant has secured some right in reference to the subject-matter of the action, or the counterclaim by the proceedings of which he would be deprived by the discontinuance.²

b. FAILURE TO PLEAD.—A defendant is not bound to counterclaim an independent cause of action in his favor against the plaintiff,³ and is not concluded by judgment in a former action,

ing special grounds therefor. *Geenia v. Keah*, 66 Barb. (N. Y.) 245.

When, after dismissal by the plaintiff, the defendant elects to go to trial upon his counterclaim, he stands in the relation of plaintiff to that cause of action, both as respects his pleading and his proof, and a substantial omission in either is as fatal to recovery as though he were prosecuting an original and independent action. *Sale v. Bugher*, 24 Kan. 432.

The representatives of a deceased defendant, who had interposed a counterclaim, may revive the action, notwithstanding the opposition of the plaintiff. *Livermore v. Bainbridge*, 49 N. Y. 125.

1. *Pacific Mail Steamship Co. v. Leuling*, 7 Abb. Pr. N. S. (N. Y.) 37; *Van Alen v. Schermerhorn*, 14 How. Pr. (N. Y.) 287; *Rees v. Van Patten*, 13 How. Pr. (N. Y.) 258.

The plaintiff may discontinue as against persons improperly made defendants even though they have filed counterclaims demanding affirmative relief. *Lee v. Eure*, 93 N. Car. 5.

That the Statute of Limitations would be a bar to an action upon a counterclaim, is a sufficient reason for a denial of a motion for a discontinuance made by the plaintiff. *Van Alen v. Schermerhorn*, 14 How. Pr. (N. Y.) 287; *Rees v. Van Patten*, 13 How. Pr. (N. Y.) 258; *Merchants' Bank v. Schulenberg*, 54 Mich. 49.

In *North Carolina* where defendant's counterclaim does not arise out of the same transaction as plaintiff's cause of action, plaintiff may submit to a nonsuit; otherwise, where the counterclaim arises out of the same transaction. *Whedbee v. Leggett*, 92 N. Car. 469.

2. *Pacific Mail Steamship Co. v. Leuling*, 7 Abb. Pr. N. S. (N. Y.) 37.

After an order has been made requiring a husband who is a plaintiff in a divorce case to pay temporary alimony to his wife, he cannot, without

complying with the order, discontinue the action on payment of costs by entering an *ex parte* order. *Leslie v. Leslie*, 10 Abb. Pr. N. S. (N. Y.) 64.

When, after the dismissal by the plaintiff of his cause of action, the defendant insists upon a trial of his set-off or counterclaim, the plaintiff may make any legal defense to such set-off or counterclaim, and to that end may, in the discretion of the court, be allowed to file proper pleadings presenting such defense. *Sale v. Bugher*, 24 Kan. 432.

In *Seaboard, etc., R. Co. v. Ward*, 18 Barb. (N. Y.) 595, it was held that a plaintiff may, before the time for replying has arrived, enter an *ex parte* order dismissing the action on payment of costs, notwithstanding the defendant has put in an answer setting up a counterclaim against the plaintiff, and demanding affirmative relief, but that if the plaintiff has failed to reply to such answer within the time prescribed by law the rule would be otherwise. See also *Oaksmith v. Sutherland*, 1 Hilt. (N. Y.) 265; *Rees v. Van Patten*, 13 How. Pr. (N. Y.) 258; *Tubbs v. Hall*, 12 Abb. Pr. N. S. (N. Y.) 237.

Procedure After Dismissal.—Where the plaintiff dismisses the action, and the trial of the issues formed upon the counterclaim is proceeded with, the counterclaim should be docketed under its proper title, the claimant as plaintiff, and the adverse party as defendant. *Rawalt v. Brewer*, 16 Neb. 444.

3. *Brown v. Gallaudet*, 80 N. Y. 413; *Welch v. Hazelton*, 14 How. Pr. (N. Y.) 97; *Lignot v. Redding*, 4 E. D. Smith (N. Y.) 285; *Bellinger v. Craigie*, 31 Barb. (N. Y.) 534; *Nemetty v. Naylor*, 63 How. Pr. (N. Y.) 387; *Kelsey v. Ward*, 38 N. Y. 83; *Morgan v. Powers*, 66 Barb. (N. Y.) 35; *Halsey v. Carter*, 1 Duer (N. Y.) 667; *McIntyre v. New York, etc., R. Co.*, 43 Barb. (N. Y.) 532; *Inslee v.*

in which he did not set it up.¹ He has a right of election to set it up as a counterclaim in defense of the action against him, or to bring a cross-action upon his demand.²

While a counterclaim or set-off need not be asserted by answer to a complaint, however, it cannot be the subject of an independent action, where it results from an alleged transaction, the existence of which in many of its material parts is directly negatived by a judgment unreversed and unappealed from, given in an action between the same parties;³ and some of the statutes are construed to require a defendant to interpose any valid counterclaim he may have, in an action against him, under the penalty

Hampton, 8 Hun (N. Y.) 230; 11 Hun (N. Y.) 156; Potter v. Gates, 56 Hun (N. Y.) 639; Stoddard v. Treadwell, 26 Cal. 294; Blackwell-Durham Tobacco Co. v. McElwee, 94 N. Car. 425.

A party having a claim against another, is not bound to wait the tedious motion of such debtor, if he sees fit to commence a suit and then delay its progress, so as to prevent the real creditor from obtaining what is due him. Lignot v. Redding, 4 E. D. Smith (N. Y.) 285; Inslee v. Hampton, 8 Hun (N. Y.) 230.

1. Brown v. Gallaudet, 80 N. Y. 413; Welch v. Hazelton, 14 How. Pr. (N. Y.) 97; Lawrence v. Bank of the Republic, 3 Robt. (N. Y.) 142; Potter v. Gates, 56 Hun (N. Y.) 639; Barth v. Burt, 17 Abb. Pr. (N. Y.) 349; Ives v. Goddard, 1 Hilt. (N. Y.) 434; Hobbs v. Duff, 23 Cal. 596; Stoddard v. Treadwell, 26 Cal. 294; Dorsey v. Reese, 14 B. Mon. (Ky.) 127; Emmerson v. Heriford, 8 Bush (Ky.) 229; Douglas v. First Nat. Bank, 17 Minn. 35; Woody v. Jordan, 69 N. Car. 189. And see Giles v. Austin, 62 N. Y. 484.

That the plaintiff allowed the amount and sued for the balance only is immaterial where it appears that the amount allowed by the plaintiff was not accepted or allowed by the court in the action. Brown v. Gallaudet, 80 N. Y. 413.

In *New York* in actions commenced in justices' courts, a defendant must avail himself of any counterclaim he may have, or be thereafter precluded from maintaining an action upon it. Douglass v. Hoag, 1 Johns. (N. Y.) 283; Inslee v. Hampton, 8 Hun (N. Y.) 230; Lord v. Ostrander, 43 Barb. (N. Y.) 339.

2. Gillespie v. Torrance, 25 N. Y. 306; 82 Am. Dec. 355; Lignot v. Redding, 4 E. D. Smith (N. Y.) 285; Fab-

ricotti v. Launitz, 1 Code Rep. N. S. (N. Y.) 121; Brown v. Gallaudet, 80 N. Y. 413; Dunham v. Bower, 77 N. Y. 76; 33 Am. Rep. 570; Halsey v. Carter, 1 Duer (N. Y.) 667; Tuckerman v. Corbin, 66 How. Pr. (N. Y.) 407; Inslee v. Hampton, 8 Hun (N. Y.) 230; Peck v. Minot, 4 Robt. (N. Y.) 323; Batterman v. Pierce, 3 Hill (N. Y.) 171; Collyer v. Collins, 17 Abb. Pr. (N. Y.) 467; O'Connor v. Varney, 10 Gray (Mass.) 231.

The only penalty for failure to plead a counterclaim rests in the matter of costs. Swensen v. Cresop, 28 Ohio St. 668.

The rule that a defense legal or equitable not set up is deemed waived, does not apply to a counterclaim. In an action to recover possession of realty, a defendant relying solely on his legal title and failing, may afterwards maintain an action to correct mistakes in the deeds. Witte v. Lockwood, 39 Ohio St. 141.

3. Nemetty v. Naylor, 63 How. Pr. (N. Y.) 387; Bellinger v. Craigie, 31 Barb. (N. Y.) 534.

These cases go upon the ground that the plaintiff's cause of action could be made out only by overcoming the defendant's claim; that if the latter was well founded it would defeat the former, and a recovery by either would be a conclusive answer to any demand made by the other, because the litigation invoked by either necessarily involved the matter upon which both must rely. Schwinger v. Raymond, 83 N. Y. 192; 38 Am. Rep. 415.

It will be assumed that the defendant suffered no injury through the action of a court in sustaining an exception to a counterclaim, which was founded on the converse of the same cause of action as that set forth in the complaint, when the verdict and judg-

of being prohibited from thereafter maintaining an action against the plaintiff thereon.¹

IV. SET-OFF OF ONE JUDGMENT AGAINST ANOTHER.—Where reciprocal claims between different parties have passed into judgment, it is the established practice of the courts to set off one judgment against another, and enter satisfaction of both to the amount of the smaller demand;² and judgment for one party may be withheld until the other, by using due diligence, may obtain his judgment, so that the one may be set off against the other, or that the one execution may balance the other.³

A debt remains mutual after verdict, as well as before, the verdict amounting to conclusive evidence of the debt only, and leaving the right of set-off as it was before.⁴ And though the claims between the parties were not mutual, so that they could not be set off against each other before judgment, when both have

ment are rendered in favor of the plaintiff. *Pacific Express Co. v. Malin*, 132 U. S. 531.

1. *Lowry v. Hurd*, 7 Minn. 356; *Ricker v. Pratt*, 48 Ind. 73.

Even though it is considered as obligatory upon a defendant to set up by answer any equitable defense or counterclaim or right to affirmative relief which he may have under the penalty of losing it, that consequence should follow only where he has the absolute right to set it up, and not where it is in the discretion of the court to grant or deny him the privilege of doing so. *Giles v. Austin*, 62 N. Y. 486.

2. *Chandler v. Drew*, 6 N. H. 469; 26 Am. Dec. 704; *Brown v. Warren*, 43 N. H. 430; *Jones v. Melton*, 6 Ala. 830; *Skrine v. Simmons*, 36 Ga. 402; 91 Am. Dec. 771; *New Haven Copper Co. v. Brown*, 46 Me. 418; *Prince v. Fuller*, 34 Me. 122; *Goodenow v. Buttrick*, 7 Mass. 140; *Makepeace v. Coates*, 8 Mass. 451; *Greene v. Hatch*, 12 Mass. 195; *Winslow v. Hathaway*, 1 Pick. (Mass.) 211; *Duncan v. Bloomstock*, 2 McCord (S. Car.) 318; 13 Am. Dec. 728; *Williams v. Evans*, 2 McCord (S. Car.) 203; *Wright v. Treadwell*, 14 Tex. 255; *U. S. v. Griswold*, 30 Fed. Rep. 604; *Sowles v. Witters*, 40 Fed. Rep. 413.

In an equitable point of view where there are counter demands subsisting between the parties liable to be set off against each other, one only is the debtor—namely, he against whom a balance would remain. *Greene v. Hatch*, 12 Mass. 195.

In *Arkansas*, judgments held by adverse parties against each other do not

extinguish each other to the extent of the smaller, and one may be claimed as a personal property exemption, and cannot then be reached by set-off. *Atkinson v. Pittman*, 47 Ark. 464.

3. *Smith v. Woodman*, 28 N. H. 520; *Hutchins v. Riddle*, 12 N. H. 464; *McQuesten v. Bowman*, 17 N. H. 24; *New Haven Copper Co. v. Brown*, 46 Me. 418; *Adams v. Manning*, 17 Mass. 180; *Rider v. Ocean Ins. Co.*, 20 Pick. (Mass.) 259. And see *Simpson v. Huston*, 14 Tex. 476.

In *Winslow v. Hathaway*, 1 Pick. (Mass.) 211, one action was brought forward on the docket, and the other was continued for judgment, in order that the two judgments might be set off against each other.

In *New Hampshire* the right to have a cause continued or executions stayed until the claimant obtains judgment, in order to effect a set-off seems to be confined to cases where the parties claiming the benefit of the set-off could not avail themselves of the right in the trial of the action. *Hovey v. Morrill*, 61 N. H. 9; 60 Am. Rep. 315.

4. *Bell v. Cowgell*, 1 Ashm. (Pa.) 7; *Metzgar v. Metzgar*, 1 Rawle (Pa.) 227; 8 Bac. Abr. 655.

To authorize a set off of judgments, it is not necessary that either of the suits should be pending. *Wright v. Cobleigh*, 23 N. H. 32.

In *Thorpe v. Wegefarth*, 56 Pa. St. 82, it is said that one judgment may be set off against another through the equitable power of the court, but to a judgment ripe for execution, there can be but one answer; to wit, payment pure and simple.

passed into judgment, one will be set off against the other, if equity requires it,¹ the general rule being that judgments may be set off against each other whenever executions issued upon them could be legally set off, one against the other, by the officer having them in his hands for service.²

1. Power to Set Off Judgments.—The power to set off one judgment against another, does not rest upon any statute, but upon the general jurisdiction of courts over their suitors, and their general superintendence of proceedings before them.³ It is a power incident to courts of equity,⁴ and it had been, for a long

1. *Smith v. Woodman*, 28 N. H. 520; *Hutchins v. Riddle*, 12 N. H. 464; *Temple v. Scott*, 3 Minn. 419; *Simson v. Hart*, 14 Johns. (N. Y.) 63; *Quick v. Durham*, 115 Ind. 302; *Carter v. Compton*, 79 Ind. 37; *Butner v. Bowser*, 104 Ind. 255. But see *Allnut v. Winn*, 3 J. J. Marsh. (Ky.) 304.

In *Duff v. Wells*, 7 Heisk. (Tenn.) 17, it was held that the right to set off judgments against each other pertains only to those founded on matters *ex contractu*; otherwise a party might circumvent the exemption laws by seizing and detaining his debtor's property, letting judgment therefor go by default, and getting such judgment credited upon his own.

2. *New Haven Copper Co. v. Brown*, 46 Me. 418; *Makepeace v. Coates*, 8 Mass. 451.

A judgment on which the party recovering is entitled to execution for the amount due, is so far a liquidated demand, that it may be set off against another judgment. *Gridley v. Garrison*, 4 Paige (N. Y.) 647.

Allowance Extinguishes Judgment.—A judgment when set off and allowed is extinguished, and the court will order it discharged of record. *Schroepell v. Jewell*, 1 Cow. (N. Y.) 208.

3. *Chipman v. Fowle*, 130 Mass. 352; *Ames v. Bates*, 119 Mass. 397; *Scott v. Rivers*, 1 Stew. & P. (Ala.) 19; 21 Am. Dec. 646; *Colquitt v. Bonner*, 2 Ga. 155; *Hutchins v. Riddle*, 12 N. H. 464; *Chandler v. Drew*, 6 N. H. 468; 26 Am. Dec. 704; *Hurd v. Fogg*, 22 N. H. 98; *Brown v. Warren*, 43 N. H. 430; *Ross v. Hicks*, 11 Barb. (N. Y.) 481; *Simson v. Hart*, 14 Johns. (N. Y.) 63; *Stilwell v. Carpenter*, 2 Abb. N. Cas. (N. Y.) 238; *Zogbaum v. Parker*, 55 N. Y. 120; *Holmes v. Robinson*, 4 Ohio 90; *Schautz v. Kearney*, 47 N. J. L. 56; *Brown v. Hendrickson*, 39 N. J. L. 239; *Ballinger v. Tarbell*, 16 Iowa 493; 85 Am. Dec. 527; *Prior v.*

Richards, 4 Bibb (Ky.) 356; *Dickinson v. Chism*, 4 T. B. Mon. (Ky.) 1; *Burns v. Thornburgh*, 3 Watts (Pa.) 78; *New Haven Copper Co. v. Brown*, 46 Me. 418; *Conable v. Bucklin*, 2 Aik. (Vt.) 221; *Rix v. Nevins*, 26 Vt. 384; *Duff v. Wells*, 7 Heisk. (Tenn.) 17. And see *Makepeace v. Coates*, 8 Mass. 451; *Goodenow v. Buttrick*, 7 Mass. 140; *Greene v. Hatch*, 12 Mass. 195; *Goodwin v. Richardson*, 44 N. H. 125; *Hovey v. Morrill*, 61 N. H. 13; 60 Am. Rep. 315; *Skrine v. Simmons*, 36 Ga. 402; 91 Am. Dec. 771; *Palmateer v. Meredith*, 4 J. J. Marsh. (Ky.) 74; *Hobbs v. Duff*, 23 Cal. 596; *Jeffries v. Evans*, 6 B. Mon. (Ky.) 119; 43 Am. Dec. 158; *Holmes v. Robinson*, 4 Ohio 90.

Courts of law, in setting off judgments, proceed upon the equity of the statute authorizing set-off. *Simson v. Hart*, 14 Johns. (N. Y.) 63; *Brown v. Hendrickson*, 39 N. J. L. 239; *Temple v. Scott*, 3 Minn. 419.

In *Com. v. Clarkson*, 1 Rawle (Pa.) 291, it was held that mutual judgments extinguish each other by operation of law without waiting for any act of the parties, and without any action upon the part of the court. See also *Skrine v. Simmons*, 36 Ga. 402; 91 Am. Dec. 771; *Meriwether v. Bird*, 9 Ga. 597.

4. *Simson v. Hart*, 14 Johns. (N. Y.) 63; *Stilwell v. Carpenter*, 2 Abb. N. Cas. (N. Y.) 238; *Smith v. Lowden*, 1 Sandf. (N. Y.) 696; *Alexander v. Durkee*, 112 N. Y. 655; *Temple v. Scott*, 3 Minn. 419; *Chandler v. Drew*, 6 N. H. 469; 26 Am. Dec. 704; *Schautz v. Kearney*, 47 N. J. L. 56; *Brown v. Hendrickson*, 39 N. J. L. 239; *Terney v. Wilson*, 45 N. J. L. 282.

The power to set off one judgment against another is an inherent one, and the only equitable power which the common-law courts originally possessed. *Burns v. Thornburgh*, 3 Watts (Pa.) 78.

time, exercised exclusively by them;¹ but it is now established that the power to set off one judgment against another is incident to courts of law, as well as to courts of equity.²

An application to a court of law for a set-off is addressed to the discretion of the court,³ and the propriety of the exercise of the power cannot be questioned on appeal.⁴ The power of a court of equity to set off one judgment against another, on motion, is the same as that of a common-law court.⁵ But where such relief is sought in a bill of equity, it is not a matter of discretion, but the court is bound to determine the rights of the parties, according to established principles of equity.⁶ Where a

1. *Simson v. Hart*, 14 Johns. (N. Y.) 63.

Surrogates' Courts.—The power to enforce the set-off of mutual demands which is exercised upon equitable principles, and where the right often depends upon complicated facts and equities, is one not allowed in the surrogates' courts. *Stilwell v. Carpenter*, 59 N. Y. 414.

2. *Scott v. Rivers*, 1 Stew. & P. (Ala.) 19; 21 Am. Dec. 646; *Gould v. Parlin*, 7 Me. 82; *Davidson v. Geoghagan*, 3 Bibb (Ky.) 233; *Palmateer v. Meredith*, 4 J. J. Marsh. (Ky.) 74; *Smith v. Woodman*, 28 N. H. 520; *Wright v. Cobleigh*, 23 N. H. 32; *Brown v. Warren*, 43 N. H. 430; *Hutchins v. Riddle*, 12 N. H. 464; *Ames v. Bates*, 119 Mass. 397; *Makepeace v. Coates*, 8 Mass. 451; *Greene v. Hatch*, 12 Mass. 195; *Barrett v. Barrett*, 8 Pick. (Mass.) 342; *Goodenow v. Buttrick*, 7 Mass. 140; *Irvine v. Myers*, 6 Minn. 562; *Temple v. Scott*, 3 Minn. 419; *Graves v. Woodbury*, 4 Hill (N. Y.) 559; 40 Am. Dec. 206; *Brewerton v. Harris*, 1 Johns. (N. Y.) 145; *Simpson v. Hart*, 1 Johns. Ch. (N. Y.) 91; *Burns v. Thornburgh*, 3 Watts (Pa.) 78.

The equity powers of the common-law courts extend only to cases which arise incidentally in suits at law, but these equitable powers having been found indispensable to the convenient administration of justice, are now within the established and acknowledged jurisdiction of the courts of law. *Simson v. Hart*, 14 Johns. (N. Y.) 63.

3. *Simson v. Hart*, 14 Johns. (N. Y.) 63; *Zogbaum v. Parker*, 55 N. Y. 120; *Baker v. Hoag*, 6 How. Pr. (N. Y.) 201; *Smith v. Lowden*, 1 Sandf. (N. Y.) 696; *Scott v. Rivers*, 1 Stew. & P. (Ala.) 19; 21 Am. Dec. 646; *Hovey v. Morrill*, 61 N. H. 9; 60 Am. Rep. 315; *Rowe v. Langley*, 49 N. H. 395; *Davidson v. Geoghagan*, 3 Bibb (Ky.) 233; *Herman v. Miller*, 17 Kan. 328; *Bartlett v. Pearson*, 29 Me. 9; *Burns v. Thornburgh*, 3 Watts (Pa.) 78; *Brown v. Hendrickson*, 39 N. J. L. 239; *Coxe v. State Bank*, 8 N. J. L. 172; 14 Am. Dec. 417; *Tolbert v. Harrison*, 1 Bailey (S. Car.) 599; *Conable v. Bucklin*, 2 Aik. (Vt.) 221; *Pate v. Gray*, Hempst. (U. S.) 155.

It is an appeal to the equitable discretion of the court. *Alexander v. Durkee*, 112 N. Y. 655.

4. *Burns v. Thornburgh*, 3 Watts (Pa.) 78; *Scott v. Rivers*, 1 Stew. & P. (Ala.) 19; 21 Am. Dec. 646; *Herman v. Miller*, 17 Kan. 328; *Baker v. Hoag*, 6 How. Pr. (N. Y.) 201; *Smith v. Lowden*, 1 Sandf. (N. Y.) 696.

Mandamus will not lie to review the discretion of a circuit judge in refusing a motion to allow one judgment to be set off against another. *Wells v. St. Joseph Co.*, 39 Mich. 21.

5. *Dunkin v. Vandenberg*, 1 Paige (N. Y.) 622; *Zogbaum v. Parker*, 55 N. Y. 120; *Herman v. Miller*, 17 Kan. 328. And see *Brown v. Hendrickson*, 39 N. J. L. 239.

6. *Herman v. Miller*, 17 Kan. 328; *Scott v. Rivers*, 1 Stew. & P. (Ala.) 19; 21 Am. Dec. 646; *Camp v. Paca*, 40 Ga. 45; *Simson v. Hart*, 14 Johns. (N. Y.) 63; *Zogbaum v. Parker*, 55 N. Y. 120; *Pate v. Gray*, Hempst. (U. S.) 155.

The power of common-law courts to compel a set-off of judgments by motion is based upon their supervisory power over their own judgments and suitors, and is governed by no fixed rules; but in actions in equity, it is said that suitors may ask the interference of the court *ex debito justitiæ*. *Zogbaum v. Parker*, 55 N. Y. 120.

In *Hurst v. Sheets*, 21 Iowa 506, it was held that the right to set off one

set-off is not authorized by statute, and it would deprive a party of any of his legal rights, he can have a remedy by appeal.¹

Where it appears as matter of law, however, that the court is not bound to allow a set-off, its refusal to do so cannot be revised;² and generally the power will not be exercised in cases in which it would be inequitable to do so,³ the discretionary power confided to the court being a judicial discretion, regulated by the principles of equity and justice, and not a wanton, capricious, or arbitrary determination of the will.⁴

2. To Whom Relief May be Granted.—A party must be the absolute and beneficial owner of a judgment in order to be entitled to set it off against a judgment existing against him.⁵ A party to an action will not be permitted to set off a judgment therein of which another is the equitable owner.⁶ Set-off is made be-

judgment against another, where the judgments are between the same parties, is not simply an equitable right but a matter of absolute legal right. See also *Struman v. Robb*, 37 Iowa 313; *Balinger v. Tarbell*, 16 Iowa 491; 85 Am. Dec. 527.

1. *Bartlett v. Pearson*, 29 Me. 9. And see *Horton v. Miller*, 44 Pa. St. 256; *Simson v. Hart*, 14 Johns. (N. Y.) 63.

A court of equity will not permit a defendant to off-set against the complainant in a suit in that court, a demand against him as a mere surety for the debt of a third person, for which the defendant has security upon the fund belonging to the principal debtor, sufficient to satisfy the debt. *Holden v. Gilbert*, 7 Paige (N. Y.) 208.

2. *Chipman v. Fowle*, 130 Mass. 352; *Burns v. Thornburgh*, 3 Watts (Pa.) 78.

3. *Herman v. Miller*, 17 Kan. 328; *Colquitt v. Bonner*, 2 Ga. 155; *Schantz v. Kearney*, 47 N. J. L. 56; *Brown v. Hendrickson*, 39 N. J. L. 239; *Baker v. Hoag*, 6 How. Pr. (N. Y.) 201; *Burns v. Thornburgh*, 3 Watts (Pa.) 78; *Low v. Duncan*, 3 Strobb. (S. Car.) 195; *Meador v. Rhyne*, 11 Rich. (S. Car.) 631; *Tolbert v. Harrison*, 1 Bailey (S. Car.) 599; *Conable v. Bucklin*, 2 Aik. (Vt.) 221; *Payne v. Webb*, 29 W. Va. 627; *Taylor v. Williams*, 14 Wis. 155.

The criterion by which every application for a set-off is to be determined, is whether it is equitable. *Baker v. Hoag*, 6 How. Pr. (N. Y.) 201; *Chase v. Woodward*, 61 N. H. 79.

The equitable question is one of fact. *Chase v. Woodward*, 61 N. H. 79.

4. *Simson v. Hart*, 14 Johns. (N. Y.)

63; *Fitch v. Baldwin*, Clark's Ch. (N. Y.) 428; *Smith v. Lowden*, 1 Sandf. (N. Y.) 696; *Terney v. Wilson*, 45 N. J. L. 282; *Brown v. Hendrickson*, 39 N. J. L. 239.

One judgment can properly be set off against another only when equity and good conscience shall require that such an adjustment shall be made. *Quick v. Durham*, 115 Ind. 302; *Puett v. Beard*, 86 Ind. 172; 44 Am. Rep. 280; *Beard v. Puett*, 105 Ind. 68.

5. *Herman v. Miller*, 17 Kan. 328; *Jones v. Chalfant*, 55 Cal. 505; *Lee v. Lee*, 31 Ga. 26; 76 Am. Dec. 681; *McGraw v. Pettibone*, 10 Mich. 530; *Mason v. Knowlson*, 1 Hill (N. Y.) 218; *Satterlee v. Ten Eyck*, 7 Cow. (N. Y.) 480; *People v. New York*, 13 Wend. (N. Y.) 649; 28 Am. Dec. 495; *Aiken v. Satterlee*, 1 Paige (N. Y.) 289.

An assignment of a judgment upon condition of its being reassigned, in case it cannot be set off, does not transfer the ownership with sufficient absoluteness to enable the assignee to use it as a set-off. *Butler v. Niles*, 26 How. Pr. (N. Y.) 61.

6. *Meador v. Rhyne*, 11 Rich. (S. Car.) 631; *Bowe v. Langley*, 48 N. H. 391.

In *Meador v. Rhyne*, 11 Rich. (S. Car.) 631, stress was laid upon the fact that the equitable ownership was known to the party making the motion when the cause of action was given.

In *Williams v. Taylor*, 69 Ind. 48, it was held that although an equitable title to a judgment has been acquired by a stranger, prior to a proceeding by the judgment defendant to have it set

tween the real and equitable owners of the judgments, and not between the nominal parties,¹ though a mere equitable interest in the judgment is not sufficient.²

3. Requisites of the Judgments.—The right of set-off attaches when, and only when, the subject-matter has passed the ordeal of a judicial determination, and the judgments sought to be set off have been actually recovered,³ in cases in which the respective courts had duly and properly acquired jurisdiction of the parties and of the subject-matter of the action.⁴ The subject-matter of the set-off must be clear, indisputable, and conclusive upon the parties.⁵

off, the legal title will control the equity and authorize the set-off to be made.

1. *Wright v. Cobleigh*, 23 N. H. 32; *Hovey v. Morrill*, 61 N. H. 9; 60 Am. Rep. 315; *Jacoby v. Guier*, 6 S. & R. (Pa.) 448; *Norwood v. Norwood*, 4 Har. & J. (Md.) 112; *Shirts v. Irons*, 54 Ind. 13.

Under the *Maine* statutes, where a promissory note has been indorsed when overdue, and judgment has been obtained thereon against the maker in the name of the indorsee, and a judgment in favor of the maker of that note has been rendered on a note given to him, before the indorsement by the payee of the other, the latter judgment may be set off against the former. *Burnham v. Tucker*, 18 Me. 179.

In *Brooks v. Harris*, 41 Ind. 390, it is held that in making a set-off the legal title is preferred to the equitable one.

2. *Lee v. Lee*, 31 Ga. 26; 76 Am. Dec. 681. And see *Carr v. Beck*, 51 Pa. St. 269.

Where mutual claims between the parties to the record are not in their nature assignable at law, the fact that a third person has acquired an interest in the plaintiff's claim, will not preclude a set-off of any claim of the defendant against the plaintiff existing at the time of the assignment. *Goodwin v. Richardson*, 44 N. H. 125; *Sanborn v. Little*, 3 N. H. 539.

3. *Smith v. Briggs*, 9 Barb. (N. Y.) 252; *Firmenich v. Bovee*, 1 Hun (N. Y.) 532; *Goddard v. Stiles*, 90 N. Y. 199; *Harris v. Palmer*, 5 Barb. (N. Y.) 105; *Prouty v. Swift*, 10 Hun (N. Y.) 232; *affirmed*, 64 N. Y. 545; *Pignolet v. Geer*, 19 Abb. Pr. (N. Y.) 264; *Barber v. Spencer*, 11 Paige (N. Y.) 517; *Zogbaum v. Parker*, 55 N. Y. 120; *Peirce v. Bent*, 69 Me. 381; *Merrill v.*

Souther, 6 Dana (Ky.) 305; *Terney v. Wilson*, 45 N. J. L. 282; *Jenkins v. Anderson* (Pa. 1887), 11 Atl. Rep. 558.

A note or other obligation not judicially settled and determined cannot be set off against a judgment. *Bag v. Jefferson*, 10 Wend. (N. Y.) 615; *Smith v. Briggs*, 9 Barb. (N. Y.) 252.

If two cross-actions are referred to an auditor, who finds in each a balance for the plaintiff, the court will not set off enough of the balance found for one party to extinguish that which has been established in favor of the other nor require the auditor to do so. *Hasselton v. Pray*, 18 N. H. 554.

In *Connecticut*, however, it is provided by statute that debts may be set off against judgments in all actions of trespass, other than such as are brought for damages for the taking of property exempt from execution. See *Talbot v. Ellis*, 33 Conn. 234.

4. *Smith v. Briggs*, 9 Barb. (N. Y.) 252; *Harris v. Palmer*, 5 Barb. (N. Y.) 105.

What Judgments May be Set Off.—A judgment at law against the complainant in favor of the defendant, may be offset on motion in equity, against a decree in equity, in favor of the complainant against such defendant for the payment of money due. *Holden v. Gilbert*, 7 Paige (N. Y.) 208.

In a proceeding to compel restitution of money collected on a judgment, which is afterwards reversed, the party who collected the money may defeat a recovery by showing that he has a demand against the complainant, equal in amount to the sum which was collected under the judgment. *Carson v. Carson*, 12 Metc. (Ky.) 96.

5. *Smith v. Briggs*, 9 Barb. (N. Y.) 252; *Harris v. Palmer*, 5 Barb. (N. Y.) 105; *Duncan v. Lyon*, 3 Johns. Ch.

The judgment must be a subsisting unsatisfied claim,¹ capable of being enforced,² and the rights of the parties thereunder must not be doubtful, complicated, or intricate.³ A dormant judgment, not barred by the Statute of Limitations, may be revived against an insolvent defendant, however, and set off against a judgment in active force, in favor of the insolvent.⁴

(N. Y.) 351; 8 Am. Dec. 513; *People v. Delaware Co.*, 6 Cow. (N. Y.) 598; *Taylor v. Williams*, 14 Wis. 155. And see *Willard v. Fox*, 18 Johns. (N. Y.) 497; *Weathered v. Mays*, 1 Tex. 472.

A judgment obtained by attachment in a justice's court, without the defendant appearing, being but *prima facie* evidence of a debt, and impeachable in an action upon it, cannot be set off on motion against a judgment. *People v. Delaware Co.*, 6 Cow. (N. Y.) 598.

The manner in which a judgment is obtained is immaterial provided it is conclusive. See *Scott v. Rivers*, 1 Stew. & P. (Ala.) 19; 21 Am. Dec. 646; *Davidson v. Geoghagan*, 3 Bibb (Ky.) 433; *Tolbert v. Harrison*, 1 Bailey (S. Car.) 599.

1. *Waterman on Set-off* (2d ed.), § 349; *McAllister v. Willey*, 60 Ind. 195; *Purvis v. Breed*, 7 La. Ann. 637; *Miller v. Starks*, 13 Johns. (N. Y.) 517; *Smith v. Briggs*, 9 Barb. (N. Y.) 252; *Gridley v. Garrison*, 4 Paige (N. Y.) 647; *Collett v. Jones*, 7 B. Mon. (Ky.) 586.

A judgment, which appears by the record to be satisfied, will not be ordered, on motion, to be set off against another judgment, although the canceled judgment has not in fact been satisfied. *Smith v. Briggs*, 9 Barb. (N. Y.) 252.

Plaintiff recovered judgment against defendant for seizing under execution some exempt property. Defendant afterwards procured an assignment of the judgment upon which the execution issued, and thereupon moved to set off the latter judgment against the former. *Held*, that this relief could not be granted, because as between the parties, the judgment for the value of the property stood in the place of the property itself. *Beckman v. Manlove*, 18 Cal. 388. But see *Prince v. Fuller*, 34 Me. 122.

It is not necessary to expressly aver that the judgment remains unsatisfied, when this is the legitimate inference from the facts alleged. *Simpson v. Huston*, 14 Tex. 476.

2. See *Best v. Lawson*, 1 Miles (Pa.) 11; *Harris v. Palmer*, 5 Barb. (N. Y.) 105; *Gridley v. Garrison*, 4 Paige (N. Y.) 647; *Simpson v. Huston*, 14 Tex. 476.

It is not necessary that a demand sought to be used as a set-off should be in the form of a personal judgment. *Hobbs v. Duff*, 23 Cal. 596.

In *Meloy v. Howk*, 32 Ind. 94, it was held that where a motion is made to set off against each other mutual judgments obtained before the same justice, it is not sufficient answer that the execution on the judgment against the party has been stayed, and that the time for such stay has not expired.

Exemption Laws.—The right to set off judgments against each other cannot be so exercised as to circumvent the exemption laws. *Duff v. Wells*, 7 Heisk. (Tenn.) 17.

A judgment recovered for the value of personal property exempt from execution, converted by the judgment debtor by a levy upon it and a sale of it, is not itself exempt, and may be set off against a judgment held by the judgment debtor against the judgment creditor. *Temple v. Scott*, 3 Minn. 419.

3. *Ross v. Hicks*, 11 Barb. (N. Y.) 481; *Story v. Patten*, 3 Wend. (N. Y.) 331; *Taylor v. Williams*, 14 Wis. 155.

Pendency of Appeal.—The owner of a judgment is not in a position to set off his judgment against the judgment of another, when an appeal from the judgment is pending and undetermined. *Prouty v. Swift*, 10 Hun (N. Y.) 233; *De Figanieri v. Young*, 2 Robt. (N. Y.) 670; *Weathered v. Mays*, 1 Tex. 472. But see *Sowles v. Witters*, 40 Fed. Rep. 413; *Groff v. Ressler*, 27 Pa. St. 71.

That there is an appeal pending from one of the judgments, is cause for retaining a motion to set off until a decision of the appeal, but not for denying it. *Irvine v. Myers*, 6 Minn. 562; *Winslow v. Hathaway*, 1 Pick. (Mass.) 211; *Coxe v. State Bank*, 8 N. J. L. 172; 14 Am. Dec. 417; *Terry v. Roberts*, 15 How. Pr. (N. Y.) 65.

4. *Simpson v. Huston*, 14 Tex. 476.

It is held, that in equity, where the element of insolvency comes in, it is not necessary that the demand of the party applying for the set-off should have been reduced to judgment,¹ nor that the demand sought to be set off should have matured,² nor that it should be undisputed or liquidated,³ the line being drawn at uncertain damages, such as rest in the sound discretion of the jury.⁴

a. **MUTUALITY OF PARTIES.**—The rule is generally stated to be that such judgments can be set off against each other only as are mutual debts existing respectively in favor of and against the same party;⁵ but the practice of setting off one judgment against

Execution on the active judgment will be enjoined in the meantime. *Simpson v. Huston*, 14 Tex. 476.

A dormant judgment cannot be set off on motion, against a judgment which is not dormant, unless there are peculiar equities between the parties which require it, or unless manifest injustice will be done to the owner of the dormant judgment by the refusal of the court to allow the set-off. *Camp v. Pace*, 40 Ga. 45.

1. *Davidson v. Alfaro*, 16 Hun (N. Y.) 353; *Gay v. Gay*, 10 Paige (N. Y.) 369; *Knapp v. Burnham*, 11 Paige (N. Y.) 333; *Pignolet v. Geer*, 19 Abb. Pr. (N. Y.) 264; *Ainslie v. Boynton*, 2 Barb. (N. Y.) 258; *Zogbaum v. Parker*, 55 N. Y. 120; *Russell v. Conway*, 11 Cal. 93; *Keightley v. Walls*, 27 Ind. 384; *Davis v. Milburn*, 3 Iowa 163. And see *Bradley v. Angel*, 3 N. Y. 475. But see *Ruddell v. Sparks*, 79 Tex. 308. See also *supra*, this title, *Set-off; Counterclaim*.

The same rule applies to Nonresidence; see *Mendenhall v. Hall*, 134 U. S. 559; *Livingston v. Marshall*, 82 Ga. 281.

Equity will allow one judgment to be set off against another where there are no means of collecting it of the judgment creditor. *Buckmaster v. Grundy*, 8 Ill. 626.

A judgment obtained for a valid subsisting demand, may be set off in equity against a judgment procured after the insolvency of the party obtaining it. *Goldsmith v. Stetson*, 39 Ala. 183.

A court of chancery will not, on motion, however, allow a debt which is not ascertained by judgment or decree to be offset against a decree for costs to the prejudice of the solicitor's lien, although the validity of the debt is admitted by the client. *Dunkin v. Vanderbergh*, 1 Paige (N. Y.) 622.

2. *Davidson v. Alfaro*, 16 Hun (N. Y.) 353; *Bradley v. Angel*, 3 N. Y. 475; *Smith v. Felton*, 43 N. Y. 419; *Smith v. Fox*, 48 N. Y. 674; *Lindsay v. Jackson*, 2 Paige (N. Y.) 581.

But the rule is otherwise where the demand against which a set-off is demanded is not due. *Bradley v. Angel*, 3 N. Y. 475.

3. *Davidson v. Alfaro*, 16 Hun (N. Y.) 353; *Knapp v. Burnham*, 11 Paige (N. Y.) 333; *Pignolet v. Geer*, 19 Abb. Pr. (N. Y.) 264.

In *New Hampshire* it is held that the demands must be liquidated or determinate by computation. *Hovey v. Morrill*, 61 N. H. 13; 60 Am. Rep. 315.

In *Russell v. Conway*, 11 Cal. 93, it was held that the insolvency of the party against whom the set-off is claimed, is a sufficient ground for the assumption of jurisdiction by a court of equity, to set off a personal judgment against a judgment *in rem* against property belonging to the applicant.

4. *Davidson v. Alfaro*, 16 Hun (N. Y.) 353; *Duncan v. Lyon*, 3 Johns. Ch. (N. Y.) 351; 8 Am. Dec. 513; *Livingston v. Livingston*, 4 Johns. Ch. (N. Y.) 292. And see *Hepburn v. Hoag*, 6 Cow. (N. Y.) 613.

A case of uncertain, unliquidated damages, even if the doubtful right is established, is not a proper subject of set-off in equity any more than at law. *Livingston v. Livingston*, 4 Johns. Ch. (N. Y.) 292; 8 Am. Dec. 562.

5. See *De Figanieri v. Young*, 2 Robt. (N. Y.) 670; *Hepburn v. Hoag*, 6 Cow. (N. Y.) 613; *Atkins v. Churchill*, 19 Conn. 394; *Pitkin v. Pitkin*, 8 Conn. 326; *Francis v. Rand*, 7 Conn. 221; *Peirce v. Bent*, 69 Me. 381; *Hart v. Brady*, 1 Sandf. (N. Y.) 626; *Hovey v. Morrill*, 61 N. H. 13; 60 Am. Rep. 315; *Shapley v. Bellows*, 4 N. H. 347;

another is not confined to judgments founded on mutual debts.¹ Where the demands of the parties have passed into judgment, and each is entitled to execution in his own right against the other, the judgments are mutual debts, without regard to the ground of action on which the judgments were founded.²

So, the requirement is generally stated to be that both judgments must be in the same right.³ It is sufficient, however, if the judgment prayed to be set off may be enforced at law against the party recovering the judgment to be diminished or satisfied by the set-off.⁴ A judgment against several persons, founded upon a joint and several liability, is a debt due from each, and

Goodwin v. Richardson, 44 N. H. 125; Holmes v. Robinson, 4 Ohio 90; Duncan v. Bloomstock, 2 McCord (S. Car.) 318; 13 Am. Dec. 728; Williams v. Evans, 2 McCord (S. Car.) 203; Conable v. Bucklin, 2 Aik. (Vt.) 221.

But courts either of law or equity, at common law, have the power, and where equitable will exercise it, to order the set off of judgments, where the claims on which the judgments are founded are not mutual. Brown v. Warren, 43 N. H. 430; Baker v. Hoag, 6 How. Pr. (N. Y.) 201.

1. Shapley v. Bellows, 4 N. H. 347; Chandler v. Drew, 6 N. H. 469; 26 Am. Dec. 704; Hutchins v. Riddle, 12 N. H. 464; Quick v. Durham, 115 Ind. 302; Puett v. Beard, 86 Ind. 172; 44 Am. Rep. 280; Winslow v. Hathaway, 1 Pick. (Mass.) 211; Goodenow v. Buttrick, 7 Mass. 140; Simson v. Hart, 14 Johns. (N. Y.) 63. But see Brooks v. Harris, 41 Ind. 390; Ruddle v. Sparks, 79 Tex. 308.

Under the *Indiana* statutes a judgment for deceit in a contract for the exchange of lands is a judgment for breach of contract, and may be set off in equity against a judgment obtained for breach of a contract of warranty in the same transaction. Quick v. Durham (Ind.), 16 N. E. Rep. 601.

In *Allnut v. Winn*, 3 J. J. Marsh. (Ky.) 304, it is held that the chancellor cannot set off one judgment against another, unless there is a connection between the transactions on which the judgments were rendered, or unless the judgment prayed to be set off cannot be enforced by legal means.

2. Shapley v. Bellows, 4 N. H. 347; Hutchins v. Riddle, 12 N. H. 464. And see Gridley v. Garrison, 4 Paige (N. Y.) 647; Goodenow v. Buttrick, 7 Mass. 140.

3. See Best v. Lawson, 1 Miles (Pa.) 11; Junker v. Hustes, 113 Ind. 524; Hovey v. Morrill, 61 N. H. 13; 60 Am. Rep. 315; Holmes v. Robinson, 4 Ohio 90; Tolbert v. Harrison, 1 Bailey (S. Car.) 599; Taylor v. Williams, 14 Wis. 155; Goodwin v. Richardson, 44 N. H. 125; Makepeace v. Coates, 8 Mass. 451.

Representative Capacity.—A judgment against an administrator, to be levied out of the estate of the intestate, may be set off against a judgment held by such administrator in his official capacity. Prior v. Richards, 4 Bibb (Ky.) 356. And see Dickenson v. Chism, 4 T. B. Mon. (Ky.) 1; Jones v. Carpenter, 9 Met. (Mass.) 509; Iredell v. Langston, 1 Dev. Eq. (N. Car.) 392; Wikel v. Garrison (Iowa 1891), 48 N. W. Rep. 803; Hazlehurst v. Bayard, 3 Yeates (Pa.) 152.

Such right of equitable set-off cannot be affected by the fact that there are no assets other than the judgment, and that the estate is indebted to the administrator for costs to an equal amount. Wikel v. Garrison (Iowa 1891), 48 N. W. Rep. 803.

4. Simson v. Hart, 14 Johns. (N. Y.) 63. And see Taylor v. Williams, 14 Wis. 155.

A judgment recovered by a woman, while sole, against A, may be set off, as to the principal and interest, against a judgment recovered by A against her and her husband personally, for a *devastavit* committed by her as administratrix. Rutherford v. Crabb, 5 Yerg. (Tenn.) 112.

A proceeding by the debtor of a decedent to set off a judgment against decedent, against one obtained by the administrator on a debt due the estate, is not affected by the insolvency of the estate—such judgment

where judgments exist against and in favor of any of the parties severally, the demands may be set off against each other.¹

A creditor may set off a judgment against several joint debtors against a judgment against him, in favor of one of such joint debtors, when such a set-off would not be inequitable;² and justice may require a several judgment to be set off against a joint judgment recovered by the debtor against the creditor together with others.³ The rule has been adopted to some extent, however, that a judgment against several jointly, and one due to one of them individually, cannot be set off against each other, except upon some equitable ground, such as the insolvency or non-residence of one of the parties.⁴

Judgments in favor of or against a person in a representative capacity cannot be set off against judgments in favor of or against him in his individual capacity;⁵ though where a trustee is

not really being assets in the hands of the administrator. *Quick v. Dunham*, 115 Ind. 302.

1. *Hutchins v. Riddle*, 12 N. H. 464; *Russell v. Conway*, 11 Cal. 93; *Allen v. Hall*, 5 Met. (Mass.) 263; *Greene v. Hatch*, 12 Mass. 195; *Simson v. Hart*, 14 Johns. (N. Y.) 63; *Conable v. Bucklin*, 2 Aik. (Vt.) 221; *Schoole v. Noble*, 1 H. Bl. 23. But see *Palmer v. Green*, 6 Conn. 14.

In *Prince v. Fuller*, 34 Me. 122, it was held that where judgments are recovered at the same term, one in favor of A against B and sureties, and the other in favor of B against A, the court will, on motion of B, set off the one against the other.

In *Warren v. Wells*, 1 Met. (Mass.) 80, it was held that a set-off of judgments should be allowed where the plaintiff can show no several counter-demand, but that it will not be allowed where it would defeat the just rights of the plaintiff against either of the several defendants.

2. *Conable v. Bucklin*, 2 Aik. (Vt.) 221; *Colquitt v. Bonner*, 2 Ga. 155; *Hazlehurst v. Bayard*, 3 Yeates (Pa.) 152; *Baker v. Hoag*, 6 How. Pr. (N. Y.) 201; *Graves v. Woodbury*, 4 Hill (N. Y.) 559; 40 Am. Dec. 296; *Seligmann v. Heller Bros. Clothing Co.*, 69 Wis. 410; *Hanchett v. Gray*, 7 Tex. 549.

A judgment against a joint defendant may be set off against a judgment in his favor in a suit in which he was sole plaintiff. *Ballinger v. Tarbell*, 16 Iowa 491; 85 Am. Dec. 527; *Hutchins v. Riddle*, 12 N. H. 464.

But although a plaintiff may receive the money due on a judgment in favor of himself and several other co-

plaintiffs, he cannot, without authority from them, set off a judgment due them jointly against another judgment held by the defendant in such joint judgment against himself alone. *Corwin v. Ward*, 35 Cal. 195; 95 Am. Dec. 93.

3. *Conable v. Bucklin*, 2 Aik. (Vt.) 221; *Goodenow v. Buttrick*, 7 Mass. 140; *Gould v. Parlin*, 7 Me. 82; *Baker v. Kinsey*, 41 Ohio St. 403.

Where A obtains a judgment against B and C, and at the same term B recovers a judgment for a large sum against A, if B will acknowledge satisfaction of the amount of A's judgment against C and himself in part of his judgment against A, the court will stay A's execution and give B and C their execution for the balance. *Goodenow v. Buttrick*, 7 Mass. 140.

The demands, however, though one of them is owned by the applicant for a set-off with others, must be mutual as between the party pleading them and the owner of the opposing demand.

Atkins v. Churchill, 19 Conn. 394.

4. *Phelps v. Reeder*, 39 Ill. 172; *Francis v. Rand*, 7 Conn. 221; and see *Baker v. Kinsey*, 41 Ohio St. 403; *Simson v. Hart*, 14 Johns (N. Y.) 63.

The right thus to depart from the general rule never arises until judgment is actually entered on both sides. *Graves v. Woodbury*, 4 Hill (N. Y.) 559; 40 Am. Dec. 296.

In *Jeffries v. Evans*, 6 B. Mon. (Ky.) 119; 43 Am. Dec. 158, it was held that one member of a firm should be allowed in equity to offset his own judgment against an insolvent debtor seeking to enforce a judgment against the firm.

5. See *Tolbert v. Harrison*, 1 Bailey

charged as a debtor, he is entitled to the benefit of any set-off, legal or equitable, in his own right, or in the right of those in privity with him, and in whose favor the debt claimed to be due from the trustee could in his hands, be made available by way of set-off.¹ And judgments in favor of or against a mere nominal party to an action cannot be set off against judgments in favor of or against him, in actions in which he is the real party in interest;² though such a set-off may be had in such case by or against the equitable owner or real party in interest.³

b. JUDGMENTS FOR COSTS.—A judgment for costs in favor of a defendant may be set off against a judgment for damages or costs recovered by the plaintiff in the same action.⁴ In separate and distinct actions, one judgment for costs may be set off against

(S. Car.) 599; *Hobbs v. Duff*, 23 Cal. 596; *Sellers v. Bryan*, 2 Dev. Eq. (N. Car.) 358; *Fair v. McIver*, 16 East 130.

A judgment obtained against executors upon a covenant executed by the testator in his lifetime, cannot be set off against a judgment obtained by the executors upon a bond executed to them as executors since the death of the testator. *Crews v. Williams*, 2 Bibb (Ky.) 262; 4 Am. Dec. 701.

In *Indiana* it is held that the question as to whether a judgment in favor of an estate ought to be set off and canceled by one against it, is not affected by solvency of the estate on the one hand, or its insolvency on the other. *Quick v. Durham*, 115 Ind. 302; *Convery v. Langdon*, 66 Ind. 311; *Carter v. Compton*, 79 Ind. 37.

1. *Allen v. Hall*, 5 Met. (Mass.) 263; *Hathaway v. Russell*, 16 Mass. 473; *Picquet v. Swan*, 4 Mason (U. S.) 443.

Where a trustee has goods in his custody, the property of the principal defendant, and in their nature liable to be attached by process of law, the question whether the trustee has any right to set off claims of his own must depend upon whether he has any lien, legal or equitable, upon such goods, or any right as against the owner, as whose property they are attached, by contract, by custom or otherwise, to hold the goods, or to retain possession in security of some debt or claim of his own. *Allen v. Hall*, 5 Met. (Mass.) 263.

2. See *Wright v. Cobleigh*, 23 N. H. 32; *Rowe v. Langley*, 48 N. H. 391; *Hobbs v. Duff*, 23 Cal. 596; *Collett v. Jones*, 7 B. Mon. (Ky.) 586; *Wheeler v. Raymond*, 5 Cow. (N. Y.) 231; 9 Cow. (N. Y.) 295; *Spencer v. Barber*,

5 Hill (N. Y.) 568; *Aiken v. Satterlee*, 1 Paige (N. Y.) 289; *Fair v. McIver*, 16 East 130.

3. *Wright v. Cobleigh*, 23 N. H. 32; *Eaton v. Brown*, cited in 4 N. H. 237; *Eaton v. Brown*, cited in 6 N. H. 28; *Bellows v. Smith*, 9 N. H. 285; *Rowe v. Langley*, 48 N. H. 391; *Hobbs v. Duff*, 23 Cal. 596; *Russell v. Conway*, 11 Cal. 93; *Wolf v. Beales*, 6 S. & R. (Pa.) 242; 9 Am. Dec. 425; *Jacoby v. Guier*, 6 S. & R. (Pa.) 448; *Barrett v. Barrett*, 8 Pick. (Mass.) 342; *Fair v. McIver*, 16 East 130. And see *Hudkins v. Ward*, 30 W. Va. 204.

Where an assignee for the benefit of creditors recovers judgment on a suit brought by his assignor, defendant can set off against it judgments for costs recovered by him after the assignment in suits brought previously against him by the assignor. *Stillings v. Smith*, 54 N. Y. Super. Ct. 488.

A judgment in favor of a judge of probate, in a suit on a probate bond brought in his name, for the benefit of a legatee, against an executor and his surties, may be set off against a judgment recovered by the executor, in his individual capacity, against the legatee. *Barrett v. Barrett*, 8 Pick. (Mass.) 342.

In *Moody v. Towle*, 5 Me. 415, a judgment recovered by the maker of a note against the payee was set off against so much of a judgment recovered on the note by an indorsee as exceeded all the just claims of the indorsee against the indorser, the note having been transferred as collateral security for such claim.

4. *Hurd v. Fogg*, 22 N. H. 68; *Willett v. Starr*, 8 Johns. (N. Y.) 123; *Cooper v. Bigalow*, 1 Cow. (N. Y.) 206; *Garner v. Gladwin*, 12 N. Y.

another,¹ and judgments for damages and for costs may be set off against each other.² Where different claims arise in the course of the same suit or in relation to the same matter, they may be arranged and offset according to equity, without reference to the lien of the solicitor.³ But in separate actions, although technically the costs belong to the party, yet in point of fact they belong to the attorney,⁴ and in such case either the set-off will be denied or the attorney's claim for fees and disbursements will be first required to be settled, and the balance only will be deducted from the judgment in favor of the opposite party.⁵ A judgment for costs which is uncollectible on account

Week. Dig. 9; *Porter v. Lane*, 8 Johns. (N. Y.) 357; *Spence v. White*, 1 Johns. Cas. (N. Y.) 102; *Yorton v. Milwaukee, etc., R. Co.*, 62 Wis. 367.

Where the granting of costs is discretionary, the court, on giving them to a party, may direct them to be set off upon a judgment held against him, and another by the adverse party, although such joint judgment be not the subject of a legal set-off. *Wheeler v. Heermans*, 3 Sandf. Ch. (N. Y.) 597.

1. *Sellick v. Munson*, 2 Vt. 13; *Taylor v. Williams*, 14 Wis. 155; *Henry v. Travelers' Ins. Co.*, 35 Fed. Rep. 15; *Butler v. Inneys*, 2 Stra. 891.

Costs are incidental and accessory to the principal debt, and follow the same rule of set-off. The only exception is when the attorney interferes and claims that his lien for costs should be protected. *Bartlett v. Pearson*, 29 Me. 9.

A court of chancery, however, will not set off costs in a suit in chancery against costs in a suit at law, between the same parties. *Wright v. Mudie*, 1 S. & S. 267, and see *Taylor v. Popham*, 15 Ves. 72.

2. See *Cooper v. Bigalow*, 1 Cow. (N. Y.) 206; *Stillings v. Smith*, 54 N. Y. Super. Ct. 488; *Scopfin v. Robinson*, 2 W. Bl. 827.

Where it is proper that a judgment be set off against a note, it is also proper that the costs recovered in the action in which the judgment was rendered should be set off in like manner. *Otcheck v. Hostetter*, 77 Iowa 509.

Where there are several suits between the same parties, if the defendant has judgment in some, and the plaintiff recovers damages in others, the costs on the judgment for the defendant may be set off against the damages recovered by the plaintiff, but not against the costs. *Decoy v. Boyer*, 3 Johns. (N. Y.) 247.

3. *Dunkin v. Vandenberg*, 1 Paige (N. Y.) 622; *Porter v. Lane*, 8 Johns. (N. Y.) 357; *Cooper v. Bigalow*, 1 Cow. (N. Y.) 206; *Utica Ins. Co. v. Power*, 3 Paige (N. Y.) 365; *Mohawk Bank v. Burrows*, 6 Johns. Ch. (N. Y.) 317; *Marshall v. Cooper*, 43 Md. 46; *Levy v. Steinbach*, 43 Md. 212; *Gano v. Chicago, etc., R. Co.*, 60 Wis. 12; *Yorton v. Milwaukee, etc., R. Co.*, 62 Wis. 367; *National Bank v. Eyre*, 8 Fed. Rep. 734. But See *Tunstall v. Winton*, 31 Hun (N. Y.) 219.

A motion to set off against a judgment the costs of summary proceedings after judgment, may properly be denied where the objection to the set-off is the attorney's claim to a lien on the costs of such proceeding after judgment, the debtor being poor, the existence and protection of the lien were important to his securing the services of the attorney. *Purchase v. Bellows*, 9 Bosw. (N. Y.) 642.

4. *Gihon v. Fryatt*, 2 Sandf. (N. Y.) 638; *Tunstall v. Winton*, 31 Hun (N. Y.) 219; *Marshall v. Meech*, 51 N. Y. 140; 10 Am. Rep. 572.

5. See *Gihon v. Fryatt*, 2 Sandf. (N. Y.) 638; *Bradt v. Koon*, 4 Cow. (N. Y.) 416; *Perry v. Chester*, 53 N. Y. 240; *Dunkin v. Vandenberg*, 1 Paige (N. Y.) 622; *Little v. Rogers*, 2 Met. (Mass.) 478; *Carter v. Bennett*, 6 Fla. 214; *Terney v. Wilson*, 45 N. J. L. 282; *Devoy v. Boyer*, 3 Johns. (N. Y.) 247; *Sellick v. Munson*, 2 Vt. 13; *Payne v. Webb*, 29 W. Va. 627; *Simpson v. Brewster*, 9 Paige (N. Y.) 245.

In *Hill v. Brinkley*, 10 Ind. 102, however, it was held that where one of the judgments which had been set off against each other had been assigned, the court will not except the amount of a lien thereon of which the assignee had no notice at the time of taking the assignment.

Some of the cases hold that the at-

of the insolvency of the defendant, however, may be set off against a judgment in his favor.¹

c. JUDGMENTS IN DIFFERENT COURTS.—Formerly judgments recovered in different courts could be set off against each other in equity only;² but it is now settled that mutual judgments may be set off against each other either at law or in equity, whether obtained in the same or different courts.³ Thus, judgments in different districts of the same court may be set off against each other,⁴ and a judgment of an inferior court may be set off against one of a superior court,⁵ and a judgment in the courts of one of the States, and one of a Federal court, or of a court of a sister State, may likewise be set off against each other.⁶ But it would appear that foreign judgments and those of our own courts cannot be set off against each other, foreign judgments not being in all respects conclusive upon the parties.⁷

d. ASSIGNED JUDGMENTS.—(See also JUDGMENTS, vol. 12, p. 58).—The right of an assignee of a judgment to set it off against a judgment held by the judgment debtor against him is recognized

torney trusts to the responsibility of his client, and his right must be subordinate to the equities of the parties. *De Figanieri v. Young*, 2 Robt. (N. Y.) 670, citing *Cragin v. Travis*, 1 How. Pr. (N. Y.) 157; *Noxon v. Gregory*, 5 How. Pr. (N. Y.) 339.

1. *Crocker v. Claughly*, 2 Duer (N. Y.) 684; *Sanders v. Gillett*, 8 Daly (N. Y.) 183; *Henry v. Travelers' Ins. Co.*, 35 Fed. Rep. 15. See *Butler v. Niles*, 26 How. Pr. (N. Y.) 61.

2. *Webster v. McDaniel*, 2 Del. Ch. 297; *Palmateer v. Meredith*, 4 J. J. Marsh. (Ky.) 74.

Arkansas statutes, § 5173, provide, that judgments for the recovery of money may be set off against each other by an order, upon motion, when both judgments are in the same court, or in action by equitable proceedings in the court in which the judgment sought to be annulled by the set-off was rendered, when the judgments are in different courts.

3. *Duncan v. Bloomstock*, 2 McCord (S. Car.) 318; 13 Am. Dec. 728; *Hooper v. Brundage*, 22 Me. 460; *Moody v. Towle*, 5 Me. 415; *Brown v. Hendrickson*, 39 N. J. L. 239; *Wright v. Cobleigh*, 23 N. H. 32; *Hill v. Brinkley*, 10 Ind. 102; *Brewerton v. Harris*, 1 Johns. (N. Y.) 145; *Cooke v. Smith*, 7 Hill (N. Y.) 186; *Simpson v. Hart*, 1 Johns. Ch. (N. Y.) 91; *Best v. Lawson*, 1 Miles (Pa.) 11; *Wright v. Mooney*, 6 Ired. (N. Car.) 22; *Sneed v. Sneed*, 14 Lea (Tenn.) 13; *Rix v. Nevins*, 26 Vt. 384; 8 Bac. Abr. 643.

In *Palmateer v. Meredith*, 4 J. J. Marsh. (Ky.) 74, the rule adopted seems to be that when the judgments were recovered in the same court, they may be set off against each other at law as well as in equity, but that when recovered in different courts, equity only has jurisdiction.

4. *Noble v. Howard*, 2 Hayw. (N. Car.) 14.

Judgments recovered in one county of *North Carolina* may be set off in another county in an action of assumpsit. *Wright v. Mooney*, 6 Ired. (N. Car.) 22.

5. *Duncan v. Bloomstock*, 2 McCord (S. Car.) 318; 13 Am. Dec. 728; *Hooper v. Brundage*, 22 Me. 460; *Schantz v. Kearney*, 47 N. J. L. 56; *Coxe v. State Bank*, 8 N. J. L. 172; 14 Am. Dec. 417; *Simson v. Hart*, 14 Johns. (N. Y.) 75; *Schemerhorn v. Schemerhorn*, 3 Cal. (N. Y.) 190; *Ewen v. Terry*, 8 Cow. (N. Y.) 126; *Kimball v. Munger*, 2 Hill (N. Y.) 364; *Thurstout v. Barne*, 2 W. Bl. 826; *Barker v. Braham*, 3 Wils. 396.

The general court of *Kentucky* cannot set off a judgment in that court against a judgment in the court of appeals, without the assent of the holder of the judgment in the latter court. *Tenant v. Marmaduke*, 5 B. Mon. (Ky.) 76.

6. *Schantz v. Kearney*, 47 N. J. L. 56.

7. As to conclusiveness of foreign judgments, see JUDGMENTS, vol. 12, p. 58.

and protected by the courts,¹ and a party may purchase a judgment for that particular purpose if the purchase is a *bona fide* transaction.² But a judgment must be owned absolutely by the person asking to set it off; if it is purchased conditionally the set-off will be refused,³ and a set-off cannot be had when the normal assignee is a mere trustee for another.⁴ So the assignee of a judgment takes it subject to rights of set-off which have already attached,⁵ the rule that an assignee can have no rights which the assignor did not have, and that if a right of set-off had attached at the time of the assignment, the assignee must take the demand

1. *Chamberlin v. Day*, 3 Cow. (N. Y.) 353; *People v. New York*, 13 Wend. (N. Y.) 649; 28 Am. Dec. 495; *Turner v. Satterlee*, 7 Cow. (N. Y.) 480; *Perry v. Cluster*, 36 N. Y. Super. Ct. 228; *Wright v. Cobleigh*, 23 N. H. 32; *Jones v. Chalfant*, 55 Cal. 505; *Pattison v. Edmondston*, 4 La. Ann. 157; *Sexton v. Lee*, 1 Hill (S. Car.) 378; *Wilson v. Reaves*, 4 Sneed (Tenn.) 173.

The *bona fide* holder of a judgment by assignment against two defendants is entitled to have a judgment recovered against him by one of such defendants, after such assignment set off against the assigned judgment, even though the second judgment is assigned to a third person, for value, without notice of the assignment of the first judgment to the defendant in the second judgment. *Brown v. Hendrickson*, 39 N. J. L. 239.

2. *People v. New York*, 13 Wend. (N. Y.) 649; 28 Am. Dec. 495; *Macaulay v. U. S.*, 11 Ct. of Cl. 694; and see *Duncan v. Bullock*, 18 Tex. 541.

An insolvent debtor cannot object to want of consideration for the assignment of a judgment against him, which the assignee has obtained for purposes of set-off. *People v. New York*, 13 Wend. (N. Y.) 649; 28 Am. Dec. 495.

Under *Alabama* Rev. Code, § 224, a transferred judgment may be the subject of a set-off in the hands of the owner, whether he have the legal title or not. *Skipper v. Stokes*, 42 Ala. 255; 94 Am. Dec. 646.

Purchase by Administrator.—An administrator who has purchased a judgment against a plaintiff, since the rendition of the judgment against him, for a debt owing by the intestate, will not be allowed by the court in the exercise of its equitable powers to set off such judgment. *Hills v. Tallman*, 21 Wend. (N. Y.) 674.

3. *People v. New York*, 13 Wend.

(N. Y.) 649; 28 Am. Dec. 495; *Gilman v. Van Slyck*, 7 Cow. (N. Y.) 469.

A judgment entered against a plaintiff may be set off against a judgment obtained by the plaintiff against the defendant, though such first judgment was assigned and afterwards reassigned to the defendant without consideration. *Jacoby v. Guier*, 6 S. & R. (Pa.) 448.

4. *People v. New York*, 13 Wend. (N. Y.) 649; 28 Am. Dec. 495; *Satterlee v. Ten Eyck*, 7 Cow. (N. Y.) 480. And see *Jacoby v. Guier*, 6 S. & R. (Pa.) 448.

A judgment purchased by a party, upon condition that if he fails to obtain a set-off, the assignment shall be void, stipulating that the assignee shall be indemnified against the costs of the motion, cannot be set off. *Gilman v. Van Slyck*, 7 Cow. (N. Y.) 469.

5. *People v. New York*, 13 Wend. (N. Y.) 649; 28 Am. Dec. 495; *Bush v. Lathrop*, 22 N. Y. 535; *Dimock v. Wilbur* (Supreme Ct.), 1 N. Y. Supp. 205; *Cutts v. Guild*, 57 N. Y. 229; *Hobbs v. Duff*, 23 Cal. 596; *Ames v. Bates*, 119 Mass. 397; *Hooper v. Brundage*, 22 Me. 460; *Brisbin v. Newhall*, 5 Minn. 273.

An assignment of a judgment conveys merely the rights which the assignor then possesses, but does not necessarily draw after it all equities of an independent nature. *Davis v. Milburn*, 3 Iowa 163.

The only object of notice to a debtor that a claim against him has been assigned, is to put him on his guard against dealing with the assignor, or perhaps obtaining other demands against him on the belief that he still continues an equitable owner. *Graves v. Woodbury*, 4 Hill (N. Y.) 559; 40 Am. Dec. 296; *Terney v. Wilson*, 45 N. J. L. 282.

Where there are judgments in the

cum onere with the right still clinging to it, having been extensively adopted; ¹ though the doctrine that the rights of a *bona fide* assignee, without notice, will be protected and that a set-off will be permitted only when it will infringe on no other right of equal grade and that it is not to affect an equitable assignee for value, prevails in many courts. ² Generally where a judgment has been assigned to the attorney who recovered it in good faith in payment for his services in the action, a judgment held by the judgment debtor against the judgment creditor, of which the attorney had

same action against and in favor of each party, the assignee of one of the judgments is charged with notice of the judgment against his assignor. *Irvine v. Myers*, 6 Minn. 562.

1. *Pierce v. Bent*, 69 Me. 381; *Hooper v. Brundage*, 22 Me. 460; *Leathers v. Carr*, 24 Me. 351; *Hobbs v. Duff*, 23 Cal. 596; *McCabe v. Grey*, 20 Cal. 509; *Wright v. Levy*, 12 Cal. 257; *Porter v. Liscom*, 22 Cal. 430; 83 Am. Dec. 76; *McBride v. Fallon*, 65 Cal. 301; *Graves v. Woodbury*, 4 Hill (N. Y.) 559; 40 Am. Dec. 296; *Cooper v. Bigalow*, 1 Cow. (N. Y.) 206; *Greene v. Hatch*, 12 Mass. 195; *Wells v. Clarkson*, 5 Mont. 336; *Hovey v. Morrell*, 61 N. H. 9; 60 Am. Rep. 315; *Chase v. Woodward*, 61 N. H. 79; *Brown v. Hendrickson*, 39 N. J. L. 239; *Merrill v. Souther*, 6 Dana (Ky.) 305; *Jeffries v. Evans*, 6 B. Mon. (Ky.) 119; 43 Am. Dec. 158; *Gordon v. Rixey*, 86 Va. 853; *Langston v. Roby*, 68 Ga. 406; *Yorton v. Milwaukee, etc., R. Co.*, 62 Wis. 367.

Some of the cases seem to hold that whether or not a judgment against an assignor may be set off against another judgment in the hands of an assignee depends upon whether or not the assignee took the judgment with the notice of the facts constituting the right of set-off. See *Irvine v. Myers*, 6 Minn. 562; *Hurst v. Sheets*, 14 Iowa 322; *Hovey v. Morrill*, 61 N. H. 9; 60 Am. Rep. 315; *Rowe v. Langley*, 49 N. H. 395.

An assignee of a judgment is deemed to have notice of all matters disclosed by the record, and proceedings in the action in which the judgment was rendered, and where that judgment or the proceedings therein disclose the equitable right of set-off, existing in favor of the defendants against the plaintiff, the assignee cannot claim to be a *bona fide* purchaser. *Hobbs v. Duff*, 23 Cal. 596.

Notice of the assignment to one of the defendants is notice to his co-defendant, they being liable as joint

contractors. *Smith v. Brown*, 151 Mass. 338.

In *Henderson v. McVay*, 32 Ala. 471, it was held that the equity of the assignee of a judgment is inferior to that of the judgment debtor, who holds a judgment against the assignor, to have the judgment set off against each other, unless the assignor was insolvent at the time of the assignment.

In *Connier v. Constantine*, 5 N. Y. Supp. 177, it was held that the holder of a judgment might set it off against a judgment against him held by the judgment debtor by assignment, even though the assignment was taken merely for the purpose of collection, if he had reason to suppose and did suppose that the assignment was absolute.

2. *Goodwin v. Richardson*, 44 N. H. 125; *Ramsey's Appeal*, 2 Watts (Pa.) 228; 27 Am. Dec. 301; *Horton v. Miller*, 44 Pa. St. 256; *Pheiffer v. Harris*, 11 Bush (Ky.) 400; *Primm v. Ransom*, 10 Mo. 444; *Gallaher v. Pendleton*, 55 Iowa 142; *Bell v. Perry*, 43 Iowa 368; *Davis v. Milburn*, 3 Iowa 163; *Wright v. Cobleigh*, 23 N. H. 32; *Mervine v. Greble*, 2 Pars. Eq. Cas. (Pa.) 271; *Duncan v. Bloomstock*, 1 McCord (S. Car.) 318; 13 Am. Dec. 728; *Hill v. Brinkley*, 10 Ind. 105; *Ledyard v. Phillips*, 58 Mich. 204; *Macaulay v. U. S.*, 11 Ct. of Cl. 694.

This doctrine is usually placed upon the ground that by the assignment the requisite mutuality is destroyed. See cases above cited.

Under this rule it is a good replication to a plea in set-off of a judgment recovered, that the whole judgment had been assigned to third persons, of which notice had been given to the judgment debtor. *Day v. Abbott*, 15 Vt. 632.

In *Catron v. Cross*, 3 Heisk. (Tenn.) 584, it was held that a debt due from the assignor of a judgment to the defendant in the judgment, cannot be set off by bill in equity against a *bona fide*

no notice, will not be set off against it;¹ though a defendant will be allowed to set off a judgment in his favor against a judgment in favor of the plaintiff, which had been assigned to his attorney, where the plaintiff is shown to be insolvent.² Mutual judgments will be set off against each other, even though one of them may have been fraudulently assigned for the purpose of preventing such set-off.³ An assignment of a demand, previous to the entry of judgment upon it, transferring a legal or even an equitable title to it, gives the assignee a superior equity to that of a party claiming a right to set off a judgment previously recovered against the assignor, and prevents the right of set-off from accruing,⁴ and there

holder of the judgment, without notice, but that it is otherwise at law.

1. *Simmons v. Reed*, 31 S. Car. 389; *Terney v. Wilson*, 45 N. J. L. 282; *Ripley v. Bull*, 19 Conn. 53; *Peckham v. Barcalow*, Hill & D. Supp. (N. Y.) 112; *Roberts v. Carter*, 9 Abb. Pr. (N. Y.) 366, note; *Zogbaum v. Parker*, 55 N. Y. 120; *Mackey v. Mackey*, 43 Barb. (N. Y.) 58; *Ely v. Cooke*, 28 N. Y. 365; *Rice v. Garnhart*, 35 Wis. 282; *contra*, when the attorney takes the assignment with notice of the equities. *Cooper v. Bigalow*, 1 Cow. (N. Y.) 206; *Davidson v. Alfaro*, 16 Hun (N. Y.) 353; *Wells v. Elsam*, 40 Mich. 218.

Though the lien of an attorney for his costs, on the judgment recovered, is subject to the right of set-off, in a proper action against the client for that purpose, when the client assigns the judgment, or the costs accrued and to accrue in the action, to his attorney, as security for his costs, the opposite party loses his right of set-off, as the assignment becomes operative before the right of set-off attaches. *Firmenich v. Bovee*, 1 Hun (N. Y.) 532. But see *Sanders v. Gillett*, 8 Daly (N. Y.) 183.

Some of the cases confine this rule to assignments made to the attorney before the right of set-off had attached. See *Simmons v. Reid*, 31 S. Car. 389; *Levy v. Steinbach*, 43 Md. 212; *Roberts v. Carter*, 38 N. Y. 107; *Robinson v. Weeks*, 6 How. Pr. (N. Y.) 161; *Ely v. Cooke*, 28 N. Y. 365; *Zogbaum v. Parker*, 66 Barb. (N. Y.) 341; *affirmed*, 55 N. Y. 120; *Countryman v. Boyer*, 3 How. Pr. (N. Y.) 386; *Nash v. Hamilton*, 3 Abb. Pr. (N. Y.) 35; *Wood v. Merritt*, 45 How. Pr. (N. Y.) 471; *Wright v. Treadwell*, 14 Tex. 255.

An agreement between an attorney and his client that the attorney shall have a lien upon a certain judgment to be recovered for a specified sum, as

compensation for his services, constitutes a valid, equitable assignment of the judgment *pro tanto* which attaches to the judgment as soon as entered. *Terney v. Wilson*, 45 N. J. L. 282.

2. *Crocker v. Claughly*, 2 Duer (N. Y.) 684.

The assignee of a bill of costs due to a solicitor, takes it subject to an equitable right of set-off, which exists against the solicitor at the time of the assignment. *Utica Ins. Co. v. Powell*, 3 Paige (N. Y.) 365.

The lien of the attorney is lost by an assignment of the claim, and it is not revived by a subsequent purchase of the judgment by the attorney. *Chappell v. Dann*, 21 Barb. (N. Y.) 17.

3. *Hurst v. Streets*, 14 Iowa 322; *Hovey v. Morrill*, 61 N. H. 9; 60 Am. Rep. 315; *Cross v. Brown*, 51 N. H. 1186; *Russell v. Conway*, 11 Cal. 93; *Morris v. Hollis*, 2 Harr. (Del.) 4; *Roberts v. Carter*, 38 N. Y. 107; *Duncan v. Bloomstock*, 2 McCord (S. Car.) 318; 13 Am. Dec. 728; and see *Jacoby v. Guier*, 6 S. & R. (Pa.) 448; *Hickman v. Hickman*, 3 Harr. (Del.) 511.

An assignment of a judgment upon condition of a rescission of the transfer, in case of the inability of the assignee to avoid a set-off, is not such a transfer of ownership as will prevent the set-off. *Butler v. Niles*, 26 How. Pr. (N. Y.) 61.

An attorney who has not given notice of his lien for costs, cannot object that an assignment of a judgment against his client, taken for the purpose of making a set-off, is in fraud of his lien. *People v. New York*, 13 Wend. (N. Y.) 649; 28 Am. Dec. 495.

4. *Mackey v. Mackey*, 43 Barb. (N. Y.) 58; *Gay v. Gay*, 10 Paige (N. Y.) 369; *Barber v. Spencer*, 11 Paige (N. Y.) 517; *Graves v. Woodbury*, 4 Hill (N. Y.) 559; 40 Am. Dec. 296; *Hackett v. Connett*, 2 Edw. Ch. (N. Y.) 73; *Prouty v. Swift*, 10 Hun (N. Y.) 232;

can be no right of set-off of the judgments until both exist. Where a judgment is assigned therefor before the judgment against the assignor is rendered, a set-off will be denied.¹

c. JUDGMENTS UPON WHICH EXECUTIONS HAVE ISSUED.—That an execution has been issued upon one or both of the judgments sought to be set off against each other, is no ground for a denial of relief.² But when the judgment debtor is arrested under execution against the person, though the judgment is not thereby absolutely extinguished, the imprisonment bars the creditor from all other remedies for the collection of the debt while the debtor is in custody.³

If the judgment debtor is discharged by consent of the complainant, his judgment is extinguished and can no longer be considered as a liquidated demand and the subject of a set-off.⁴

affirmed in 64 N. Y. 546; *Perry v. Chester*, 53 N. Y. 243; *Robert v. Carter*, 38 N. Y. 107; *Nash v. Hamilton*, 3 Abb. Pr. (N. Y.) 35; *Ferguson v. Bassett*, 4 How. Pr. (N. Y.) 168; *Spencer v. Barber*, 5 Hill (N. Y.) 568; *Wellman v. Frost*, 38 Hun (N. Y.) 389; *Pignolet v. Geer*, 19 Abb. Pr. (N. Y.) 267; *Wood v. Merritt*, 45 How. Pr. (N. Y.) 471; *Terney v. Wilson*, 45 N. J. L. 282; *Pheiffer v. Harris*, 11 Bush (Ky.) 400; *Makepeace v. Coates*, 8 Mass. 451; *Rowe v. Langley*, 48 N. H. 391; *Goodwin v. Richardson*, 44 N. H. 125; *Weaver v. Rogers*, 44 N. H. 112; *Williams v. Evans*, 2 McCord (S. Car.) 203; *Tolbert v. Harrison*, 1 Bailey (S. Car.) 599; *Duncan v. Bloomstock*, 2 McCord (S. Car.) 318; 13 Am. Dec. 728.

In *Lammers v. Goodeman*, 69 Ind. 76, however, it was held that where a cause of action is assigned during the pendency of the action but before judgment, and judgment is afterwards obtained thereon, a judgment in favor of the judgment debtor, and against the judgment creditor, may be set off against it, when the assignment of the demand was taken by the assignee with notice of the equity of set-off.

The burden of proof rests upon the assignee of a demand to establish that the assignment was made before any right of set-off attached. *New Haven Copper Co. v. Brown*, 46 Me. 418.

Fraudulent Assignments.—A set-off of one judgment against another is not prevented by the assignment of the demand upon which the latter judgment was rendered, before its rendition fraudulently made. Nothing can be claimed in a court of equity by rea-

son of such an assignment. *Russell v. Conway*, 11 Cal. 93.

1. *Wyvell v. Barwise*, 43 Minn. 171; *Mackey v. Mackey*, 43 Barb. (N. Y.) 58. And see *Smith v. Brown*, 151 Mass. 338; *Spencer v. Barber*, 5 Hill (N. Y.) 568.

That the party against whom the off-set is sought is insolvent, is immaterial unless he was insolvent at the time of the assignment. *Henderson v. McVay*, 32 Ala. 471.

The court will not order a judgment against the plaintiff, which has been assigned to the defendant, to be set off against a judgment obtained by the plaintiff against the defendant, where the plaintiff, prior to the assignment, has conveyed his property for the benefit of creditors. *Dunkin v. Calbraith*, 1 Browne (Pa.) 47.

2. See *Meloy v. Howk*, 32 Ind. 94; *Dickinson v. Chism*, 4 T. B. Mon. (Ky.) 1; *Williams v. Evans*, 2 McCord (S. Car.) 203; *Hanchett v. Gray*, 7 Tex. 549; *Simpson v. Huston*, 14 Tex. 476; *Yorton v. Milwaukee, etc., R. Co.*, 62 Wis. 367.

Set-off after judgment saves the oppressive and ruinous sacrifice of property. *Simpson v. Huston*, 14 Tex. 476.

3. *Bowe v. Campbell*, 63 How. Pr. (N. Y.) 170; *McGuinty v. Herrick*, 5 Wend. (N. Y.) 240; *Cooper v. Bigelow*, 1 Cow (N. Y.) 206; *Koenig v. Steckel*, 58 N. Y. 476.

In *Utica Ins. Co. v. Power*, 3 Paige (N. Y.) 365, it was held that the simple fact of the arrest of a judgment debtor under execution against the person was not sufficient to prevent a set-off as between him and the complainant.

4. *Utica Ins. Co. v. Power*, 3 Paige

but if a defendant in execution escapes, the plaintiff is remitted to his former rights; the imprisonment is no longer a satisfaction and the judgment may be again used as a set-off.¹

Where two parties have mutual executions against each other, either party is entitled, under the statutes of some of the States, to have one execution set off by the sheriff against the other.² The foundation of the judgments upon which the executions were issued is immaterial.³ The only limitation which the statute prescribed to a set-off of executions is that they must be between the same parties,⁴ and that they must belong to the parties respectively in the same right.⁵

An assignment of one of the executions is not sufficient to prevent their set-off against each other, or to justify the officer in refusing to make the set-off.⁶ It must appear that one of the executions has been lawfully and in good faith assigned before the execution creditor under the other execution became entitled to the sum due on his execution, in order to prevent it.⁷

The lien of an attorney for his fees and disbursements in obtaining the judgment, however, is paramount to the rights of the

(N. Y.) 365; *Poucher v. Holley*, 3 Wend. (N. Y.) 184; *Yates v. Van Rensselaer*, 5 Johns. (N. Y.) 364.

In *Williams v. Evans*, 2 McCord (S. Car.) 203, where the applicant for a set-off had seized his debtor in execution, and the debtor had died in prison, after which the application to set off the judgment against a judgment in favor of the debtor was made, the application was denied upon the ground that it was made too late, the judgment in favor of the debtor having been in the meantime assigned to another.

1. *McGuinty v. Herrick*, 5 Wend. (N. Y.) 240.

After the defendant is discharged from prison under the insolvent act, the judgments may also be set off. *Cooper v. Bigalow*, 1 Cow. (N. Y.) 206.

2. *Shapley v. Bellows*, 4 N. H. 347; *Leathers v. Carr*, 24 Me. 351; *New Haven Copper Co. v. Brown*, 46 Me. 418; *Goodenow v. Buttrick*, 7 Mass. 140; *Jones v. Carpenter*, 9 Met. (Mass.) 509; *Porter v. Leach*, 13 Met. (Mass.) 482; *Ocean Ins. Co. v. Rider*, 22 Pick. (Mass.) 210; *Lyon v. Smith*, 66 Mich. 676; *Culver v. Pearl*, 1 Tyler (Vt.) 12.

The officer is required to make such set-off, even though one of the executions has been assigned to a third person, where it appears that both demands had existed between the parties long anterior to the assignment. *Leathers v. Carr*, 24 Me. 351.

3. *Shapley v. Bellows*, 4 N. H. 347.

4. *Shapley v. Bellows*, 4 N. H. 347; *New Haven Copper Co. v. Brown*, 46 Me. 418; *Jones v. Carpenter*, 9 Met. (Mass.) 509.

5. *Shapley v. Bellows*, 4 N. H. 347; *New Haven Copper Co. v. Brown*, 46 Me. 418; *Jones v. Carpenter*, 9 Met. (Mass.) 509.

That one of the executions is in favor of an executor or administrator is immaterial if the other is against him in the same capacity. *Jones v. Carpenter*, 9 Met. (Mass.) 509.

6. *Porter v. Leach*, 13 Met. (Mass.) 482; *New Haven Copper Co. v. Brown*, 46 Me. 418; *Leathers v. Carr*, 24 Me. 351.

It would appear that an assignment made for the mere purpose of defeating the right of set-off is insufficient. *Porter v. Leach*, 13 Met. (Mass.) 482.

After the executions have been set off and returned satisfied, it is too late to raise the objection that one of them has been assigned. *Lyon v. Smith*, 66 Mich. 676.

7. *Porter v. Leach*, 13 Met. (Mass.) 482; *New Haven Copper Co. v. Brown*, 46 Me. 418; *Primm v. Ransom*, 10 Mo. 444; *Perkins v. Thompson*, 3 N. H. 145; *Goodwin v. Richardson*, 44 N. H. 125.

The time of the delivery of an execution to an officer is to be deemed to be the time at which the execution creditor becomes entitled to the money

parties to have their mutual executions set off against each other, and will not be discharged or affected by such set-off.¹ The general, though not universal rule, is that it is obligatory upon the officer to make the set-off when he is so requested by either judgment creditor, if the law allows it, and that he will render himself liable by a refusal to do so.² But if there is reasonable apprehension of danger in proceeding to act, the officer may require an indemnity from the consequences attendant upon making such set-off.³

4. Intervening Rights of Third Parties—(See also ATTORNEY AND CLIENT, vol. 1, p. 942).—When the equitable rights of third parties would be affected by an offset of judgments it is not to be made to the injury of intervening rights honestly acquired.⁴ The rights of *bona fide* assignees of one of the judgments are sometimes considered as within this rule,⁵ and the lien of the attorney for his costs and disbursements of the suit is paramount to the claim of the adverse party to set off a judgment recovered against the client in another suit.⁶ The courts will sustain the

due thereon. *Primm v. Ransom*, 10 Mo. 444.

1. *Shapley v. Bellows*, 4 N. H. 347; *Dunklee v. Locke*, 13 Mass. 525; *Jones v. Carpenter*, 9 Met. (Mass.) 509.

Counsel Fees Not Included.—In the case of a set-off either of judgments or of executions, the lien of the attorney for his fees and disbursements therein, does not extend to council fees, but only to attachable costs. *Ocean Ins. Co. v. Rider*, 22 Pick. (Mass.) 210.

2. *Leathers v. Carr*, 24 Me. 351; *New Haven Copper Co. v. Brown*, 46 Me. 418; *Porter v. Leach*, 13 Met. (Mass.) 482; *Goodenow v. Buttrick*, 7 Mass. 140.

That he is not obliged to do so, see *Anonymous*, *Brayt.* (Vt.) 118; and see *Gould v. Parlin*, 7 Me. 82.

An officer must have the writs in his possession as such, and be authorized and obliged to obey them. Where one of the writs is in the hands of the corner, therefore, and the other in the hands of the sheriff, a set-off between them cannot be compelled. *Goodenow v. Buttrick*, 7 Mass. 140.

In *Alabama* the sheriff is held to be incompetent to determine when one execution should be set off against another. *Brazeal v. Smith*, 5 Ala. 206.

3. *Leathers v. Carr*, 24 Me. 351.

The officer in order to protect himself must give notice of a reasonable apprehension of danger to the creditor in order to enable him to furnish indemnity. *Leathers v. Carr*, 24 Me. 351.

In *Gould v. Parlin*, 7 Me. 82, it was held that where a party has once applied to the discretion of the court by motion to set off one judgment against another, which application was refused, after a full hearing on the merits, he cannot afterwards maintain an action against the sheriff to whom both executions have been delivered, for refusing to set off the executions against each other.

4. *Ames v. Bates*, 119 Mass. 397; *Greene v. Hatch*, 12 Mass. 195; *Gay v. Gay*, 10 Paige (N. Y.) 369; *Ramsey's Appeal*, 2 Watts (Pa.) 228; 27 Am. Dec. 301.

Third persons cannot take advantage of an irregularity in the assignment of a judgment, however, where the assignor has made no objection. *Ramsey's Appeal*, 2 Watts (Pa.) 228; 27 Am. Dec. 301.

5. See, *infra*, this title, *Assigned Judgments*.

6. *Gridley v. Garrison*, 4 Paige (N. Y.) 647; *Ferguson v. Bassett*, 4 How. Pr. (N. Y.) 170; *Devoy v. Boyer*, 3 Johns. (N. Y.) 247; *Cole v. Grant*, 2 Cai. (N. Y.) 105; *Zogbaum v. Parker*, 55 N. Y. 120; *Carter v. Bennett*, 6 Fla. 214; *Leavenson v. Lafontaine*, 3 Kan. 523; *Dunklee v. Locke*, 13 Mass. 525; *Barrett v. Barrett*, 8 Pick. (Mass.) 342; *Shapley v. Bellows*, 4 N. H. 347. The court will protect an attorney's lien to the same extent as the right of an assignee. *Bradt v. Koon*, 4 Cow. (N. Y.) 416.

lien of the attorney whenever it can be done without infringing upon the Statute of Set-off;¹ but if the case be within the words or the spirit of the act, the courts, upon bill filed, must abide by it.² Where the question arises upon pleadings in a suit, the rules of law must govern, but where the application is to the discretion of the court, it will be decided as shall be just and equitable.³ Where the adverse judgments are rendered in the same cause, however, or where they arise out of the same transaction or with relation to the same subject-matter, the attorney's lien extends only to the clear balance resulting from the equities between the parties, and the set-off may be made without reference to it;⁴ though the attorney's lien for cost recovered will not be suspended or satisfaction of the judgment delayed

In an action to set off judgments by a plaintiff as assignee of the judgment, he cannot, even if entitled to set off his judgment against that of the defendant, make use of it to defeat the incidental claims for costs, growing out of any legal proceedings to collect the defendant's judgment, instituted before the assignment of the plaintiff's judgment to him. *Butler v. Niles*, 26 How. Pr. (N. Y.) 61. And see *Brisley v. Jones*, 5 N. J. Eq. 512.

1. *Sweet v. Bartlett*, 4 Sandf. (N. Y.) 661; *Martin v. Kanouse*, 9 Abb. Pr. (N. Y.) 370, note; 17 How. Pr. (N. Y.) 146; *Nash v. Hamilton*, 3 Abb. Pr. (N. Y.) 35; *Peckham v. Barcalow*, Hill & D. Supp. (N. Y.) 112; *Ward v. Wordsworth*, 1 E. D. Smith (N. Y.) 598; *Van Pelt v. Boyer*, 8 How. Pr. (N. Y.) 319; *De Figanieri v. Young*, 2 Robt. (N. Y.) 670; *Creighton v. Ingersoll*, 20 Barb. (N. Y.) 541; *Hooper v. Brundage*, 22 Me. 460.

In *Michigan* an appeal in equity to obtain an offset of a judgment will not lie, unless it shows that the amount involved after satisfying any proper claim of the attorneys, exceeds \$100. *Wells v. Elsam*, 40 Mich. 218.

2. *Nicoll v. Nicoll*, 16 Wend. (N. Y.) 446; *Martin v. Kanouse*, 9 Abb. Pr. (N. Y.) 370, note; 17 How. Pr. (N. Y.) 146; *Firmenich v. Bovee*, 1 Hun (N. Y.) 532; *Roberts v. Carter*, 24 How. Pr. (N. Y.) 44; *Brooks v. Hanford*, 15 Abb. Pr. (N. Y.) 342; *Hayden v. McDermott*, 9 Abb. Pr. (N. Y.) 14; *Perry v. Chester*, 36 N. Y. Super. Ct. 228; *Smith v. Chenoweth*, 12 Civ. Pro. Rep. (N. Y.) 89; *Mohawk Bank v. Burrows*, 6 Johns. Ch. (N. Y.) 317; *People v. New York*, 13 Wend. (N. Y.) 649; 28 Am. Dec. 495; *Porter v. Lane*, 8 Johns. (N. Y.) 357. But see

Gridley v. Garrison, 4 Paige (N. Y.) 647; *Dunkin v. Vandenberg*, 1 Paige (N. Y.) 622; *Shirts v. Irons*, 54 Ind. 13.

Although on motion to set off judgments, courts can protect their officers by refusing to set them off, so as to defeat an attorney's lien for his costs, yet it is fully settled that the statute respecting set-offs overrides the lien of an attorney. *De Figanieri v. Young*, 2 Robt. (N. Y.) 670. And see cases above cited.

An attorney who obtained a judgment and afterwards became the owner of it, cannot interpose his lien for costs and disbursements as an objection to the set-off of another judgment against it. It cannot be held that a party has a lien upon what is his own. *Carey v. Chester*, 36 N. Y. Supr. Ct. 228.

3. *Gihon v. Fryatt*, 2 Sandf. (N. Y.) 638; *Martin v. Kanouse*, 9 Abb. Pr. (N. Y.) 370, note; 17 How. Pr. (N. Y.) 146; *Davison v. Alfaro*, 16 Hun (N. Y.) 360; *Perry v. Chester*, 36 N. Y. Super. Ct. 228.

Under the *Iowa* statute, the lien of an attorney upon moneys in the hands of an adverse party, attaches only from notice to such party, and where the right to set off a judgment recovered in one action against that recovered in another between the same parties arises before such notice, it is superior. *Hurst v. Sheets*, 21 Iowa 501.

4. *Mohawk Bank v. Burrows*, 6 Johns. Ch. (N. Y.) 317; *Utica Ins. Co. v. Power*, 3 Paige (N. Y.) 365; *Porter v. Lane*, 8 Johns. (N. Y.) 357; *Prince v. Fuller*, 34 Me. 122; *Yorton v. Milwaukee, etc., R. Co.*, 62 Wis. 367.

This seems to be the rule, even though an assignment of the judgment has been made to the attorney to secure him for his disbursements and

until an unliquidated claim of the opposite party can be ascertained, and a balance finally struck between the parties.¹

5. Set-off; How Enforced.—The set-off of mutual judgments may be enforced either by action instituted for that purpose, or by motion made in the proper court;² and the jurisdiction of a court of law to direct a set-off is concurrent in most cases with that of a court of equity.³ Where a complicated, intricate state of facts is presented, however, a motion for a set-off in a court of law will be denied, and the parties will be left to obtain their rights in equity;⁴ and it will not be allowed on motion in a court, either of law or of equity, where one of the demands sought to be set off has not been liquidated by judgment.⁵ Upon a bill in equity, or an action at law to obtain a set-off, the attorney's lien cannot be regarded, but on motion it may;⁶ and a court of law frequently refuses to interfere on motion in cases in which by action the

advances. *Yorton v. Milwaukee, etc., R. Co.*, 62 Wis. 367.

1. *Mohawk Bank v. Burrows*, 6 Johns. Ch. (N. Y.) 317; *Ainslie v. Boynton*, 2 Barb. (N. Y.) 258.

The costs in one suit will not be set off against a judgment recovered in another suit between the same parties, to the prejudice of the attorney to whom the cost belonged, when they were unliquidated when the right of set-off attached. *Ainslie v. Boynton*, 2 Barb. (N. Y.) 258.

2. *Stilwell v. Carpenter*, 59 N. Y. 414.

The party claiming the set-off has his election to seek relief in chancery subject to appeal, or he is at liberty to apply to the summary discretion of a court of law not subject to a writ of error. *Simson v. Hart*, 14 Johns. (N. Y.) 63.

A proceeding to have one judgment set off against another, based on a motion in writing in the nature of a complaint, is a summary proceeding, and may be commenced and proceeded with as on a motion. No formal pleadings are necessary, but the parties may mutually resort to formal pleadings to present questions of law for decision. *Quick v. Durham*, 115 Ind. 302; *Brooks v. Harris*, 41 Ind. 390.

3. *Gridley v. Garrison*, 4 Paige (N. Y.) 647; *Simson v. Hart*, 14 Johns. (N. Y.) 63.

A court of equity may order a set-off of one judgment, rendered in a court of law against another. *Buckmaster v. Grundy*, 8 Ill. 626.

In ordinary cases, an application to the equity powers of a court of law is

a more cheap and expeditious remedy than an action in equity, and in such cases while a court of equity will entertain an action for such relief, application to that court will be discouraged by refusing cost to the complainant. *Gridley v. Garrison*, 4 Paige (N. Y.) 647.

4. *Story v. Patten*, 3 Wend. (N. Y.) 331; *Wright v. Cobleigh*, 23 N. H. 32; *Holmes v. Robinson*, 4 Ohio 90; *Taylor v. Williams*, 14 Wis. 155.

Such an application will be granted on motion only when no long examination of the facts is necessary. *Taylor v. Williams*, 14 Wis. 155.

In *Hobbs v. Duff*, 23 Cal. 596, it was held that where the parties to two judgments are not the same, a court of common-law jurisdiction cannot set off one against the other, but a court of equity will look beyond the nominal to the real parties in interest and adjudicate the rights of the parties accordingly.

5. *Davidson v. Alfaro*, 16 Hun (N. Y.) 353; *Pignolet v. Geer*, 19 Abb. Pr. (N. Y.) 264. See also *Dunkin v. Vandenberg*, 1 Paige (N. Y.) 622.

In *Allnut v. Winn*, 3 J. J. Marsh. (Ky.) 304, it was held that a court of equity cannot set off one judgment against another, unless there be some connection between the transactions on which the judgments were rendered, or unless the set-off cannot be enforced by legal means.

6. *Purchase v. Bellows*, 16 Abb. Pr. (N. Y.) 105; *Nicoll v. Nicoll*, 16 Wend. (N. Y.) 446; *Martin v. Kanouse*, 9 Abb. Pr. (N. Y.) 370, note; 17 How. Pr. (N. Y.) 146; *Ainslie v.*

relief sought would be granted as a matter of strict statutory right.¹ A decision of a court of law upon a summary application to its equity powers for a set-off, does not preclude chancery from examining the question, nor is chancery concluded where a new fact is disclosed, which was not presented to the court of law.² That a party has neglected an opportunity to set off a judgment, or the subject-matter thereof upon a trial in which it was available, is no ground for a refusal of a motion to set off the judgment against another.³

a. MOTION, WHEN AND WHERE MADE.—A judgment debtor, who has a judgment against his creditor, ought to avail himself of the earliest opportunity to make his application for a set-off.⁴ If he delays until the interests of third persons become involved, the application will be denied;⁵ but if no such interests inter-

Boynton, 2 Barb. (N. Y.) 258; Perry v. Chester, 36 N. Y. Super. Ct. 228.

A right to set off a judgment in favor of A against B, against a judgment in favor of B against A, cannot be asserted by motion on behalf of A, where it appears that, before B's judgment was obtained, he assigned his claim to a third person. If A has any equities, they can only be enforced by action, not by motion. Swift v. Prouty, 64 N. Y. 545.

Assignment Pending Litigation.—A debt absolutely assigned to a stranger pending litigation thereon and before judgment, cannot be set off against another debt on motion; but in an action brought for that purpose such a set-off may be allowed. Pignolet v. Geer, 19 Abb. Pr. (N. Y.) 264.

1. Purchase v. Bellows, 16 Abb. Pr. (N. Y.) 105.

2. Simson v. Hart, 14 Johns. (N. Y.) 63; Pignolet v. Geer, 19 Abb. Pr. (N. Y.) 264; Gridley v. Garrison, 4 Paige (N. Y.) 647; Scott v. Rivers, 1 Stew. & P. (Ala.) 19; 21 Am. Dec. 646.

The decision of the court is not subject to review and is not *res adjudicata*. People v. St. Joseph Co., 39 Mich. 21.

Collateral Attack.—The validity of a judgment sought to be set off cannot be impeached upon the application for the set-off, Porter v. Liscom, 22 Cal. 430; 83 Am. Dec. 76; Skrine v. Simmons, 36 Ga. 402; 91 Am. Dec. 771, if rendered by a court of competent jurisdiction. Skrine v. Simmons, 36 Ga. 402; 91 Am. Dec. 771.

3. Mason v. Knowlson, 1 Hill (N. Y.) 218; Russell v. Conway, 11 Cal. 93; Hobbs v. Duff, 23 Cal. 596. But see Dunkin v. Calbraith, 1 Browne

(Pa.) 47; McLean v. Bindley, 114 Pa. St. 559.

Where a creditor, after obtaining judgment, becomes insolvent, equity will compel the allowance of any set-off which the debtor may have against him, although it existed when the suit was brought and judgment rendered, if not litigated therein. Chicago, etc., R. Co. v. Field, 86 Ill. 270.

In McGraw v. Pettibone, 10 Mich. 530, however, it was held that a bill to have a set-off allowed to a decree in equity, cannot be sustained where the demands sought to be set off would have constituted a defense in the former chancery suit, where it is not alleged that the facts upon which the set-off is claimed were then unknown.

4. Williams v. Evans, 2 McCord (S. Car.) 203; Duncan v. Bloomstock, 2 McCord (S. Car.) 318; 13 Am. Dec. 728.

Motion Papers.—Where a motion is made to set off judgments, the moving papers should be entitled in all the causes which contain the judgments to be set off, whether in the court in which the motion is made, or in some other court. Alcott v. Davison, 2 How. Pr. (N. Y.) 44.

5. Williams v. Evans, 2 McCord (S. Car.) 203; Duncan v. Bloomstock, 2 McCord (S. Car.) 318; 13 Am. Dec. 728.

Leave to issue execution on a judgment should not be granted after the lapse of five years from its rendition, where it appears that the judgment debtor holds a judgment against the party making the application greater in amount than that on which the application is based. The applicant

Definition.

SET-OFF—SETTLE.

Definition.

vene, it would appear that the application might be made at any time while the judgments remain valid and subsisting demands.¹

The application cannot be made in a court other than that in which one of the judgments was rendered.² Where the judgments were rendered in different courts, the application must be made to the court in which the judgment adverse to the applicant was rendered,³ that court having control over the judgment and the applicant having the power to credit or satisfy his judgment against his judgment debtor.⁴

SETTLE.—To make a settlement ;⁵ to fix ;⁶ to settle or deter-

should be left to an action upon his judgment, in which action a debtor could avail himself of his equitable set-off. *Betts v. Garr*, 1 Hilt. (N. Y.) 411.

1. See *Hobbs v. Duff*, 23 Cal. 593; *Williams v. Evans*, 2 McCord (S. Car.) 203.

A judgment rendered twenty years ago, and recently made up by permission of the court, may be allowed to be set off in an action commenced many years after said judgment, but before the completion of the record. *Parker v. Rugg*, 9 Gray (Mass.) 209.

An action brought in a court of equity to enforce a set-off of one judgment against another, is an action upon a judgment or decree within the Statute of Limitations, and may be brought at any time within five years from the time of its rendition. *Hobbs v. Duff*, 23 Cal. 596. And see *Dieffenbach v. Roch*, 112 N. Y. 621.

2. See *Hicks v. Ross*, 11 Barb. (N. Y.) 481; *People v. New York*, 13 Wend. (N. Y.) 649; 28 Am. Dec. 495.

A motion to set off judgments obtained in a justice's court, transcripts of one or both of which have been filed with the county clerk, should be made to the county court. *Hicks v. Ross*, 11 Barb. (N. Y.) 481.

3. *Hicks v. Ross*, 11 Barb. (N. Y.) 481; *Cooke v. Smith*, 7 Hill (N. Y.) 186; *Stilwell v. Carpenter*, 2 Abb. N. Cas. (N. Y.) 238; *Dunkin v. Vandenberg*, 1 Paige (N. Y.) 622; *Russell v. Conway*, 11 Cal. 93; *Irvine v. Myers*, 6 Minn. 562; *Wright v. Cobleigh*, 23 N. H. 32; *Brookfield v. Hughson*, 44 N. J. L. 286; *Taylor v. Williams*, 14 Wis. 155.

Where a judgment of reversal has been obtained, in the supreme court, of a judgment in the common pleas, and a restitution awarded, and afterwards the same plaintiff obtains a second judgment against the same

defendant on the same contract in the common pleas, that court may set off the judgment of reversal against the second judgment, but the supreme court will not do so. *Brewerton v. Harris*, 1 Johns. (N. Y.) 144.

In an action before a justice of the peace, the defendant cannot set off a judgment recovered by him against the plaintiff, before another justice which has been removed to a higher court by *certiorari*. *Willard v. Fox*, 18 Johns. (N. Y.) 497.

4. *Russell v. Conway*, 11 Cal. 93.

Judgment in Action for Set-off.—Where judgment was rendered by a justice for the plaintiffs, respectively, in actions brought by each against the other, and one of the defendants appealed, and afterwards on the trial of the cause under a plea of set-off, interposed his judgment before the justice against the plaintiff's claim, and thereby obtained a verdict in his favor, the judgment thereon should be entered without costs and judgment for the costs against the defendant. *Groff v. Ressler*, 27 Pa. St. 71.

5. *Grier v. Grier*, L. R., 5 H. L. 688; 4 Moak's Eng. Rep. 71. See **SETTLEMENT**, vol. 22, p. 488.

6. See *McWhorter v. Benson*, Hopk. (N. Y.) 37.

Settle Boundaries.—Where the words of a request by the landowners of a certain township made of the tithe commissioners was that they "inquire into, ascertain, and set out," the boundaries of said township, it was held that the words were equivalent to words of the statute providing that the commissioners should in such case inquire into and settle the boundaries. *In re Dent*, 8 Q. B. 43; 55 E. C. L. 41.

Settled Limits of the United States.—The words "settled limits of the United States," used in a life-insurance policy to restrict the assured from

mine the form and substance of ; as to settle an issue, interrogatories, a bill of exceptions, or case.¹

SETTLED CASE ON APPEAL.—(See also APPEAL, vol. I, p. 616.)

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I. DEFINITION.—The term settled case, or case made or stated, is applied to that part of the record on appeal which consists of a statement prepared by the appellant's counsel, setting forth so much of the testimony and proceedings had in the court below as may be material to the questions intended to be reviewed in the appellate court, subject to amendments of the opposing counsel, and to a settlement by the trial judge.²

II. NATURE AND OFFICE.—A settled case or statement on appeal is in the nature of a bill of exceptions, and in some jurisdictions may be used as a substitute for a writ of error to review the judgment of a court rendered after trial of an issue of fact ; or upon the report of a referee,³ or a judgment granting or denying a

travel, was held to mean the established boundaries of the United States ; not the region of settlements. *Caster v. Connecticut Mut. L. Ins. Co.*, 22 N. Y. 427. See *LIMIT*, vol. 13, p. 666, n. 1.

1. *Abb. L. Dict.* ; *And. L. Dict.*

2. *Black's L. Dict.* 176.

In *New York*, the term "case" is applied to the aggregation of papers and evidence which is presented to the appellate court at the argument of an appeal. In other States, the words "appeal-book," or "paper-book," are applied to what in *New York* is known as the case on appeal. See 15 *Alb. L. J.* 242.

In *California*, and some other western States, in which the rules of practice are based upon the *California Code*, as, for example, *Oregon* and *Nevada*, the term "statement on appeal," instead of case made or stated, is to designate that part of the record containing the settled statement of counsel. Case made, however, is the term most frequently employed, and, for that reason, it is used generally throughout this article.

3. A case made is as appropriate a method of review as is a writ of error. *Wheeler v. Wilkins*, 19 *Mich.* 80. But the office of a case made is no broader

than that of a writ of error and bill of exceptions. *Earle v. Westchester F. Ins. Co.*, 29 *Mich.* 414 ; *Grand Rapids v. Whittlesey*, 32 *Mich.* 192.

In *Nevada*, alleged errors in a charge or instructions can only be brought to the attention of the supreme court in one of three ways : by being embodied in a bill of exceptions ; or in a settled statement ; or endorsed by the judge ; as required by § 426 of the practice act. *State v. Darling*, 4 *Nev.* 413.

In *North Carolina*, a bill of exceptions, or a case stated by the presiding judge, in the nature of a bill of exceptions, was inadmissible upon an appeal from an inferior to a superior court of equity. *Graham v. Skinner*, 4 *Jones Eq. (N. Car.)* 94.

In *Minnesota*, the supreme court may, if it is deemed necessary, order a bill of exceptions or a case to be prepared and attached to the judgment roll where an appeal is taken. But a bill of exceptions or a settled case is not necessary to enable the court to review a judgment upon questions presented by the findings of law and fact of the judge, or referee who tried the cause. *Morrison v. March*, 4 *Minn.* 422.

The findings of fact in a cause tried by the court cannot be questioned if there

motion for a new trial;¹ while in other jurisdictions, especially where the writ of error has been abolished by statute, it may supersede the writ of error altogether, and is required to be employed in certain cases.²

is no case containing a statement of the evidence. *Allen v. Hayden*, 25 Minn. 267. See *Claffin v. Lawler*, 1 Minn. 297.

Objections to testimony submitted upon a trial before a referee, cannot be reviewed upon his report; but the testimony must be embodied in a bill of exceptions or in a case made. *Bazille v. Ullman*, 2 Minn. 134.

The supreme court will not examine the question whether or not the evidence supporting a judgment was properly received and considered, unless there is a case made, or bill of exceptions. *Dartwell v. Davidson*, 16 Minn. 530. In such a case the court will only inquire whether the judgment is justified by the facts as found by the court below. *First Nat. Bank v. Parsons*, 19 Minn. 289; *St. Paul v. Kuby*, 8 Minn. 154.

In *Arizona*, if the provisions of the statutes have been complied with as to the form, preparation, settling, signing, etc., of a bill of exceptions, any exceptions to the rulings of the lower court in admitting or excluding evidence may be properly preserved by being incorporated in the statement on appeal. *Southerland v. Putnam* (Arizona 1890), 24 Pac. Rep. 320.

In *Washington*, an appeal from an equitable action will be dismissed in the absence of a statement of facts settled and certified as required by laws of 1891, p. 347, § 22. *McNatt v. Harmon* (Wash. 1891), 28 Pac. Rep. 748; *Enos v. Wilcox* (Wash. 1891), 28 Pac. Rep. 364; *Caldwell v. Bank of Washington* (Wash.), 28 Pac. Rep. 365. And this statement must contain the whole evidence. *Singer v. Roeder* (Wash. 1892), 28 Pac. Rep. 748. So where an action was begun as an action at law, but which was tried and decided as a suit in equity. *Harker v. Crosby* (Wash. 1891), 28 Pac. Rep. 745.

In *Michigan*, the sole object of the statute is to do away with the necessity of a bill of exceptions and writ of error, by permitting the parties to bring before the court, in a case to be made after trial, all the questions arising thereon that could properly be embodied in a bill of exceptions. *Beeson v. Hollister*, 11 Mich. 193.

Where a party who has taken exceptions on a trial in an inferior court, may elect to remove the cause to the superior court upon a bill of exceptions, or on a case made, the settling and filing of a bill of exceptions will be deemed an election of that method, and he cannot thereafter make and settle the case. *Richardson v. Yawkey*, 9 Mich. 139; *Near v. Mitchell*, 23 Mich. 382. A writ of error sued out after the case is settled is a waiver of the case. *Hatch v. White*, 18 Mich. 194.

When the court has permitted a plaintiff to take an inquest when he had no right to do so, a proper affidavit of merits having been filed and served, the error may be reviewed on case made. *Wells v. Booth*, 35 Mich. 424.

But proceedings in taking judgment by default, and an assessment of damages by the clerk, cannot be reviewed by the supreme court on a case made. *Beeson v. Hollister*, 11 Mich. 193.

The supreme court has no jurisdiction of cases made for review upon the facts, even though the record leads irresistibly to the inference that the case below turned upon certain questions of law. The party complaining of the judgment must have excepted to the rulings on points of law, or to the rendition of judgment upon the finding of facts. *Wertin v. Crocker*, 47 Mich. 642; *Chatterton v. Parrot*, 46 Mich. 432; *Hedges v. Hibbard*, 46 Mich. 551.

The supreme court cannot, in reviewing a case made, weigh evidence determining facts, or review the findings of the court below, upon questions of fact. *Heimbach v. Weinberg*, 18 Mich. 48; *Schmidt v. Miller*, 22 Mich. 278; *Walrath v. Campbell*, 28 Mich. 123; *Peabody v. McAvoy*, 23 Mich. 526. And it is only where there is a total want of evidence, or where the finding is contrary to the undisputed evidence, that the supreme court can overthrow the facts found by the court below. *Cragin v. Gardner*, 64 Mich. 399; *Tuxbury v. French*, 39 Mich. 190.

1. As to making a case on a motion for a new trial, and on an appeal from orders granting or denying a new trial, see *NEW TRIAL*, vol. 16, pp. 646 *et seq.*, 680 *et seq.*

2. In *New York*, prior to 1860, the

only mode of review after trial by the court, was upon a case containing the proper exceptions, if questions of law were to be examined on the appeal. *Hunt v. Bloomer*, 13 N. Y. 342; *Otis v. Spencer*, 16 N. Y. 610; *Magic v. Baker*, 14 N. Y. 435; *Pope v. Dinsmore*, 29 Barb. (N. Y.) 367; *Conolly v. Conolly*, 16 How. Pr. (N. Y.) 225. And the decisions of referees could be reviewed only in the same manner. *Johnson v. Whitlock*, 13 N. Y. 346. In this case Comstock, J., said: "It has been more or less understood that an appeal may be taken on a record containing the report, and without any case being made where it is intended to review questions of law only. But the code does not admit of this interpretation, as a case must always be made after a trial by the court, and as the decision of a referee can only be reviewed in the same manner, it follows that the same proceeding must be taken." *Westcott v. Thompson*, 16 N. Y. 613; *Manly v. Insurance Co. of N. A.*, 1 Lans. (N. Y.) 20. This was so, even though the facts necessary to present the legal question intended to be raised, appear upon the face of the referee's report. *Turner v. Haight*, 16 N. Y. 465. These cases are opposed to and overrule *Brewer v. Isish*, 12 How. Pr. (N. Y.) 481. But after the amendment of § 272 of the code (Sessions Laws, 1860, pp. 783, 786) it was said in *Ferguson v. Hamilton*, 35 Barb. (N. Y.) 427, that it was supposed that the practice was made to correspond with the decision in that case, and that a review might be had of a judgment entered on the report of a referee on exceptions without the formality of a case which before was indispensable.

After various amendments, the *New York Code Civ. Proc.*, § 997, now provides as follows: "Where a party intends to appeal from a judgment rendered after the trial of an issue of fact, or to move for a new trial of such issue, he must, except as otherwise prescribed by law, make a case and procure the same to be settled and signed by the judge or referee by or before whom the action was tried as prescribed by the general rules of practice." See *Voisin v. Commercial Mutual Ins. Co.*, 123 N. Y. 120.

Under this section it has been held in *Schwarz v. Weber*, 103 N. Y. 658, following *Ferguson v. Hamilton*, 35 Barb. (N. Y.) 427, that the conclusions of law of a judge or referee, duly ex-

cepted to, may be reviewed on appeal by filing exceptions to the findings of the trial court from questions of law, according to § 994, Code Civ. Proc., and having the appeal heard upon these exceptions, without preparing and settling the case. The exceptions referred to are exceptions filed after the trial of an issue of fact to the conclusions of law reached by the referee or court. *Goldschmidt v. Goldschmidt*, 47 N. Y. Super. Ct. 184.

But there is no provision of the code dispensing with a case when the appellant intends to review a final judgment only, entered upon the verdict of the jury, and if a case is not made, the appeal brings nothing before the court that can be reviewed. *Delano v. Harp*, 37 Hun (N. Y.) 275; *Clason v. Baldwin*, 59 Hun (N. Y.) 622.

Where there is no case made or settled, showing that any question was raised or any exception taken, and no report of a referee of findings of the court with exceptions, the court of appeals has no jurisdiction, and no appeal lies. *Smith v. Starr*, 70 N. Y. 155. See *Doty v. Carolus*, 31 N. Y. 547; *Weed v. New York, etc., R. Co.*, 29 N. Y. 616.

It seems that a party aggrieved by an interlocutory judgment may also, after entry of the judgment, move for a new trial on one or more exceptions contained in a case made; and from the order granting or refusing the motion an appeal may be taken to the court of appeals. *Raynor v. Raynor*, 94 N. Y. 248.

Where the referee did not find any facts which could sustain a judgment in favor of the plaintiffs, and was not requested to find any facts which he declined to find, the exception to the report of the referee cannot be sustained, and the court will not assume to find such additional facts from the evidence as will make the exception available; but the party appealing must make his case and have it settled with such a statement of facts as will necessarily show that the law is in his favor. *Smith v. Newland*, 9 Hun (N. Y.) 553; *Grant v. Morse*, 22 N. Y. 323.

New York Code of Civil Procedure, § 1539, provides that "where an appeal to the court of appeals from a judgment rendered at the general term of the court below upon a verdict, subject to the opinion of the court, has been perfected, a case containing a concise statement of the facts, of the questions

of law arising thereon, and of the determination of those questions by the general term, must be prepared and settled, by or under the directions of the court below, and annexed to the judgment-roll." See *Cowenhoven v. Ball*, 118 N. Y. 231; *Reinmiller v. Skidmore*, 59 N. Y. 661; *Essex Co. Bank v. Russell*, 29 N. Y. 673; *People v. Featherly* (N. Y. 1892), 30 N. E. Rep. 48.

Section 2576, of the same code, provides that "an appeal may be taken from the erroneous decision of the surrogate upon questions of law, or upon facts, or upon both. If taken from a decree rendered by the surrogate of an issue of fact, it must be heard upon a case made and settled by him." *In re Potter*, 32 Hun (N. Y.) 599. See *French v. Powers*, 80 N. Y. 146. But if the appeal from the surrogate's decree be not upon an issue of fact, no case is required, and the procedure is according to § 998 of the Code of Civil Procedure. *In re Jackson*, 32 Hun (N. Y.) 200.

A motion to dismiss an appeal on the ground that no case or case containing exceptions has been heard or filed, will be denied if the appellant is otherwise entitled to be heard. *Goldschmidt v. Goldschmidt*, 47 N. Y. Super. Ct. 184.

Where an appeal is taken under § 2381, *New York Code of Civil Procedure*, from an order confirming an award and a judgment thereon, it is improper to depose and serve the case; but the appeal is to be heard on such papers as were before the court when the judgment or order was made. *Poole v. Johnston*, 32 Hun (N. Y.) 215.

A party cannot review the adverse opinions of a judge unless he makes a bill of exceptions, or a case for the purpose, and moves upon it for a new trial. *Dickerson v. Cook*, 3 Duer (N. Y.) 324.

In 2 *Rumsey's Practice*, 386, it is said: "There is no difference in practice between a case, a case and exceptions, or a case containing exceptions, in regard to the preparation and service. The real distinction between them is as to the purpose for which they can be used, and what should be inserted in them. Where a party desires to review the facts after a trial by the court or a referee, or upon motion for a new trial after a verdict, he must prepare a case which shall contain all the material evidence upon the trial; but where he desires to review exceptions taken dur-

ing the trial, he must prepare a case and exceptions, or a case containing exceptions."

In *Kansas*, there are two methods of bringing up a civil case for review: upon a case made; and upon a transcript. In no other way can the appellate jurisdiction of the court to review such cases be invoked or exercised. The case may be briefer than a transcript; in fact it was mainly devised for the purpose of abridging the record and lessening the expense of review. *Neiswender v. James*, 41 Kan. 463. See *Kingman, etc., R. Co. v. Quinn*, 45 Kan. 477.

The office of a statement on appeal, as provided by statute in *California*, is to bring into the record those orders and rulings, together with the facts necessary to explain them, which are made in other stages of the proceedings in the case, not during the progress of the trial, and not contained in the judgment roll. *Harper v. Minor*, 27 Cal. 107; *De Johnson v. Sepulveda*, 5 Cal. 149. Compare *Richey v. Ford*, 2 Oregon 201.

Where a party desires to have interlocutory orders reviewed on appeal, such orders should be embodied in the statement on appeal. *Abbott v. Douglass*, 28 Cal. 295.

In *California*, non-appealable orders can only be reviewed by means of the statement on appeal from the final judgment. *Gates v. Walker*, 35 Cal. 289; *Stone v. Stone*, 17 Cal. 513.

Where questions of law alone are sought to be reviewed on appeal, and a statement of facts is necessary to their explanation, a statement on appeal, rather than a motion for a new trial and statement thereon, is the appropriate mode of procedure. *Treadwell v. Davis*, 34 Cal. 601; 94 Am. Dec. 770.

A party who does not wish to raise any question as to the sufficiency of evidence, on an appeal from an order granting or refusing a new trial, but only desires to have the rulings on questions of law arising in the progress of the trial reviewed, may introduce such rulings, with sufficient evidence to point them, into his statement on appeal; or may make a bill of exceptions as he proceeds, and thus have them reviewed on appeal from the judgment. *Harper v. Minor*, 27 Cal. 107.

But when an appeal is had directly from an appealable order, made on affidavits, the statement on appeal is not necessary. *Stone v. Stone*, 17 Cal. 513.

III. BY WHOM AND WHEN MADE AND SERVED.—A case is made or prepared in the first instance by the party intending to appeal,¹ and this must be done and the case served upon the opposite party within the time prescribed by statute, or by a rule or order of the court in which the cause was tried.² Generally, the

A stipulation that a statement "may be used on the motion for a new trial in this cause and also on appeal," allows it to be used on appeal from the judgment, as well as on an appeal from the decision on the motion. *Hastings v. Halleck*, 13 Cal. 203.

Where there is no controversy as to any material fact, and the action of the court below is sought to be reviewed on questions of law alone, a statement on appeal is not only a proper method, but is often the most convenient, expeditious and economical mode of bringing the alleged errors before the appellate court. *Treadwell v. Davis*, 34 Cal. 601; 94 Am. Dec. 770. See *Hutton v. Reed*, 25 Cal. 478; *Estate of Boyd*, 25 Cal. 511; *Harper v. Minor*, 27 Cal. 107. But this decision was afterwards overruled in *Reed v. Bernal*, 40 Cal. 628.

In *Montana R. Co. v. Warren*, 137 U. S. 348, it was held that as the statement on appeal was authorized by the *Montana* statutes as a method of presenting questions to the supreme court, such statement was sufficient to enable the Supreme Court of the United States, on error to the territorial court, to review the rulings of the trial court.

1. *Weeks v. Medler*, 18 Kan. 425.

2. *Buckley v. Althorf*, 86 Cal. 643; *McIntyre v. Willis*, 20 Cal. 177; *Hege-man v. Cantrell*, 50 How. Pr. (N. Y.) 188. See also *Aetna Life Ins. Co. v. Koons*, 26 Kan. 215, where it was held that if not made within such time, and if no extension has been granted, the court is powerless to act.

If no proceedings are taken for settlement, but the appellant, without notice to the other party, files with the appeal papers a certified copy of the judge's minutes of the evidence taken on the trial, such copy cannot be treated as a case made under the statute. *Wright v. Dudley*, 8 Mich. 74.

In *Weeks v. Medler*, 18 Kan. 425, it was held that where there was no notice to or suggestion of amendments, or appearance by the opposite party before the settling and signing by the trial judge, the case made is improperly settled and presents no questions for review to the supreme court.

A statute allowing three months after trial, for the making of a case, will be construed to allow three months from the time when the decree is made. *Wright v. Dudley*, 8 Mich. 74.

The provision of the *Minnesota* statute, for the preparation of a case within five days after trial by the court or referee, contemplates that the case shall be continued or considered pending until the filing of the decision. *Irvine v. Myers*, 6 Minn. 558.

In *Farlin v. Sook*, 26 Kan. 397, the following facts appeared: The court allowed plaintiff sixty days in which to make and serve a case upon the defendant, ordering at the same time that the defendant should be allowed twenty days after service to make amendments. The attorney for the plaintiff made a case and on the fifty-ninth day served it upon defendant, taking from him a written acknowledgment of the service, and agreeing to hand the case to his attorney within ten days. Four days afterwards he served the case upon the attorney for the defendant, taking from him also an acknowledgment of the service. The service upon the attorney being made after the expiration of the time prescribed, he, not having been informed that the case had before been served upon his client, believed it to be a nullity, and therefore suggested no amendments, and allowed it to be settled and signed by the judge without objection. Upon the case being brought to the supreme court, the defendant's attorney moved to dismiss it on the ground that it had not been properly made; whereupon the plaintiff's attorney introduced in evidence the separate paper containing the acknowledgment of the defendant himself that the service had been made within the prescribed time; and it was held that while the conduct of the plaintiff's attorney was not commendable in obtaining the advantage of having the case settled, etc., without any suggestions from the defendant's attorney, yet the case was valid and the motion to dismiss was overruled.

The ten days allowed in *New York*, for the making of a case, after trial by the court, run from the filing of the

By Whom and When *SETTLED CASE ON APPEAL*. Made and Served.

judge, in his discretion, may extend the time for making and serving a case, if the application for such extension is made before the expiration of the time originally fixed.¹

findings and not from the entry of judgment. And the amendment of the judgment as to costs does not waive the right to appeal from the errors of the judgment, or give additional time to file a case. *Hood v. Hood*, 1 Monthly L. Bul. 85.

In case of trial by jury, the ten days begin to run from the entry of judgment, not from the verdict. And if a judgment is amended, from the date of such amendment. *Rafferty v. Byrnes*, 2 Monthly L. Bul. 56.

Under the *New York Code Proc.*, § 268, the service of a copy of the referee's report, and notice of filing, did not limit the time to serve a case. The ten days allowed for that purpose did not begin to run until the entry of the judgment and the notice thereof. And this practice was not changed by § 994 Code Civ. Proc. *French v. Powers*, 80 N. Y. 146.

So where the defendant served copies of an order dismissing a complaint, and of the judgment, but failed to serve a copy of the decision of the court, and the plaintiff appealed within thirty days, it was held error to dismiss the appeal because of failure to make and serve a case, since exceptions could be taken and the case made at any time within ten days after service of a copy of the decision, and written notice of the entry of judgment thereon, and such copy not having been served, the time for making the case had not expired. *Schwarz v. Wever*, 103 N. Y. 658.

If a party fails to make and serve a proposed case, within the time limited by the court on granting an extension of time, such failure is cured by subsequently allowing and settling the case. *Volmer v. Stagerman*, 25 Minn. 234.

The adverse party may waive an objection that the proposed case was served upon his attorneys too late, by receiving and admitting "due service" through such attorneys. *State v. Baxter*, 38 Minn. 137.

1. In *Kansas*, the district judge has no power to extend the time for making a case, after the time fixed by the statute and by the order of the court and judge has once elapsed. *Aetna Life Ins. Co. v. Koons*, 26 Kan. 215; *Cohen v. Trowbridge*, 6 Kan. 388;

Hodgden v. Comrs., 10 Kan. 637; *Couse v. Phelps*, 11 Kan. 455; *R. Co. v. Fort Scott*, 15 Kan. 478; *R. Co. v. Wingfield*, 16 Kan. 217; *Weeks v. Medler*, 18 Kan. 425; *Shumaker v. O'Brien*, 19 Kan. 476; *Hunt v. Spencer*, 20 Kan. 128; *Ingersoll v. Yates*, 21 Kan. 91; *Dodd v. Abram*, 27 Kan. 69; *Dyal v. Topeka*, 35 Kan. 63; *Security Investment Co. v. Love*, 43 Kan. 157. But as the statute does not prescribe the time within which the judge shall settle and sign the same, he has the power, after a case made and the amendments are properly served within the time fixed by the order of the court, to delay the settling and signing of the same, upon notice to the parties interested, for reasonable time to incorporate in the case made, omitted testimony in order that the case made, when finally signed, may in all matters speak the truth. *Hammerslough v. Hackett*, 30 Kan. 57; *Sloan v. Beebe*, 24 Kan. 347; *Building Assoc. v. Beebe*, 24 Kan. 363; *Meixell v. Kirkpatrick*, 25 Kan. 13; *Pierce v. Myers*, 28 Kan. 364; *Douglass v. Parker*, 32 Kan. 593; *Gerlach v. Skinner*, 34 Kan. 89.

The attorneys cannot, by agreement, extend the time for making a case, without an order from the court trying the cause. *Limerick v. Haun*, 44 Kan. 696.

A judge cannot make judicial orders while absent from his district. Therefore an order by which the time for serving and settling a case made is extended, is a nullity, and the case not having been settled during the time originally prescribed, the petition in error was dismissed. *Dunn v. Travis*, 45 Kan. 541.

The court may grant further time to prepare a case on appeal where it appears that, through mistake, a copy of the counter-case has been sent to the counsel of one defendant, supposing him also to be counsel for the other defendant. *Russell v. Koonce*, 104 N. Car. 237.

The rule that the time for making and serving a case cannot be extended after the time originally prescribed has elapsed, does not seem to apply in *New York*. "Where the time to make and serve a case has expired, the court,

IV. CONTENTS.—A case or statement on appeal, from a judgment rendered after trial of an issue of fact, or upon the report of a referee, must contain the facts found and the conclusions of law arrived at,¹ and the exceptions taken by the party

upon good cause shown, may, in its discretion, and upon such terms as justice requires, permit the party to serve a case *nunc pro tunc*." Bailey's New Trial and Appeal, citing *New York Code Civ. Proc.*, § 783; *Strong v. Hardenburgh*, 25 How. Pr. (N. Y.) 438. See *Sheldon v. Wood*, 14 How. Pr. (N. Y.) 18. Compare *Toll v. Thomas*, 18 How. Pr. (N. Y.) 324; *Haase v. New York Cent. R. Co.*, 14 How. Pr. (N. Y.) 430.

The same practice seems to prevail in *Minnesota*. See *Volmer v. Stagerman*, 25 Minn. 234, where it was held that if, after the expiration of the time limited by statute, where no judgment has been entered, leave to make a case is granted by the court, such leave operates as an extension.

Where only eight days were left in which to prepare and present a case for settlement, after receiving the stenographer's transcript, and the attorney's filed affidavits as to the impossibility of making a case within that time, and moved the court to allow an extension, which was denied, it was held, upon petition for mandamus to the judge, that it was the duty of the respondent to settle the case and to grant an extension of time for that purpose; that while it would have been the better practice to have applied to the court for an extension before the time fixed for settling the case had expired, still such expiration would not justify a refusal under the circumstances of the case. *Lake Shore, etc., R. Co. v. Chambers* (Mich. 1891), 50 N. W. Rep. 741. See *Cameron v. Calkins*, 43 Mich. 191; *Gram v. Wasey*, 45 Mich. 223; *Tilden v. Wayne Circuit Judge*, 44 Mich. 515.

By the *New York General Rule of Practice*, 32, it is provided that whenever it shall be necessary to make a case, it shall be made and served within ten days after the trial; or within ten days after notice of the decision of a motion for a new trial, if such motion be made and be not decided at the time of trial, if the trial were before a jury. Under this rule it is held that leave to make a case more than a year after trial cannot be granted as a matter of right. *Martin v. Platt*, 53 Hun (N. Y.) 42.

If the time within which an appel-

lant may serve notice of an appeal has expired, the time for making and serving a case cannot be extended. *Estate of Cluff*, 11 Civ. Proc. Rep. (N. Y.) 338.

In *De Lamater v. Havens*, 5 Dem. (N. Y.) 53, it is held that the surrogate court has no power to disregard, relax or extend the operation of any of the general rules of practice prescribed by the supreme court for the surrogate's government. And, therefore, further time to serve a case on appeal cannot be granted after the period within which such service may be made has fully elapsed.

An agreement that "plaintiff shall have thirty days in which to file his case and defendant thirty days thereafter," allows the defendant thirty days from the time when the case is served by the appellant. *Mitchell v. Haggard*, 105 N. Car. 173.

Under *California Code Civ. Proc.*, § 1054, which authorizes the court to extend the time for not more than thirty days without the consent of the other party, it is held that where the latter agrees to one extension beyond the thirty days, such consent does not empower a judge to grant another extension without again obtaining permission from the adverse party.

If the case of the appellant only is sent up to the supreme court, but it appears that such case was served on the appellee within the time prescribed and that he offered no amendments, it will be considered a case on appeal. *Booth v. Ratcliffe*, 107 N. Car. 106. See *State v. Carlton*, 107 N. Car. 956. But if the case does not show that it has been served on the appellee or his counsel, the supreme court will not consider it. *Peebles v. Brasswell*, 107 N. Car. 68.

1. *Westcott v. Thompson*, 16 N. Y. 613; *Matthews v. Mayor, etc.*, of N. Y., 14 Abb. Pr. (N. Y.) 209; *Hunt v. Bloomer*, 13 N. Y. 341; *Magie v. Baker*, 14 N. Y. 435; *Smith v. Grant*, 15 N. Y. 590; *Leffler v. Field*, 33 How. Pr. (N. Y.) 385; *Barrett v. Tewksbury*, 15 Cal. 354; *Reynolds v. Lawrence*, 15 Cal. 359; *Dobbins v. Dollarhide*, 15 Cal. 374; *Rogers v. Beard*, 20 How. Pr. (N. Y.) 282; *Laurence v. Fowler*, 20 How. Pr. (N. Y.) 407; *Tuxbury v. French*, 39 Mich. 190.

appealing,¹ together with so much of the evidence and other

The case must state every question raised by the appellant. *Rodman v. Harvey*, 102 N. Car. 1; *Probasco v. Cook*, 39 Mich. 714.

When there is but one question sought to be presented to the supreme court for review by a case made, the case itself or the certificate of the judge must show what that question is. *Morgan v. Chapple*, 10 Kan. 216; *Shumaker v. O'Brien*, 19 Kan. 478.

The case is not in a condition for review, where the special findings are only partial and incomplete without any general finding of facts; all the material facts established should appear in the finding. *Adams v. Champion*, 31 Mich. 233; *Zeller v. Harris*, 23 Mich. 286.

A mere recital showing the facts of a case at law, the nature of the judgment, and the fact that a party excepted to it, presents no question for the supreme court, if there are no findings and the judgment is good in form. *Chatterton v. Parrott*, 46 Mich. 432; *Hedges v. Hibbard*, 46 Mich. 551.

The decision of a judge, or the report of a referee, for the purpose of authorizing a judgment or forming a part of the record, need only state in general terms what the judgment is to be; but for the purpose of reviewing the judgment, the facts found and the conclusions of law must be stated separately, and must be contained in a case. The court of appeals cannot look for them elsewhere, and will dismiss the appeal on motion; or, if the cause is brought on for argument, will affirm the judgment, whatever may appear in the decision of the court or the report of the referee. *Otis v. Spencer*, 16 N. Y. 610.

If the findings contained in the case, as settled by the referee, differ from those contained in his report, the former will be deemed correct, as it is upon the case that exceptions stand. *Schwinger v. Raymond*, 83 N. Y. 192; 38 Am. Rep. 415. See *Tompkins v. Lee*, 59 N. Y. 662.

Where there appeared at the end of a settled case a supplemental statement of suggested assignments of error, which, though brought to the notice of the court, were not made a part of the case, the appellate court could not consider it. *Rodman v. Harvey*, 102 N. Car. 1.

1. *Hunt v. Bloomer*, 13 N. Y. 341;

Magie v. Baker, 14 N. Y. 435; *Smith v. Grant*, 15 N. Y. 590; *Leffler v. Field*, 33 How. Pr. (N. Y.) 385; *Lawrence v. Fowler*, 26 How. Pr. (N. Y.) 407; *Tremain v. Rider*, 13 How. Pr. (N. Y.) 148; *Westcott v. Thompson*, 16 N. Y. 613; *French v. Powers*, 80 N. Y. 146; *Wilkinson v. Earl*, 39 Mich. 626.

The court of appeals cannot give effect to a stipulation of counsel by which it is to be understood that an exception follows every objection made; and cannot review on appeal rulings to which no exceptions appear in the case. *Briggs v. Waldron*, 83 N. Y. 582. See *Carey v. Carey*, 4 Daly (N. Y.) 270.

An exception taken during the trial, by a party who finally succeeded, is improperly incorporated in the case unless its insertion can be justified by the existence of a special reason therefor. *Dabney v. Stevens*, 10 Abb. Pr. N. S. (N. Y.) 39. See *Clark v. House*, 61 Hun (N. Y.) 624; *Beach v. Cooke*, 28 N. Y. 568; 86 Am. Dec. 260.

In *Rodman v. Harvey*, 102 N. Car. 1, it is said: "Only the facts necessary to an intelligent understanding of the questions of law intended to be presented, should be stated in the proper connection. Of course 'the written instructions, signed by the judge, and written requests for instructions, signed by the counsel, and the written exceptions, shall be deemed conclusive as to what such instructions, requests and exceptions were,' because the statute so declares; and these, when they exist, should be made a part of the case settled. They constitute certain evidence of what they embrace. The statement of the case settled should state fairly every question made by the appellant at the proper time."

The report of a referee, and the exceptions, are necessarily separate instruments originally; but the case is to be single and is to be made up as though the findings and exceptions were had on the trial of the cause, the exceptions in their proper order following the findings. *Rogers v. Beard*, 20 How. Pr. (N. Y.) 282.

If the record in ejectment shows no findings of facts, nor exceptions to the rulings of the judge; but merely recites that the parties proved certain things, and that the judge decided for the plaintiff, and rendered judgment in his favor that he recover of defendant the

proceedings had upon the trial below as is material to the questions raised by the exceptions.¹

possession of the premises, there is no case made for review. *Wertin v. Crocker*, 47 Mich. 642.

1. *Leffler v. Field*, 33 How. Pr. (N. Y.) 385; *Bissell v. Hamlin*, 20 N. Y. 519; *Marckwold v. Oceanic Steam Nav. Co.*, 8 Hun (N. Y.) 547; *Durham v. Richmond, etc., R. Co.*, 108 N. Car. 399. See also *Missouri, etc., Transp. Co. v. Palmer*, 19 Kan. 471, where it was said that a case made must be complete and perfect when settled and signed by the judge. To be available, on review in error in the supreme court, the original case made must be attached to, and filed with, the petition in error; and it must contain a statement of so much of the proceedings and evidence or other matters of the lower court as may be necessary to present the errors complained of.

Evidence.—In *Muscott v. Hanna*, 26 Kan. 770, the case made contained a statement, to the effect that certain witnesses were sworn as witnesses in behalf of the plaintiff, relative to the value of the services of plaintiff in certain specified actions; and gave testimony tending to prove that such services were worth from twenty to thirty-five dollars; then followed another statement that "the defendant here rested his defense, and the evidence on both sides was here closed, and the foregoing is all the evidence given by both parties on the trial of this action in the district court." It was held that such a case showed that it sufficiently contained the evidence introduced on the trial. In delivering the opinion, *Horton, C. J.*, said: "After a case made is settled and signed by the judge, it is no longer the mere writing or language of counsel, but is the record made by the judge. The statute permits it to contain so much of the proceedings and evidence as may be necessary to present the errors complained of, and where several witnesses testified as to the value of services, and there is no contradictory evidence, it would seem unnecessary to set forth in detail all their testimony, but a general statement as to its purport will be sufficient when there is no error alleged concerning its admission. This course, it seems, was adopted in this case, and as the substance of such testimony was set forth, we do not

think it contradicts the statement in the record that all the testimony is embraced therein."

Where a case made recites that the same contains a substantial synopsis of the evidence only; and it is claimed that the evidence does not sustain the findings of fact by the court, it has been held that the record was not sufficient to entitle the plaintiff to have the evidence reviewed in the supreme court. *Barker v. Barker*, 43 Kan. 91. See *Walker v. Braden*, 34 Kan. 660, where the court said: "We are disposed to encourage a reduction of the record, and the omission from the case made of all matter not necessary to the review of the questions raised. If the questions which it was desired should be decided here had been briefly and clearly stated, and the judge had certified that all, or substantially all, the testimony relative to those questions was contained in the case made, it would be sufficient."

When it is claimed that the evidence is not sufficient to support the verdict, the statement on appeal should specify the particulars in which such evidence is insufficient, and the testimony introduced should be confined to those points alone. All evidence not bearing upon the objection specified is irrelevant. *Harper v. Minor*, 27 Cal. 107.

Documentary evidence used at the trial, and referred to in the statement, is deemed a part thereof. *Carman v. Pultz*, 21 N. Y. 547. Such documentary evidence should be inserted in, attached to or so referred to as to be made a part of, such case; if they are included in the return on appeal, they will be stricken out on motion. *Acker Post No. 21 v. Carver*, 23 Minn. 567. See *Robinson v. Bartlett*, 11 Minn. 410; *Thompson v. Howe*, 21 Minn. 98.

In the statement of a case on appeal, it is not necessary to copy in full, deeds and other documentary evidence introduced to show title, and not objected to at the time as insufficient. If the substance of such documents is stated, it is sufficient. *Albion Consolidated Min. Co. v. Richmond Min. Co.*, 19 Nev. 225.

Exhibits used in evidence should not be inserted in the settled case when it is clear that they are not material to

If the case made is to contain all the evidence introduced upon the trial, as when it is intended to move for a new trial on the facts, or to raise the question that the findings are contrary to the evidence, a statement to that effect must be contained in the case itself, and not in the certificate of the judge who settled it.¹

ment or to render himself in execution." Archbold Cr. Pr. & Pl. (8th ed.) 611.

By *South Carolina* Sup. Ct. Rule No. 5, it is provided that if the case is voluminous, an index to the pleadings, exhibits, depositions, and other matters shall be added. It is held that such index is simply a matter of convenience, and its absence is not ground for dismissal of the appeal. Neither is the fact that the case was served in several distinct parts ground for such dismissal. *Archer v. Long* (S. Car. 1891), 14 S. E. Rep. 24.

The order of the circuit judge settling the case, is not made a part thereof by *South Carolina* Rule of Court No. 5, and the court cannot direct such order to be printed in the case. *Watson v. Neal* (S. Car. 1891), 14 S. E. Rep. 289. See *Archer v. Long* (S. Car. 1891), 14 S. E. Rep. 24.

The *South Carolina* Code, § 345, provides that where counsel for the respective parties agree on a statement of the case for the supreme court, no return or other paper from the lower court is necessary; and rule 2 of the supreme court declares that such agreed statement with the returns shall constitute the "return." Therefore the mere fact that such statement does not specifically purport to be the return will not deprive it of that character. *McNair v. Craig*, 34 S. Car. 9. See *Nabors v. Latimer*, 30 S. Car. 607, which, if apparently, is not really, in conflict with the foregoing case.

If the charge of a judge to the jury is not excepted to, it should not be inserted in the case. *Shook v. O'Neil*, 1 Month. L. Bul. 38; *Bulkeley v. Keteltas*, 4 Sandf. (N. Y.) 450.

1. *Eddy v. Weaver*, 37 Kan. 540; *Burlington, etc., R. Co. v. Grimes*, 38 Kan. 241; *Hill v. First Nat. Bank*, 42 Kan. 364; *State v. Harper Co.*, 43 Kan. 195; *Western Home Ins. Co. v. Hogue*, 41 Kan. 524; *Hoopes v. Buford, etc., Implement Co.*, 45 Kan. 549; *Newby v. Myers*, 44 Kan. 477; *Cox v. James*, 45 N. Y. 557; *Spence v. Chambers*, 39 Hun (N. Y.) 193; *Cheney v. New York Cent., etc., R. Co.*, 16 Hun (N. Y.) 415; *People v. Bradner*, 44 Hun

(N. Y.) 233; *Graff v. Ross*, 47 Hun (N. Y.) 152; *Jeffers v. Bantley*, 47 Hun (N. Y.) 90; *Murphy v. Board of Education*, 53 Hun (N. Y.) 171; *Henry v. Hinman*, 21 Minn. 378; *Downer v. Foulhuber*, 19 Minn. 179; *White Pine Co. v. Herrick*, 19 Nev. 34.

The case made must, upon its face, affirmatively show that it contains all the evidence, or the questions presented will not be reviewed. *Limerick v. Gwinn*, 44 Kan. 694. Or, at least, it should be shown by something which has received the approval of the judges as to its correctness. *Winstead v. Standeford*, 21 Kan. 270. See *Home Ins. Co. v. Wood*, 47 Kan. 521. And unless the fact appears affirmatively, it will be presumed by the court that additional evidence sufficient to sustain the findings was given, which does not appear. *Griffiths v. Phelps*, 21 N. Y. W'kly Dig. 390; *Porter v. Smith*, 35 Hun (N. Y.) 118; 7 Civ. Pro. Rep. (N. Y.) 195; *Howland v. Howland*, 20 Hun (N. Y.) 472; *Perrine v. Hotchkiss*, 59 N. Y. 649. See *Porter v. Smith*, 107 N. Y. 531; *Aldredge v. Aldredge*, 120 N. Y. 616.

But where a party claims that a particular finding of fact is without any evidence to support it, and has excepted thereto, presenting thereby only a question of law for review, it need not be stated in the case that all the evidence bearing on such finding is set forth therein. In that case, the distinction is thus put: "First, in a case where the appellant intends to raise the question on appeal that any finding of fact is against the weight of evidence, then it must appear by the case that all the evidence bearing on the finding of fact sought to be reviewed is set forth therein. Second, if it is claimed by the appellant that a particular finding is without any evidence to support it and is excepted to as is provided in § 993 of the Code Civ. Proc., and thus presenting a question of law only, then it is unnecessary that any statement that all the evidence bearing on the finding is set forth in the case." This distinction rests upon the ground that in the first case exceptions cannot be taken,

V. AMENDMENTS BY ADVERSE PARTY.—The first step towards a final settlement of the case, as proposed by the party appealing, after it has been served upon his opponent, is the suggestion by the latter of amendments to such parts thereof as are defective by reason of a failure to set forth correctly and truly the evidence, or other matters necessary; or because it contains what it should not, or omits what it should contain;¹ and this must be

while in the latter an exception may be taken. Under the old practice in *New York*, this distinction was not made. *Perkins v. Hill*, 56 N. Y. 89.

When the first recital in the case made was to the effect that the case included all the evidence offered by each party before they rested the case, necessarily excluding that which was afterwards introduced; and the plaintiff in error, evidently deeming this insufficient, attempted to supplement it by the certificate of the official stenographer, and later by another certificate of the judge who tried the cause, it was held that the record failed to properly show that all the evidence was preserved; and therefore the supreme court could not say that the verdict was without support. *Ryan v. Madden*, 46 Kan. 245.

When a settled case does not purport to contain all the evidence, an exception is not available because a question asked was allowed to be answered when the question assumes certain facts that have not been proved. *St. Paul, etc., R. Co. v. Murphy*, 19 Minn. 500.

In *Clark v. House*, 61 Hun (N. Y.) 624, it was held that where the case contained the following statement: "The foregoing is all the evidence and other proceedings had upon the trial of this action, which are in any way material to the questions to be raised by this appeal," such statement was sufficient to bring up questions of fact for review. In delivering the opinion of the court, Lewis, J., said: "It has been held in a number of cases, that a certificate that all the evidence is in, that bears upon the questions to be raised, is sufficient to raise questions of fact for the appellate court. It is claimed by the respondent, that the statement that it contains all the material evidence, leaves it with the appellant to say what is, or what is not, material evidence. It is difficult to distinguish between a statement that a case contains all the evidence bearing upon the questions to be reviewed, and one that it contains all the material evidence. The appellant, in proposing his

case, stated that it contained all the testimony in any way material to the questions he wished to raise. If he omitted any testimony which the respondent thought should go into the case, he was at liberty to ask its insertion; and when the case was settled, if it contained all the testimony in any way material to the questions to be raised, it must be held, we think, that the questions of fact are before the appellate court for review."

It is sufficiently shown that the case contains all of the evidence, if a certificate of the official reporter to that effect is made a part of the settled case by being left in it when settled. *Coleman v. Reiersen*, 36 Minn. 222.

1. If no proceedings are taken for settlement, but the appellant, without notice to the other party, files with the appeal papers a certified copy of the judge's minutes of the evidence taken on the trial, such copy cannot be treated as a case made under the statute. *Wright v. Dudley*, 8 Mich. 74.

So in *Weeks v. Medler*, 18 Kan. 425, it was held that if there was no notice to, or suggestion of amendments or appearance by, the opposite party, before the settling and signing by the trial judge, the case made is improperly settled, and presents no questions for review to the supreme court.

If a proposed case is so inaccurate as to render it practically impossible to correct it, without striking out the whole or nearly the whole of it, the court may allow a new case to be substituted instead of specified amendments. *Tyng v. Marsh*, 51 How. Pr. (N. Y.) 465. But ordinarily such practice is irregular and will not be allowed. *Stuart v. Binsse*, 4 Bosw. (N. Y.) 616.

In *Morse v. Smith*, 105 N. Car. 322; 18 Am. St. Rep. 983, it was held a sufficient compliance with the *North Carolina Code*, § 550, which provides that the appellee shall return the case served on him "with his approval or amendments endorsed or attached," if he makes his objections to the case by asking that a statement prepared by

done within the time prescribed by statute, or by a rule or order of court, else he will be presumed to have agreed to the case as proposed.¹

VI. SETTLEMENT—1. In General.—The case having been made by the appellant, and served upon his opponent, and amendments suggested by the latter, must be settled by the trial judge, if the appellant cannot agree to the proposed amendments.²

him be substituted. See *State v. Gooch*, 94 N. Car. 982.

When the judge sustains exceptions filed by the appellee to the appellant's statement of case on appeal, and directs the case thus modified to be redrafted and sent up, it is the duty of the appellant to have this done. When he fails to do this, and merely sends up his statement of case, together with appellee's exceptions and the order of the judge, there is no "case settled on appeal;" and the court in its discretion (if there are no errors on the face of the record proper) may on motion of the appellee, or *ex mero motu*, either affirm the judgment or remand the case. *Mitchell v. Tedder*, 107 N. Car. 358.

Before the expiration of the time allowed by statute for proposing amendments to a case, an order to show cause why such case should not be settled does not deprive the party upon whom it is served of the right to propose his amendments thereto. *Phoenix v. Gardner*, 13 Minn. 294.

If the case of the appellant only is sent up to the supreme court, but it appears that such case was served on the appellee within the time prescribed, and that he offered no amendments, it will be considered the case on appeal. *Booth v. Ratcliffe*, 107 N. Car. 6. See *State v. Carlton*, 107 N. Car. 956. But if the case does not show that it has been served on the appellee or his counsel, the supreme court will not consider it. *Peebles v. Braswell*, 107 N. Car. 68.

How Made.—The settled practice in *New York* requires that the lines of the proposed case be numbered, and that the amendments be proposed in detail; they should be written on the proposed case, or on a separate paper, with reference to the line and page of the original; and if on separate paper, each place and passage to which amendments are proposed should be distinctly marked on the original case before being submitted for settlement. And further, the party proposing a case shall himself examine the amendments and mark upon each his assent or

objection. *Stuart v. Binsse*, 4 Bosw. (N. Y.) 616. See *Milward v. Hallett*, Col. & C. Cas. (N. Y.) 261.

Where the amendments are not put in at their proper places, but are attached to the end of the statement, with reference to the pages and lines of the original draft, which has been changed in preparing the copy for the appellate court, they will not be considered. *Gallatin Canal Co. v. Lay*, 10 Mont. 528.

1. *Connor v. Morris*, 23 Cal. 447.

Where a statute allows three days for the suggestion of amendments, after the time fixed for making and serving a case, an extension of the time prescribed for making and serving does not deprive the party of the right to three days for suggesting amendments; and the three days do not commence to run from the date of the actual service of the case, but from the expiration of the period of extension. Thus, where thirty days were allowed to make and serve a case, the amendments could be suggested within thirty-three days. *Missouri, etc., R. Co. v. Fort Scott*, 15 Kan. 435.

2. To the point that there must be a settlement, see *Becker v. Yellowstone Co.*, 10 Mont. 87.

In *New York*, an omission to have the case settled and signed cannot be complained of in the court of appeals, if the general term received and acted upon it. *Reese v. Boese*, 92 N. Y. 632.

A case made after judgment for review by the supreme court must show upon its face that it is settled and signed by the trial judge for that purpose. *Gard v. Stevens*, 12 Mich. 9.

Where the appellants served their case on appeal, and the appellee his counter-case or amendments, in the proper time, but before the case was settled the judge died, for which reason the appellants moved for a new trial, a motion of the appellee to withdraw his counter-case, and leave the appellant's statement as the case on appeal, was allowed. *Drake v. Connelly*, 107 N. Car. 463.

2. Time.—The time for settling and signing a case, or statement on appeal, is usually fixed by a statute, or by a rule or order of the court; and is subject to an extension for good cause shown.¹

Where a case is made for the supreme court, and served upon the defendant within the proper time, and properly settled and signed by the judge, bearing the attestation of the clerk and filed by him, the presumption is, in the absence of anything to the contrary, that all the requirements of the law were complied with upon the settlement. *Douglass v. Parker*, 32 Kan. 593.

An allegation upon appeal, that the court omitted to settle a statement which was submitted to it, cannot be taken as a substitute for the statement, nor does it constitute a reason for reversing the judgment. *Hoadley v. Crow*, 22 Cal. 265.

Where a statement which was filed in the lower court, on motion for a new trial, was neither agreed to by counsel nor settled by the judge who tried the cause, it has not sufficient authentication to constitute any part of the record which the supreme court can notice. *Doyle v. Seawall*, 12 Cal. 425.

In *Johnson v. Whitlock*, 13 N. Y. 344, is found the following brief summary of proceedings on review as stated by Comstock, J.: "The procedure for a review will be simple, and entirely homogeneous in both trials by the court and by referees, and this is what the code evidently intended. For the sake of greater distinctness, it may be summed up thus: After trial the first step will be to except, within the time limited, upon the legal points and propositions involved in the final decision ruled against the party intending to appeal. The next proceeding will be to prepare a case and have it settled by the judge or referees, if not agreed on. This will contain the evidence bearing upon any conclusion of fact intended to be reviewed; also the exceptions taken during the trial, and those made after the trial, to the final decision. The facts found and conclusions of law must be separately stated. This statement, like the other parts of the case, must be prepared by the party who appeals, and of course it will be subject to amendment and settlement. On the case so prepared and settled, the review is to be had at the general term. The exceptions separately served after judgment

should not appear at all, except as they are settled and stated in the case."

In *Mower v. Hanford*, 6 Minn. 535, it was held that if a case not properly settled was made part of the record on appeal to the supreme court, the appeal would not, for that cause, be dismissed; but the court would strike the case from the record.

Where a case filed in the supreme court did not conclusively show on its face that it was intended for a case made after judgment, and the trial judge certified that in signing it he did not suppose he was settling a case under the statute, and that the one signed did not set forth the whole facts as they existed, it was held that the papers should be sent back to the trial court for such action as that court should deem proper. *Farrand v. Bentley*, 6 Mich. 281.

Where an order was made below for taking proof, and the evidence put in at the hearing was documentary by stipulation, no settlement of the case is necessary to enable the supreme court to consider the evidence. *Stone v. Welling*, 14 Mich. 514.

Exceptions to the refusal of the court to find certain facts, at the request of one of the attorneys, were served and incorporated in the case on appeal, but no notice of such exceptions was filed in the clerk's office. It was held proper for the judge who settled the case to strike out the exceptions, together with the requests to which they referred. *Young v. Young*, 18 N. Y. Supp. 116; reversed in 30 N. E. Rep. 1012.

1. *Minnesota Laws*, 1870, ch. 74, provide for the serving of a proposed case within twenty days after trial, for amendments thereto within ten days thereafter, and for settlement within fifteen days after service of amendments; and further, that "if not presented within the time aforesaid, or such further time as may be stipulated or granted, the same shall be deemed abandoned." Where the case and amendments were served within the proper time, but nothing more was done for three or four months, when an order was made to show cause why the case should not be settled, it was held that the effect of such order was to grant the

3. Notice.—The proposed amendments having been served upon the party making the case, it becomes his duty to notify the adverse party that the case and amendments will be submitted at a certain time and place for settlement;¹ a failure to give such notice may be deemed an acceptance of the amendments as proposed, and the case may become settled by lapse of time.²

4. Before Whom Made.—The case must be settled before the judge before whom the cause was heard;³ and this even though

"further" time as mentioned in the statute; and the case was not to be deemed abandoned. *Cook v. Finch*, 19 Minn. 407.

In *Minnesota*, the time for settling a case may be extended by stipulation of counsel. *State v. Baxter*, 38 Minn. 137.

The district court of *Kansas* may make a rule as to the time at which cases made must be noticed for settlement by the court, and failure to comply therewith, if reasonable, is sufficient ground for refusal by the court to settle and sign. And where such rule provides for ten days after the service of amendments, and that, if the case is not noticed for settlement in that time, the party preparing it "shall be deemed to have abandoned his case, and the same shall not thereafter be settled or allowed," it is held to apply to all cases made, whether any extension of time has been granted for making or not. *Jones v. Menefee*, 28 Kan. 437.

The ruling in the case of *Aetna L. Ins. Co. v. Koons*, 26 Kan. 215, that if the case is not made within the time prescribed by statute, and no extension is granted, the court is powerless to act, is based on the ground that the statute limits the time for *making and serving*. No such limitation exists in regard to settling and signing, and hence the court may postpone such action, and cause it to be done upon reasonable notice at a later time. *Hammerslough v. Hackett*, 30 Kan. 57. But still, the party making a case, who ignores an order fixing a time for settling and signing, does so at the peril of a refusal of the court to do so at a later time. *Hill v. First Nat. Bank*, 42 Kan. 364.

The *North Carolina* code, § 550, provides that after the appellee has duly filed his objections to the appellant's case, the latter shall "immediately" request the judge to determine upon a time for settling the case. Under this statute it was held that where, because of an unexplained delay of seven

months on the part of the appellant in applying to the judge to settle the case, the latter could not remember what had happened at the trial, the supreme court, on appeal, will take the appellee's case. *Simmons v. Andrews*, 106 N. Car. 201.

1. *Wright v. Dudley*, 8 Mich. 74; *Penter v. Staight*, 1 Wash. 365; *U. S. v. Lone Fisherman*, 3 Wash. Ter. 316; *Caton v. Switzler*, 3 Wash. Ter. 242; *Snyder v. Kelso* (Wash. 1891), 28 Pac. Rep. 335; *Enos v. Wilcox* (Wash. 1891), 28 Pac. Rep. 364.

Where no amendments are offered to a statement on appeal, it may be settled without notice to the respondent, but it must be authenticated, either by the judge or by the parties. *Kavanagh v. Maus*, 28 Cal. 261.

In *Kenyon v. Knipe*, 3 Wash. Ter. 243, it was held that the trial court had no power to extend the time for the service of notice for the settlement required by the *Washington* Appeal Act of 1883. See *Snyder v. Kelso* (Wash. 1891), 28 Pac. Rep. 335.

A notice to the appellee fixing Sunday as the day for settling the statement was void, and the judge had no authority to order an extension of the time for settling, by reason of such notice. *Cadwell v. First Nat. Bank* (Wash. 1891), 28 Pac. Rep. 365.

A case made for the supreme court was held valid, although showing upon its face that it was settled and signed five days before the time therefor, and not showing notice to the opposite party—there being satisfactory evidence that his attorney of record was present when it was settled and signed, and made no objection thereto. *Russell v. Anthony*, 21 Kan. 450; 30 Am. Rep. 436.

2. *Whiting v. Kimball*, 6 Bosw. (N. Y.) 690; *Ingersoll v. Smith*, 62 How. Pr. (N. Y.) 474.

3. *Visher v. Webster*, 13 Cal. 58; *Hodgden v. Ellsworth Co.*, 10 Kan. 637;

his term of office may have expired before the time fixed for settlement.¹ Mandamus may issue to compel such settlement.²

5. Proceedings.—The proceedings, upon the settlement of a case, depend largely on the rules of court where such settlement is made. The general duty of the judge or other officer is to determine between the proposed case and amendments, striking

People v. Bradner, 44 Hun (N. Y.) 233; *Johnson v. Whitlock*, 13 N. Y. 344. See *Fielden v. Lahens*, 14 Abb. Pr. (N. Y.) 48, where it was held that the act of settling a case is judicial and not ministerial, and that a party has a right to require the presence of all the referees, a settlement by two only out of three being irregular.

The case must be settled by the judge who tried the cause, although the county in the meantime has been changed to another judicial district. *Thurber v. Ryan*, 12 Kan. 453.

An official stenographer has no power to determine whether a case made contains all the evidence, or to settle the truthfulness of the statements made therein. *Burlington, etc., R. Co. v. Grimes*, 38 Kan. 241. See *Ryan v. Madden*, 46 Kan. 245.

In *Louisiana*, it is held that it is only when the opposite party refuses to join in making out a statement, or when the parties cannot agree, that the party appealing can call upon the court for a statement. *Castaing v. Stone*, 4 La. Ann. 18; *Lucas v. Bell*, 10 La. Ann. 150.

Interest.—Where after the making of a report by a referee, in favor of the plaintiff, the latter executed an agreement, as a consideration of its delivery, giving to the referee a first lien, for his fees, "upon the judgment and claim of the plaintiff," which was to be paid out of the first moneys collected upon such judgment, and both plaintiff and referee knew that an appeal would be taken, it was held that the referee was disqualified from settling the case. *Leonard v. Mulry*, 93 N. Y. 392.

Judge Pro Tem.—A judge *pro tem.* may settle a case after the expiration of the term of court at which the cause was tried, and over which he presided, if it is within the time prescribed by law, or by a rule or order of the court. *Missouri, etc., R. Co. v. Fort Scott*, 15 Kan. 435; *Garven v. Jennerson*, 20 Kan. 371.

1. *Gruble v. Wood*, 27 Kan. 535; *Thurber v. Ryan*, 12 Kan. 453; *Johnson v. Higgins*, 53 Conn. 236; *Harris*

v. Morange, 1 N. Y. City Ct. 221; *Harris v. Whitney*, 6 How. Pr. (N. Y.) 175; *People v. Peabody*, 6 Abb. Pr. (N. Y.) 228; *Conover v. Devlin*, 15 How. Pr. (N. Y.) 472. See *Taylor v. Mason*, 28 Kan. 381. But in *Washington*, under Acts 1890, p. 324, which provides for a settlement by "the court or judge who tried the cause," it has been held that the trial judge cannot settle a case after the expiration of his term of office. *Faulconer v. Warner*, 2 Wash. 525; *Enos v. Wilcox* (Wash. 1891), 28 Pac. Rep. 364; *Gunderson v. Cochrane* (Wash. 1892), 28 Pac. Rep. 1105.

Kansas Code, § 449, provides that "in all cases heretofore or hereafter tried, when the term of office of a trial judge shall have expired, or may hereafter expire during the time fixed for making or settling and signing a case, it shall be his duty to certify, sign, and settle the case in all respects as if his term had not expired." Under this statute, when an action is tried before a district judge and time is given to make a case, which time expires before the expiration of the term of office of the judge, and no time is fixed by him for settling and signing, such judge cannot, after the expiration of his term of office, settle and sign the case. *St. Louis, etc., R. Co. v. Corser*, 31 Kan. 705.

If the trial judge die before settlement, the case may be settled by any other judge of the court. *Hasard v. Conklin*, 1 N. Y. City Ct. 220; *Morse v. Evans*, 6 How. Pr. (N. Y.) 445; *Ireland v. Grant*, 34 How. Pr. (N. Y.) 132.

2. *In re Tweed*, 47 How. Pr. (N. Y.) 162. See *Lake Shore, etc., R. Co. v. Chambers* (Mich. 1891), 50 N. W. Rep. 741. In *People v. Baker*, 14 Abb. Pr. (N. Y.) 19, it is said: "It [a mandamus] has been held to be the proper remedy to compel the settlement of a case or bill of exceptions, also to amend the same according to facts. So a referee may be compelled by mandamus to settle a case and exceptions, and to settle it correctly. But before the

out all unnecessary matter, and adding what has been improperly omitted.¹ Where there is any dispute as to the testimony, the notes of the official stenographer will be referred to;² and after the whole has been adjusted, the judge's signature must be affixed to the case.³ In addition, there must be annexed the certificate of the judge, to the effect that it is a true and correct statement of the evidence and such other proceedings as have been incorporated in the case;⁴ and the whole must bear the attestation

writ will be issued to compel the settlement in a particular way, it must be made to appear that it will then be according to the facts."

1. *Missouri River, etc., R. Co. v. Wilson*, 10 Kan. 105.

In *Canzi v. Conner*, 4 Abb. N. Cas. (N. Y.) 148, it is said: "The settlement of a case is left very much to the discretion of the judge presiding at the trial." Where an exhibit forms a part of the case, the trial judge cannot arbitrarily strike out words which form a part thereof. *Healey v. Terry*, 7 N. Y. Supp. 321.

In *Salina Bldg., etc., Assoc. v. Beebe*, 24 Kan. 363, it was held that the same rules must necessarily apply to the power and duty of the trial judge in settling and signing a case made, so far as accuracy is concerned, as to bills of exception. And where a petition asks that a new trial be granted, or that the original case made be reformed, because it was settled and signed by the trial judge, under a mistake and misapprehension of the testimony given on the trial, such petition does not state facts sufficient to constitute a cause of action.

On the settlement of a case, the appellant's counsel made affidavit that a certain exception was taken at the trial, but it did not appear on the judge's minutes or the stenographer's notes. It was held that an amendment by the appellee, striking it out, was properly allowed. *Canzi v. Conner*, 4 Abb. N. Cas. (N. Y.) 148.

2. *Nelson v. New York Cent., etc., R. Co.*, 1 Monthly L. Bul. 15.

In *Petrie v. Columbia, etc., R. Co.*, 27 S. Car. 63, it was held that the judge, in settling the case for appeal, may state his rulings and the facts bearing upon the exceptions taken, even as to matters not disputed by the opposing counsel; notwithstanding that such statement appears to conflict with the stenographer's notes taken on the trial.

3. *McNish v. Bowers*, 30 Hun (N. Y.) 214; *Reese v. Boese*, 92 N. Y. 632; *Harris v. Van Wart*, 96 N. Y. 642; *Snead v. Tietjen* (Arizona 1890), 24 Pac. Rep. 324; *Stuefen v. Jefferis*, 9 Mont. 66. But where an order, signed by the judge who tried the cause, provided that the case as amended stand as the settled case in the action, such settlement and allowance of the case was held sufficient, although the case itself was not signed. *Volmer v. Stagerman*, 25 Minn. 234.

Where the case is signed by the judge, and purports to have been settled before him, it will be presumed to have been properly settled. *Sallee v. Ireland*, 9 Mich. 154.

4. *Hanson v. Tompkins*, 2 Wash. 508; *Madigan v. West Coast F. & M. Ins. Co.* (Wash. 1892), 28 Pac. Rep. 1027; *Zeukner v. Northern Pac. R. Co.*, 3 Wash. Ter. 60; *McClesky v. State* (Tex. 1890), 13 S. W. Rep. 997; *Lynn v. State*, 28 Tex. App. 515; *Guyon v. Rooney*, 53 Hun (N. Y.) 633.

A stipulation of counsel will not do away with the necessity for such authentication. *Hodgden v. Ellsworth Co.*, 10 Kan. 637.

But the statement on appeal will not be stricken out where the authentication of the judge was omitted by mistake, if the clerk obtained such authentication a short time afterwards, but failed to attach it to the statement for several months, neither party having been prejudiced by the omission. *Marks v. Culmer* (Utah 1890), 23 Pac. Rep. 757.

Where a case made was settled and signed by the judge of the district court, with his certificate, to the effect that it contained a true and correct statement of all the pleadings, motions, orders, evidence, findings, etc., had in the cause, but no evidence appeared in the case made preceding his certificate and the attestation of the clerk, although attached to the case was a paper purporting to contain the

of the clerk and the seal of the court. But the certificate of the clerk is not necessary.¹

VII. CORRECTING; SUPPLEMENTING; RESETTLING.—While the judge before whom the cause was tried, may, on his own motion, before signing the case, make such alterations, additions, and erasures as he thinks necessary,² neither he nor the appellate court has the power, as a general rule, to amend or supplement

evidence produced on the trial, which paper was certified by the official stenographer, and not otherwise identified or authenticated, it was held that such evidence was no part of the case made, and that the alleged errors could not be reviewed. *Mullony v. Humes*, 47 Kan. 99.

The authentication of a referee of a case made is conclusive upon the court, which has no authority to change his certificate. But if a mistake in engrossment is shown, it should be sent back to such referee for correction. *Taylor v. Parker*, 18 Minn. 79.

The certificate of a judge that "the foregoing statement on motion for a new trial has been settled and allowed by me," includes and properly authenticates certain exhibits used in evidence and referred to in the body of the statement, although the certificate is attached to the body thereof, and precedes the exhibits, which are set out in the appendix of such statement. *Sharon v. Sharon*, 79 Cal. 633.

Where the certificate of the trial judge commenced as follows, "I don't think as it would be just to say that this paper is settled and signed for what appears on its face," and then proceeds to state certain facts that transpired in the case; says that the testimony as prepared and presented to him is not true and nowhere allows the record as presented as a case made, it was held that it was not properly authenticated; nor did the addition by the clerk of what is certified by him to be the testimony, make it a case. The certificate of the judge must show affirmatively that he has settled it. *Allen v. Krueger*, 25 Kan. 75.

Where a judge certifies that a statement on appeal is correct according to his recollection, the statement is not sufficiently authenticated. *Van Pelt v. Littler*, 14 Cal. 194. But a certificate that it is substantially correct is sufficient. *Battersby v. Abbott*, 9 Cal. 566.

Washington Laws 1883, p. 59, § 4, provides that the statement on ap-

peal shall contain the "material facts of the case." Under this act, where the certificate of the judge set forth that the statement on appeal contained all the material facts relative to the execution of the bond sued on, such certificate was held not sufficient. *King Co. v. Hill*, 1 Wash. 63.

Certificate of Trial Judge Impeachable Only for Fraud.—If the certificate of the trial judge to a case made is shown to be intentionally false and fraudulently prepared, the supreme court should wholly disregard it and order a new trial. *Missouri, etc., R. Co. v. Fort Scott*, 15 Kan. 435.

Unless the certificate is shown to be false and fraudulently made, the decision of the trial judge that a case made for his signature is untrue, is conclusive and final. *Salina Bldg., etc., Assoc. v. Beebe*, 24 Kan. 363.

1. No certificate of the clerk of the court is required to a case made; his attestation and the seal of the court are sufficient. *Muscott v. Hanna*, 26 Kan. 770.

When what purports to be a case made is signed by the judge who tried the cause, but is not attested by the clerk, and has not the seal of the court attached, the same is not properly authenticated and the case should be dismissed. *Karr v. Hudson*, 19 Kan. 474. See *Limerick v. Gwinn*, 44 Kan. 694; *Limerick v. Haun*, 44 Kan. 696; *Linton v. Frazier*, 29 Kan. 20. But when, under such circumstances, a motion is made in the supreme court to dismiss the case and petition in error for that reason, and then the plaintiff in error, on leave, withdraws the case temporarily and presents it to the clerk of the district court, who duly attests and authenticates it with his signature and the seal of the court, it is held that the motion to dismiss the case should be overruled. *Pierce v. Meyers*, 28 Kan. 364.

2. *Sloan v. Beebe*, 24 Kan. 343; *Salina Bldg., etc., Assoc. v. Beebe*, 24 Kan. 363; and see *supra*, this title, *Amendments; Settlement*.

a case made after it has been signed and certified.¹ If the case as sent up appears not to be properly settled, or is defective by reason of the omission of material parts of the proceedings, it may, on motion, be sent back for resettlement to the court below.²

1. *Snively v. Abbott Buggy Co.*, 36 Kan. 106; *Lewis v. Linscott*, 38 Kan. 379; *Graham v. Shaw*, 37 Kan. 734; *Carter v. Beckwith*, 82 N. Y. 83; *Porter v. Parks*, 2 Hun (N. Y.) 654.

The case made, after being settled and signed by the judge as required by statute, cannot be perfected and supplemented in the supreme court by attaching to it certified copies of the pleadings and other proceedings had in the lower court which are neither referred to nor incorporated in the case. *Missouri, etc., Transp. Co. v. Palmer*, 19 Kan. 471; *Coin v. Trowbridge*, 6 Kan. 338; *Hodgden v. Comrs.*, 10 Kan. 638; *Sullivan v. Leavenworth, etc.*, R. Co., 17 Kan. 503; *Thompson v. Williams*, 30 Kan. 114; *Fort Scott v. Deeds*, 36 Kan. 621.

More than six months after the case made had been settled and signed by the judge, and attested and filed by the clerk, it was opened, and what purported to be the copy of a deed was inserted and attached to the plaintiff's petition. It was claimed by the plaintiff that at the time the case was made, the exhibit in some manner had become detached from the petition and could not be found, and it was therefore not copied; but that it being afterwards found, it was copied and attached to the record. It was held that such action was unauthorized and improper, that after the settling, signing, attesting, and filing, even the judge of the court is powerless to amend or change the case, much less any other officer or party; and that having been materially changed, it was not entitled to consideration. *Hill v. First Nat. Bank*, 42 Kan. 364.

Where a motion is filed in the supreme court to have a case made returned for correction, so that certain words may be stricken out if it appears that the words are wholly immaterial for the purposes of the case, they will be considered as stricken out, and the motion denied. *Edwards v. Porter*, 28 Kan. 700.

"The case stated or settled on appeal passes into and becomes a part of the case in the court below, and comes to this [the supreme] court as part of the record. This court has no author-

ity to make, alter or modify it in any material respect, or to determine that it was or was not duly filed. It is therefore appropriate and proper, indeed necessary, that the court below should hear all motions and make all proper orders in respect to it." *Walker v. Scott*, 102 N. Car. 487.

In *Taylor v. Mason*, 28 Kan. 381, it was held, where sixty days were given to make a case after trial and judgment entered, and within that time the case was made and served, and amendments proposed, that after the sixty days, supplementary proceedings could not be incorporated into that case, but should be embodied in a new case made, or in a bill of exceptions.

But the supreme court will not necessarily dismiss a case made, simply because it was changed by the judge below after it had passed, strictly speaking, from his jurisdiction, the alteration being one manifestly originally intended by both parties, and one which justice required to be made. *Wilson v. James*, 29 Kan. 233.

2. *Matthews v. Mayor, etc.*, of N. Y., 14 Abb. Pr. (N. Y.) 209; *Bliss v. Hoggson*, 84 N. Y. 667; *Johnson v. Whitlock*, 13 N. Y. 344; *Jaycox v. Cameron*, 49 N. Y. 645. In *Westcott v. Thompson*, 16 N. Y. 613, it was said that where the referee in his report set out the evidence at length, and stated that the facts proved on the first trial did not materially differ from those proved on the trial to which his report related, except as to one additional fact which he stated, and omitted to tell what state of facts was proved on the first trial, that nothing was before the court on which the judgment could be reviewed; and the appeal was dismissed, with leave to the appellant to apply to the supreme court for an amendment of the finding of facts by the referee and the case, so as to conform to the requirements of law.

The *New York* practice requires that a motion for the resettlement of a case be made upon affidavits setting forth what took place on the former trial; and it must be made at a special term. *Witbeck v. Waine*, 8 How. Pr. (N. Y.) 433. This case held further, that the order for resettlement might

VIII. FILING.—After the case has been settled and signed by the judge or other officer, and attested by the clerk, it must, within a certain time, usually prescribed by a rule of court, be filed in the clerk's office;¹ and a failure to comply with this rule

be made, where the action was pending in the court of appeals, before the record was sent back; but in *Adams v. Bush*, 2 Abb. Pr. N. S. (N. Y.) 118, it is held that after an appeal to the court of appeals and a case made and returned to the clerk, the court below will not hear a motion to correct the case, but it must be sent back to enable them to do so.

A referee being for the purpose of the action a special term judge, a motion to re-settle a case should properly be made before the general term. *Cheever v. Brown* (Supreme Ct.), 7 N. Y. Supp. 918. See *Pettit v. Pettit*, 20 N. Y. W'kly Dig. 154.

Where, upon an appeal from an order granting a new trial, it did not in any way appear that an order to show cause why the case for a new trial previously served should not be allowed, settled, and signed, was ever disposed of, or that the case was allowed, examined, or signed by the judge or that the new trial was granted upon the case as proposed and presented in the paper-book, it was held that the irregularity was too important to be overlooked, and the same was remanded to the court below with leave to the respondent to apply for correction of the record, or an amendment of the return. *Phoenix v. Gardner*, 13 Minn. 294.

Where one of the parties caused a case to be filed in the supreme court, which he claimed was a case settled after judgment, but it did not conclusively show on its face that it was so intended, and the trial judge who signed the document certified to the superior court that in so signing he did not suppose he was settling a case under the statute, and that the one signed did not set forth all the facts as they existed, it was held that the papers should be remitted to the trial court for such action as it should deem proper under the circumstances. *Farrand v. Bentley*, 6 Mich. 281.

When, upon the trial of an action, all evidence to be offered by the defendant in support of a counter-claim set up in his answer was excluded by the court, and a motion to have the case re-settled and to have the ruling

of the court excluding the evidence and the exception thereto inserted was denied, it was held that such denial was error; and that, as the right of the party to review the action of the court below was absolute, so was his right to have a complete and accurate statement of the matters determined against him set forth in the case; and the order was reversed and a re-settlement directed with the addition proposed to be made. *Gleason v. Smith*, 34 Hun (N. Y.) 547. As to such an order being appealable, see *People v. New York Cent. R. Co.*, 29 N. Y. 418; *In re Duff*, 41 How. Pr. (N. Y.) 350. In *Marckwald v. Oceanic Steam Nav. Co.*, 8 Hun (N. Y.) 548, it was further held, on appeal from an order denying a motion made for the re-settlement of a case containing exceptions on the ground that it should contain only so much of the evidence as is necessary to present questions of law raised on the trial, and not all the evidence, that such order should be reversed and a re-settlement directed, excluding needless depositions and stenographic notes and substituting in place thereof, so far as might be proper, a statement of the facts which such evidence proved or tended to prove. See *McNish v. Bowers*, 30 Hun (N. Y.) 214.

The superior court will order the re-settlement of a case where the affidavits used on a motion for a new trial have been omitted. *Gallaudet v. Steinmetz*, 45 N. Y. Super. Ct. 239.

If an exception which was actually taken was not noted by the stenographer, and the case was settled in accordance with his report, the remedy is by a motion to re-settle. *Toner v. Mayor, etc.*, of N. Y., 1 Abb. N. Cas. (N. Y.) 302.

If the trial judge refuses to re-settle a case because he thinks it is correctly settled, such refusal is conclusive upon the appellate court. *Grossman v. Supreme Lodge, etc.*, 52 Hun (N. Y.) 611.

1. *Mix v. San Diego, etc., R. Co.*, 86 Cal. 235; *Galveston v. Dazet* (Tex. 1891), 16 S. W. Rep. 20; *Johnson v. Sabine, etc., R. Co.*, 69 Tex. 641. After a case or exceptions has been settled, it is filed with the clerk and

Definition.

SETTLEMENT.

Definition.

will be deemed an abandonment of the case, unless the time for filing has been extended by the court.¹

SETTLEMENT.²—In contracts, as between debtor and creditor, a settlement is an agreement by which two or more persons who have dealings together, so far arrange their accounts as to ascertain the balance due from one to the other; an accounting, adjustment, or liquidation of mutual accounts and agreement

becomes a record of the court, and it may be taken *prima facie* in the further progress of the action as evidence of the facts therein appearing. *VanBergen v. Ackles*, 21 How. Pr. (N. Y.) 314.

By the 37th rule of the *New York* court of common pleas, the party must file with the clerk a copy of the case as settled, and the original papers containing the case and amendments as they came from the judge or referee. *Parker v. Link*, 26 How. Pr. (N. Y.) 375.

But in *South Carolina*, the rule (Cir. Ct. Rule 49) does not say that the original case shall be filed, and so an appeal will not be dismissed because a copy of such case has been filed instead. *Archer v. Long* (S. Car. 1891), 14 S. E. Rep. 24.

By Gen. Rule, *New York* supreme court rules, the case cannot be filed by the clerk unless the same is so ordered by the judge. Under this rule it is held that if the appellant fails to procure an order filing the case, such order may be procured by the respondent. *Davidge v. Coe*, 9 N. Y. Supp. 310.

By Rev. Stat. *Texas*, art. 1379, the court may, by an order entered upon the record, authorize the statement of facts to be made up, signed and filed during vacation. When no such order is shown to have been made, the statement will not be considered on appeal, if the statement was filed two days after the adjournment of the trial court. *Broussard v. Sabine*, etc., R. Co., 75 Tex. 702; *San Antonio*, etc., R. Co. v. *Moore*, 75 Tex. 643. See *White v. Parks*, 67 Tex. 605; *International*, etc., R. Co. v. *Scott*, 58 Tex. 187.

In *Ballew v. Anderson*, 31 S. Car. 360, it was held on a motion to reinstate an appeal dismissed by the clerk for failure to file the return required, that where the appellant relied upon a local practice in his county of agreeing upon a case and filing a printed copy of the same with the clerk of the su-

preme court within a reasonable time, such filing would not excuse his non-compliance with a rule requiring him to file the return or an agreed statement of the case, as allowed by act of March 5, 1875, within the time required by said rule; and that he must be deemed to have waived his appeal.

1. *Leech v. West*, 2 Cal. 95; *Harper v. Minor*, 27 Cal. 107; *Kavanagh v. Maus*, 28 Cal. 261.

Where it appeared that the appellant failed to comply with the rule requiring a case made to be filed in the clerk's office within a certain time after settlement, and such omission did not appear to have occurred by reason of inadvertence, mistake or excusable neglect, a motion to perfect an appeal on such case was dismissed, and a motion for an order declaring the appeal abandoned was granted. *Donahue v. Enterprise R. Co.*, 33 S. Car. 608. See *Archer v. Long* (S. Car. 1891), 14 S. E. Rep. 24.

Until the time for filing a case made, or the extension of such time, expires, the case cannot be noticed for argument. *Donohue v. Hicks*, 21 How. Pr. (N. Y.) 438.

The court may extend the time for filing a case, even though the time as originally prescribed has already expired. *Strong v. Hardenburgh*, 25 How. Pr. (N. Y.) 438.

But a motion for a new trial does not extend the time for filing. *Mahoney v. Caperton*, 15 Cal. 313.

The mere failure of the clerk to mark the case "filed" will not be ground for dismissing the appeal where the case was left with him by the party making it, in good time. *Aultman v. Utsey*, 33 S. Car. 611. See *Fore v. Western N. Car. R. Co.*, 101 N. Car. 526.

2. **Settlement as Between Guardian and Ward.**—See *GUARDIAN AND WARD*, vol. 9, p. 85.

Account and Settlement of Executors and Administrators.—See *EXECUTORS AND ADMINISTRATORS*, vol. 7, p. 165.

upon the balance.¹ The word may be used in the sense of mere computation, or it may be so used as to include the idea of compromise or adjustment of controversy.² The term settlement does not necessarily mean payment,³ though it may, especially under circumstances which exclude the idea of controversy and adjustment, be understood as meaning payment.⁴ Questions involving the construction of this word frequently arise in the law of agency in cases where it is necessary to determine the powers of an agent under an authority to "settle" or to make a "settlement."⁵

1. Bouv. L. Dict.; *Baxter v. State*, 9 Wis. 38. See *National Bank v. Norton*, 1 Hill (N. Y.) 572; *Foot v. Gooding*, 9 Barb. (N. Y.) 371; *Dorsey v. Kollock*, 1 N. J. L. 35; *Moore v. Hymen*, 13 Ired. (N. Car.) 274. See ACCOUNT—ACCOUNT STATED, vol. 1, p. 108.

2. See *Moore v. Hymen*, 13 Ired. (N. Car.) 274. See CONTRACT, vol. 3, p. 837, n. 1; COMPOSITION WITH CREDITORS, vol. 3, p. 385, *et seq.*

Settlement Between Parties as Affecting Attorney's Lien.—See ATTORNEY AND CLIENT, vol. 1, pp. 971-973; LIENS, vol. 13, pp. 619-620.

3. *Foot v. Gooding*, 9 Barb. (N. Y.) 371; *Baxter v. State*, 9 Wis. 32.

4. See Abb. L. Dict.; *Austin v. Smith*, 39 Me. 203; *McMurray v. Taylor*, 30 Mo. 263; 77 Am. Dec. 611; *New York, etc., R. Co. v. Bates*, 68 Md. 194; *Gandolfo v. Appleton*, 40 N. Y. 533; *National Bank v. Norton*, 1 Hill (N. Y.) 572.

When the word "settle" is used in the sense of accounting together and striking a balance, a promise to settle implies a promise to pay the balance. *Moore v. Hyman*, 13 Ired. (N. Car.) 274.

Two contracting parties are said to settle an account when they are certain what is justly due by one to the other; when one pays the balance or debt due by him, he is said to settle the balance. 11 Ala. 419.

It was held that the word "settled" at the foot of a bill of parcels, imported a receipt of payment and acquittance. *Rex v. Martin*, 7 C. & P. 549; 32 E. C. L. 626.

But it is not always that the word necessarily means payment in full. Thus, where a debtor inclosed a check in a letter of transmittal, which was merely a printed form, with the blanks filled out in writing and containing the printed words, "in settlement of account," and the letter also inclosed a

receipt in similar form and with the same printed words, it was held that the words, "in settlement of account," meant no more than "applied on account." *Widner v. Western Union Tel. Co.*, 51 Mich. 291.

Circumstances Precluding the Idea of Controversy and Adjustment.—A promise to settle a demand which has been liquidated and is undisputed means to pay it. *Pinkerton v. Bailey*, 8 Wend. (N. Y.) 600; *Stilwell v. Coope*, 4 Den. (N. Y.) 225; *Brody v. Doherty*, 30 Miss. 40.

5. See AGENCY, vol. 1, p. 367.

It was held that a power of attorney to settle up mercantile business, which had been conducted in the name of the principal, did not confer power to purchase or to execute a note for the purchase price of real estate. *Fisher v. Salmon*, 1 Cal. 413; 54 Am. Dec. 297.

But it was held that a power given by one to his agent, authorizing him to settle the principal's business and collect all claims due him, gave the agent authority to execute a replevin bond. *Merrick v. Wagner*, 44 Ill. 266.

Where a physician left his books of account for services with his agent "for settlement," it was held that the agent had no authority to assign the books to a surety of his principals as security. The words "for settlement" restricted the authority of such an agent to a power to settle the demands with the persons from whom they were due. *Wood v. McCain*, 7 Ala. 800; 42 Am. Dec. 612.

Where one holding certain vouchers for certain personal services rendered to a railroad company, had sent the unpaid vouchers to his agent, with authority to make the best settlement possible, it was held that the term "settlement" gave the agent not only authority to determine the amount due, but to collect and receipt the money coming to the principal under such

In conveyancing, settlement is the limitation of real or personal property or the enjoyment thereof to several persons in succession, prescribing the mode of holding, enjoying, and disposing of it.¹ The settlement generally implies a deed, or an instrument equivalent to a deed, such as articles of agreement for a settlement; but a settlement may be and often is made by will.² The party making the deed of settlement is called the settlor,

settlement. New York, etc., R. Co. v. Bates, 68 Md. 184.

An agreement by partners upon the dissolution of the firm that the business should be settled with one of the partners, was held not to authorize such partner to renew a note which had been given by a partnership. In regard to the meaning of the authority to settle, the court by Cowen, J., said: "This was no more than a power to liquidate partnership demands and sanction the liquidation by the firm name. It no more gave power to renew the old note than to give one payable in chattels. A says to B, settle my debts with C, and sign my name for the purposes of such settlement. It is a strained and unnatural construction to say that B may use A's name in extinguishing the old contract by executing such a new one in A's name as he pleases. The agent can do no more than deal with the old debt by paying or stating an account. The word 'settle,' as here used in respect to the debts due from the firm, and the word 'business' no doubt covers these, is thus defined by Mr. Webster: 'To adjust; to liquidate; to balance or to pay; as, to settle accounts.' Webst. Dic. 'Settle,' pl. 18, 4th ed. That this is so understood by courts, may also, I think, be collected from several of the cases cited by the learned counsel for the defendant on the argument. Kilgour v. Finlyson, 1 H. Bl. 155; Mowatt v. Howland, 3 Day (Conn.) 353; White v. Union Ins. Co., 1 Nott & M. (S. Car.) 561; 9 Am. Dec. 726; Sanford v. Mickles, 4 Johns. (N. Y.) 224. Others cited by him are in point. Abel v. Sutton, 3 Esp. 111; Martin v. Walton, 1 McCord (S. Car.) 16; Hackley v. Patrick, 3 Johns. (N. Y.) 536. These were all cases of an express authority to settle, after dissolution, yet the first holds that the power did not extend to indorsing a partnership note even in liquidation of a partnership debt. In the second, it was denied

to be a power of renewal; and in the third, a power of adjustment was denied to operate as an authority to sign an account stated. In the case at bar an express power to use the name is given; but it is confined to the purposes of adjustment (settlement). The words did not work an extension of power in any respect beyond the form of doing the business." National Bank v. Norton, 1 Hill (N. Y.) 572.

An attorney authorized by salvors to settle their claims against the vessel saved, has authority to receive the money, but not to afterwards distribute it upon his own judgment among the salvors, or to pay charges against the fund. Hawkins v. Avery, 32 Barb. (N. Y.) 551.

It was held that a clerk in a store authorized to settle a claim against a carrier for the loss of certain goods, cannot give a discharge without receiving any consideration. His mere agreement to receive other goods in place of those lost will not operate as a release of the carrier's liability. Patterson v. Moore, 34 Pa. St. 69.

The power "to settle" on an assignment of a complainant's interest in a contract was held not to authorize the assignee to include it in a general arbitration of all matters in difference between him and the other party to the contract. Held, also, that an award thereon obtained against the protest of the complainant, and by the assignee's deception, constituted no bar to a specific performance of such contract. Lawrence v. Emson, 31 N. J. Eq. 67.

1. Abb. L. Dict.; Bouv. L. Dict.

See Grier v. Grier, L. R., 5 H. L. 688; 4 Moak's Eng. Rep. 71; Micklethwait v. Micklethwait, 4 C. B. N. S. 858; 93 E. C. L. 856.

Settlement of Estate.—The term settlement of estate, when applied to the estates of deceased persons, may mean the settlement of the probate account. Calkins v. Smith, 41 Mich. 409; Allen v. Dean, 148 Mass. 594.

2. Sweet's Dict.

Definition.

SEVER—SEVERANCE.

Definition.

and those who are to be benefited by it, the beneficiaries.¹ Such deeds are generally made in contemplation of marriage,² but may be executed for other purposes, as to provide for gradual payment of creditors without absolute disposal of the property.³

Settlement may also be used in the sense of taking up habitation, as in the various statutes relating to the poor,⁴ public lands,⁵ elections,⁶ taxation, etc.⁷

SEVER; SEVERABLE—(*Compare* SEVERANCE).—To separate; to divide. When joint defendants put in separate pleas and rely on separate defenses, they are said to "sever."

SEVERABLE.—Capable of separation or division; admitting of severance from other things to which it had been joined, and of distinct existence.

SEVERAL.—1. Separate; individual; independent. In this sense, the word is distinguished from "joint." Also exclusive; individual; appropriated. In this sense it is opposed to "common."⁸ 2. More than two but not very many.⁹

SEVERAL FISHERY.—See FISH AND FISHERIES, vol. 8, p. 24.

SEVERALLY.—Distinctly; separately; apart from others.¹⁰

SEVERALTY.—See CHATTELS, vol. 3, p. 169; ESTATES, vol. 6, p. 895.

SEVERANCE—(See also JOINDER, vol. 11, p. 986; PARTIES TO ACTIONS, vol. 17, p. 470).—1. In pleading at law, when there are

1. Abb. L. Dict.

2. See MARRIAGE SETTLEMENTS, vol. 14, p. 538.

3. Abb. L. Dict. See TRUST DEEDS.

4. See POOR AND POOR LAWS, vol. 18, p. 766; Reg. v. Inhabitants, 7 Q. B. 533; 53 E. C. L. 532; Jefferson v. Washington, 19 Me. 293; Cummington v. Wareham, 9 Cush. (Mass.) 588; La Crosse v. Melrose, 22 Wis. 462.

5. See PUBLIC LANDS; Rector v. U. S., 92 U. S. 698; 3 Cent. L. J. 612; Balfour v. Meade, 1 Wash. (U. S.) 25; In re Selby, 6 Mich. 193.

Actual Settler.—See ACTUAL SETTLER, vol. 1, p. 186, note; Stroud v. Missouri, etc., R. Co., 4 Dill. (U. S.) 396.

6. See ELECTIONS, vol. 6, p. 255.

7. See COME, vol. 3, p. 314.

Settled Minister.—A person authorized to perform ministerial functions, and particularly the celebration of marriage resident in the county where he performs them, and who has the charge of a particular church and congregation. He must not be an itinerant, but a local preacher. Kibbe v. Antram, 4 Conn. 140.

8. Black's L. Dict.

A testator provided for the division of his property after the "several deaths" of four named persons. It was held that "several" could not be construed as equivalent to "respective," but that the testator's intention was that the division should be postponed until all the deaths should have occurred. Colton v. Fox, 67 N. Y. 348.

9. Einstein v. Marshall, 58 Ala. 153; 29 Am. Rep. 729. In that case, defendants had recommended the plaintiffs to credit A to the extent of "several" hundred dollars. It was held that "several" included seven.

"Several" may mean "all"—*e. g.*, where a testator directed that the residue of his property upon the death of his wife, should be divided among his "several children," it was said: "By the expression 'my several children' the testator referred to all his children living and dead, as a class. By the word 'several' he probably meant 'all.'" Outralt v. Outralt, 42 N. J. Eq. 501.

10. State Nat. Bank v. Reilly, 124 Ill. 464. "The expression 'severally liable,' when applied to a number of persons, usually implies that each one

Definition.

SEVERE—SHAREHOLDER.

Definition.

several defendants in an action, they may either all plead jointly one and the same defense, or each defendant may plead a separate defense for himself, if he thinks such a course preferable; in which latter case he is said to sever, and his doing so is termed severance in pleading.¹

2. The destruction of any one of the unities of a joint tenancy. It is so called because the estate is no longer a joint tenancy, but is severed.²

3. The word "severance" is also used to signify the cutting of the crops; such as grass, etc., or the severing of anything from the realty.³

SEVERE—(Compare **SERIOUS**, vol. 22, p. 105).—See note 4.

SEWER.—See **COMMON**, vol. 3, p. 347; **DRAINS AND SEWERS**, vol. 6, p. 2.

SHAM PLEADING.—See **PLEADING**, vol. 18, p. 504.

SHARE—(See also **STOCK**).—A portion of anything, *e. g.*, a share in an estate.⁵

SHAREHOLDER—(See also **STOCKHOLDERS**).—In the strict sense of the term, a shareholder is a person who has agreed to become a member of a company, and with respect to whom all the required formalities have been gone through—*e. g.*, signing deed of settlement, registration, or the like. A shareholder by estoppel is a person who has acted and been treated as a shareholder, and consequently has the same liabilities as if he were an ordinary shareholder.⁶

is liable alone." *Pruyn v. Black*, 21 N. Y. 301.

1. Abb. L. Dict.

2. Bouv. L. Dict. See also **JOINT TENANTS**, vol. 11, p. 1057.

3. Brown's L. Dict.; Abb. L. Dict. See generally **CROPS**, vol. 4, p. 887.

4. **Severe illness**, in an interrogatory addressed to the applicant for a life insurance policy, means such an illness as has, or ordinarily does have, a permanent detrimental effect upon the physical system. *Goucher v. Northwestern, etc., Assoc.*, 20 Fed. Rep. 596. See also *Holloman v. Life Ins. Co.*, 1 Woods (U. S.) 674; *Boos v. World Mut. L. Ins. Co.*, 64 N. Y. 236; *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497; 10 Am. Rep. 166. See generally **LIFE INSURANCE**, vol. 13, p. 632.

5. For "share" as used in wills, see **WILLS**.

Share and Share Alike.—See **WILLS**. **Renting "On Shares"**.—See **CROPS**, vol. 4, p. 895.

Used as Synonymous with Stock—(See

also **STOCK**).—There is no such thing *in rerum natura* as a railway share. It is not such a thing as you can see, or touch or handle. It is a term which indicates simply a right to participate in the profits of a particular joint stock undertaking. Well, then, stock, or that which is called "stock," the thing into which the shares have been consolidated, so far as regards the interest of one person in that stock, is the right to participate in the profits of the undertaking. Both sets of words, "my railway stock," "my railway shares," mean, etymologically, my right to share. *Morrice v. Aylmer, L. R.*, 10 Ch. App. 148; 11 Moak's Rep. 503. See also *Harrison v. Vines*, 46 Tex. 15; *Trinder v. Trinder, L. R.*, 1 Eq. 695; *In re Bodman, L. R.*, 1891, 3 Ch. 135; 35 Am. & Eng. Corp. Cas. 585.

6. Sweet's Law Dict., citing *Lind on Part.*, p. 130.

Thus, a person who has acted as a shareholder may be liable for the debts of the company, although he has never been registered as a shareholder, and is there-

SHARP.—See note 1.

SHAVE.—This term is used sometimes to denote the act of obtaining the property of another by oppression and extortion; but it also denotes the buying of existing notes and other securities for money, at a discount.²

SHEEP.—(See generally **ANIMALS**, vol. 1, p. 571; **CATTLE**, vol. 3, p. 43 n.).—See note 3.

SHELLEY'S CASE (RULE IN).—See also **CHILDREN**, vol. 3, p. 229; **ESTATES**, vol. 6, p. 875; **ISSUE**, vol. 11, p. 868; **LEGACIES AND DEVICES**, vol. 13, p. 7; **PERPETUITIES**, vol. 18, p. 335; **REAL PROPERTY**, vol. 19, p. 1028; **REMAINDERS**, vol. 20, p. 828; **WILLS**.

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I. STATEMENT AND ORIGIN OF RULE.—When a person takes an estate of freehold, legal or equitable, under a deed, will, or other writing, and afterwards, in the same deed, will, or writing, there is a limitation, by way of remainder, with or without the interposition of any other estate, of an interest of the same quality, as legal or equitable, to his heirs generally, or the heirs of his body, by that name in deeds or writings of conveyance, and by that or some such name in wills, and as a class or denomination of persons to take in succession from generation to generation, the limitation to the heirs will entitle the person or ancestor himself to the estate or interest imported by the limitation.⁴

fore not a shareholder in the full sense of the word. *Portal v. Emmens*, L. R., 1 C. P. Div. 201. See also **STOCK-HOLDERS**.

1. **Sharp and Dangerous Weapon.**—See **WEAPON**.

2. *Stone v. Cooper*, 2 Den. (N. Y.) 293. The term is therefore not actionable *per se*.

3. On the trial of an indictment for stealing "one sheep" it appeared that

the animal was only one year old. *Held*, a fatal variance. And it was said that the term "sheep" only properly described a wether, and not a ewe nor a lamb. *Rex v. Birket*, 4 C. & P. 216; 19 E. C. L. 351. See generally, **INDICTMENT**, vol. 10, p. 556.

4. 1 Preston on Estates 263.

Other Statements.—In *Shelley's Case*, 1 Rep. 104 a, the rule was stated to be that when the ancestor by any gift or

It is generally supposed that the Rule had its origin in the principles and policy of feudal tenures. This policy favored descents as much as possible, there being feudal burdens which attached to the heir when he took by descent from which he would have been exempt as purchaser.¹

conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, "the heirs" are words of limitation of the estate and not words of purchase. This statement of the Rule is that of Coke and is that most generally adopted. In this case the Rule was stated on the authority of several cases in the Year Books, viz., 24 Edw. III, 27 Edw. III, 38 Edw. III, 40 Edw. III. Sir William Blackstone, in his opinion in *Perrin v. Blake*, Harg. Law Tracts 501, relies on a still earlier case in 18 Edw. II as establishing the Rule. In *Co. Litt.* 22b, 319b, Lord Coke asserted that the Rule was a clear and undisputed rule of law; and it was laid down as such by Fitzherbert and Rolle. *Fitz. Abr.*, tit. *Feoffment*, pl. 109; 2 *Rol. Abr.* 417. The case of the Provost of Beverly, 40 Edw. III, just cited, decided in 1366, was said by Preston, who gave at large a translation of it, to be precisely in point in its assertion of the existence of the Rule. 1 *Preston on Estates* 304.

In *Challis' Real Prop.* 129, it is said that Shelley's Case decided these two distinct propositions:—First: When the ancestor by any assurance takes an estate of freehold, and by the same assurance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, always in such cases "heirs," etc., are words of limitation, and not of purchase; Second: The further addition of words of limitation to "heirs" makes no difference, provided that the further limitation is to heirs of the same quality.

"Wheresoever the ancestor takes any estate of freehold, whether it be or be not such as may determine in his lifetime, and there is afterwards in the same conveyance an unconditional limitation to his right heir or heirs in tail (either immediately without the intervention of any mean estate of freehold between his freehold and the subsequent limitations to his heirs, or mediately, that is, with the interposition of some such mean estate), there such subsequent limitation to the heirs or heirs in tail vests immediately in

the ancestor, and does not remain in contingency or abeyance." *Fearne*, 1 *Rem.* 33.

"In any instrument, if a freehold be limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate; if it be limited to the heirs of his body, he takes a fee tail; if to his heirs, a fee simple." *Serj. Glynn in Perrin v. Blake*, 1 *Coll. Jurid.* No. 10, p. 288.

"Whenever a limitation of land to A for his life or any other estate of freehold is followed by the limitation of a remainder to his heirs, or the heirs of his body, the latter limitation shall have the same effect as if it had been made to him and his heirs, or to him and the heirs of his body. It confers the benefit of the remainder on the ancestor himself; it inserts, in effect, his name in the limitation of the remainder; it creates a gift to him, and tacks to such a gift the word 'heirs,' etc., as words of limitation of his estate. A remainder to the heirs of A is turned into a remainder to A and his heirs." *Hayes' Real Est. (Inquiry, etc.)* 93.

1. This view of the Rule's origin and purpose was favored by several of the judges of the king's bench in *Perrin v. Blake*, 1 *Coll. Jurid.* 298, 305, 312; *Harg. Law Tracts* 389. It is also supported by 1 *Challis' Real Prop.* 123, and by 1 *Prest. Est.* 295, where it is said: "After wardships, reliefs and other incidents of tenure flowing from estates of inheritance were introduced into the feudal system, it was accounted a fraud on the lord, who was entitled to these fruits and incidents on the death of his tenant and the succession of the heir, that there should be a power to give the property to the ancestor for his life only, and of extending the enjoyment to his heirs, *quatenus* they were his heirs; so that the heirs should be entitled precisely in the same manner as if they took by hereditary succession, and yet take as purchasers in their own right, and, as a consequence, defeat the lord of the fruits to which he would have been entitled on a succession from the ancestor."

II. NOT A RULE OF INTENTION.—The Rule in Shelley's Case is a rule of law and not of construction. Where the language used in the instrument brings the case within the Rule, the fact that it was the intention of the grantor or devisor that the Rule should not operate is of no importance.¹ So imperative is the Rule that

Blackstone, J., in *Perrin v. Blake*, 4 Burr. 2579; Harg. Law Tracts 489, imputed the origin, growth, and establishment of the Rule to the aversion that the common law had to the inheritance being in abeyance. He thought another foundation of the Rule to lie in the desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner by vesting the inheritance in the ancestor and thereby giving him the power of disposition. In *Doe v. Laming*, 2 Burr. 1100, Lord Mansfield thought the Rule to have been introduced originally, not only to save to the lord the fruits of his tenure, but likewise for the sake of specialty creditors.

The following exposition of the origin and meaning of the Rule is from Williams on Real Prop., 254*. "In ancient times, the feudal holding of an estate granted to a vassal continued only for his life. And from the earliest times to the present day a grant or conveyance of lands, made by any instrument (a will only accepted), to A, simply without further words will give him an estate for his life, and no longer. If the grant was anciently made to him and his heirs, his heir, on his death, became entitled; and it was not in the power of the ancestor to prevent the descent of his estate accordingly. He could not sell it without the consent of his lord; much less could he then devise it by his will. The ownership of an estate in fee simple was then but little more advantageous than the possession of a life interest at the present day. The powers of alienation belonging to such ownership, together with the liabilities to which it is subject, have almost all been of slow and gradual growth, as has already been pointed out in different parts of the preceding chapter. A tenant in fee simple was, accordingly, a person who held to him and his heirs; that is, the land was given to him to hold for his life, and to his heirs to hold after his decease. It cannot, therefore, be wondered at that a gift expressly in these terms, 'To A for his life, and after his decease to his

heirs,' should have been anciently regarded as identical with a gift to A and his heirs, that is, a gift in fee simple. Nor, if such was the law formerly, can it be a matter of surprise that the same rule should have continued to prevail up to the present time. Such indeed has been the case. Notwithstanding the vast power of alienation now possessed by a tenant in fee simple, and the great liability of such an estate to involuntary alienation for the purpose of satisfying the debts of the present tenant, the same rule still holds; and a grant to A for his life, and after his decease to his heirs, will now convey to him an estate in fee simple with all its incidents; and in the same manner, a grant to A for his life, and after his decease to the heirs of his body, will now convey to him an estate tail as effectually as a grant to him and the heirs of his body. In these cases, therefore, as well as in ordinary limitations to A and his heirs, or to A and the heirs of his body, the words heirs and heirs of his body are said to be words of limitation; that is, words which limit or mark out the estate to be taken by the grantee. At the present day, when the heir is perhaps the last person likely to get the estate, these words of limitation are regarded simply as formal means of conferring powers and privileges on the grantee as mere technicalities, and nothing more. But, in ancient times, these same words of limitation really meant what they said, and gave the estate to the heirs or the heirs of the body of the grantee, after his decease, according to the letter of the gift. The circumstance that a man's estate was to go to his heir was the very thing which afterwards enabled him to convey to another an estate in fee simple. And the circumstance that it was to go to the heir of his body was that which alone enabled him, in after times, to bar an estate tail and dispose of the lands entailed by means of a common recovery."

1. Fearn's Cont. Rem. 188; Hayes' Real Est. 95; Harg. Law Tracts 489; *Doe v. Smith*, 7 T. R. 531; 2 Jarman on Wills (5th Am. ed.) 332*; 4 Kent's

Com. (13th ed.) 221* *et seq.*; 2 Washburn on Real Prop. (5th ed.) 273*; Polk v. Faris, 9 Yerg. (Tenn.) 209; 30 Am. Dec. 400; 2 Minor's Inst. 395; Baker v. Scott, 62 Ill. 88; Carpenter v. Van Olinder, 127 Ill. 42; 11 Am. St. Rep. 92; Hileman v. Bouslaugh, 13 Pa. St. 344; 53 Am. Dec. 475; Cockin's Appeal, 111 Pa. St. 26; List v. Rodney, 83 Pa. St. 483; Kleppner v. Laverty, 70 Pa. St. 70; Allen v. Craft, 109 Ind. 476; 58 Am. Rep. 425; Crockett v. Robinson, 46 N. H. 461; Thomas v. Higgins, 47 Md. 439; Warner v. Spiegg, 62 Md. 14; Hughes v. Nickals, 70 Md. 484; 14 Am. St. Rep. 377.

This doctrine may now be considered as established. In the great case of Perrin v. Blake, Harg. L. Tracts 489; 4 Burr. 2579, the Court of King's Bench made the Rule yield to the testator's manifest intent; he having declared in his will his intent and meaning to be that none of his children should sell his estate for a longer time than their lives, and to that intent devising a part of his estate to a son for and during the term of his natural life, remainder over during his life, remainder to the heirs of the body of the son with remainders over. The question was whether the son took an estate for life or an estate tail, and that depended upon the other question whether the words "heirs of the body" were to be taken to be words of purchase to affect the manifest intent of the will, or words of limitation according to the Rule in Shelley's Case. On error to the exchequer chamber, the judgment of the King's Bench was reversed; and upon a further writ of error to the house of lords, the dispute was compromised and a *non pros.* entered on the writ of error by consent, so that the final result of the controversy affirmed the rule that even the testator's manifest intent could not control the legal operation of the word "heirs" when standing for the ordinary line of succession as a word of limitation and render it a word of purchase.

It is now settled that the decision of the Court of Queen's Bench was erroneous. Williams on Real Property 213*.

In the earlier case of Bagshaw v. Spencer, 1 Ves. 142, 2 Atk. 582, 1 Coll. Jurid. No. 15, Lord Hardwicke had decided, where there was a devise to trustees in fee in trust, and after divers limitations in trust, then to B for life,

remainder to the trustees and their heirs during his life, to preserve contingent remainders, and after the death of B remainder to the heirs of his body, that this was a trust in equity and that B did not take an estate tail under the will, for that the words "heirs of the body" should be deemed words of purchase to fulfill the manifest intent. But this decision was not in accord with the decisions of the King's Bench in Colson v. Colson, 2 Atk. 248; Str. 1125, in which the Rule in Shelley's Case had been emphatically and recently enforced in a similar case, and was questioned and overruled in Wright v. Pearson, 1 Eden 119, and Jones v. Morgan, 1 Bro. C. C. 206, on the ground that that case was not one of an executory trust, and that, therefore, it should have been held within the Rule.

In Doe v. Laming, 2 Burr. 1100, Lord Mansfield denied, as he did also in Colson v. Colson, 2 Atk. 248, that there was any solidify in the distinction between trusts executed and trusts executory, and held that all trusts were executory, because a trust executed was within the Statute of Uses. He insisted, also, that there was no foundation for the distinction between the equitable and legal estate and that a court of equity as well as a court of law was equally bound by a general rule of law.

In Doe v. Smith, 7 T. R. 531, Lord Kenyon took a distinction between a general and a secondary intention in a will, and held that the latter must give way when the two intentions interfered, and that if the testator intended that the first taker should take only an estate for life and that his issue should take as purchasers, yet if he intended that the estate should descend in the line of hereditary succession, the general intent should prevail and the word "issue" be deemed a word of limitation.

See Doe v. Colyear, 11 East 548; Jesson v. Doe, 2 Bligh 2; Doe v. Harvey, 4 B. & C. 610, 10 E. C. L. 420, in support of the doctrine that the words "heirs of the body," whether in deeds or wills, are construed as words of limitation, unless it appears clearly and unequivocally that the words were used to designate certain individuals answering the description of heirs at the time of the death of the first taker.

Hargrave, in his observations on the Rule, favored giving it a most absolute

and peremptory application, considering it beyond the control of intention when a fit case for its application existed; and that it was a conclusion of law of irresistible efficacy when the testator did not use the words "heirs" or "heirs of the body" in a special or restrictive sense, for any particular person or persons who should be the heir of the tenant for life at his death, and in that instance inaptly denominated heir, and when he did not intend to break in upon and disturb the line of descent from the ancestor, but used the word "heirs" as *nomen collectivum* for the whole line of inheritable blood. *Harg. Law Tracts* 489.

Fearne said: "Nothing can be better founded than Mr. Hargrave's doctrine, that the Rule in Shelley's Case is no medium for finding out the intention of the testator; that, on the contrary, the Rule supposes the intention already discovered . . . which ought to be adjusted before the Rule is thought of—that to resolve that point, the ordinary rules for interpreting the language of wills ought to be resorted to; that when it is once settled, that the donor or testator has used words of inheritance according to their legal import, has applied them intentionally to comprise the whole line of heirs to the tenant for life, and has really made him the *terminus* or ancestor, by reference to whom the succession is to be regulated, then comes the proper time to inspect the Rule in Shelley's Case; that then, too, it will appear that . . . it is perfectly immaterial whether the testator meant to avoid the Rule or not; and that to apply it, and to declare the words of inheritance to be words of limitation, vesting an inheritance in the tenant for life, as the ancestor and *terminus* of the heirs, is a mere matter of course. *Fearne's Cont. Rem.* 188.

Hayes said: "The Rule does not assume to fix or shackle the meaning of words. It strikes at the intention when discovered, but it furnishes no touchstone for directing the import of the limitations. That is entirely without the province of the Rule, and is left to the uncontrolled operation of general principles. On the one hand, the word 'heirs,' though properly a word of limitation, will not by its magic attract the Rule, if it be clearly used as a substituted term for 'sons' and 'children,' etc.; on the other hand, the words 'sons,' 'children,' etc., though properly words of purchase, will not

repel the Rule, if they be clearly used as substituted terms, for heirs. The Rule wars not with words; it leaves to the common rules of exposition the task of working out the meaning; and stands aloof until they have performed their office." *Hayes' Real Est.* 95.

Kent says, "All the modern cases contain one uniform language, and declare that the words, heirs of the body, whether in deeds or wills, are construed as words of limitation, unless it clearly and unequivocally appears that they were used to designate certain individuals answering the description of heirs at the death of the party." 2 *Kent's Com.* 229*.

Minor says: "The Rule is not a mean to discover the intention of the grantor or testator, but supposing the intention ascertained, the Rule controls it so far as it is repugnant to the policy of the law, giving effect to the general and legal, rather than to the more particular and proscribed, intent. The party making such a limitation has in his mind two purposes, which are legally in conflict. One is to give the ancestor only a life estate, the other to limit the land to his heirs collectively, and in indefinite succession. These two intents cannot stand together, without more or less of general mischief to the public welfare; and the Rule prevails simply to subordinate the particular, and apparently less important, design of limiting the ancestor's interest to a life estate, to the more comprehensive, and probably the preferred, purpose of transmitting the inheritance in the manner indicated." 2 *Minor's Inst.* 395.

Farman says: "The Rule in Shelley's Case is a rule of law and not of construction;" and that, since the final determination of *Perrin v. Blake*, 4 Burr. 2579; *Harg. Law Tracts* 489, "The Rule in question has been regarded as one of the most firmly established rules of property, and, strictly speaking, no instance can be adduced of a departure from it. Undoubtedly, in many cases a devise to a person for life, and after his death to the heirs of his body, has been held by force of the context to give an estate for life only to the ancestor; but this has been the result, not of holding the heirs of the body, as such, to take by purchase, but of construing those words to designate some other class of persons generally less extensive. The Rule, therefore, was excluded, not violated by this

interpretation." 2 Jarman on Wills (5th Am. ed.) 333*.

Washburn says: "Wherever the Rule does apply, it is, as a rule of the common law, so imperative, that, though there be an express declaration that the ancestor shall only have a life-estate, it will not defeat its union with the subsequent limitation to his heirs. So, though the limitation be accompanied by a declaration to the effect that the heirs shall take as purchasers, or is made to the heirs of the first taker and their heirs, or where the estate is to A for life, and, after his death, to the heirs of his body, to share as tenants in common, or to be equally divided between them, it comes within the Rule." 2 Washburn, R. P. * 273.

In *List v. Rodney*, 83 Pa. St. 483, the court, by Mercur, J., said: "It is only after the intention has been discovered that the Rule in *Shelley's Case* can be applied; it cannot be used as a means of discovering the intention."

This matter underwent discussion in the very recent *Illinois* case of *Carpenter v. Van Olinder*, 127 Ill. 42; 11 Am. St. Rep. 92; here the will gave to the testator's widow and daughter the use of property "to be divided among them as the same would be by law without a will, except that it is my will that none of the real estate be sold, or disposed of, except the wood-lot in the big woods, for their use, but to be kept sacred for their heirs." The decision was, that the word "heirs" in the will was a word of limitation and not of purchase, and that the estate was vested in the devisee in fee simple and not for life. The court said: "Stress is laid, in argument, upon different matters, as presented by the entire devise, claimed to show that the testator could not have intended to give an estate in fee to his daughters. But we have seen that this is not the question. If the language he used, in the legal sense that must be placed upon it in the connection in which it occurs, imports a conveyance in fee to the daughters, such must be its effect, although it may appear that he actually only intended to convey a life estate, the only inquiry permissible being, whether, from other parts of the devise, it appears that the word 'heirs' was used in a sense more restricted than the term itself imports,—as the equivalent of 'children,' 'issue,' or some other partial or restricted class of heirs." In

this case the court referred with disapproval to certain language used in the opinion in *Belsay v. Engel*, 107 Ill. 182, which appeared to place the decision in that case upon the intention of the testator to vest a fee in the legal representatives or legal heirs of certain grandchildren, as determined from a consideration of all the language of the will, and not, as should have been done, upon the evident intention of the testator to use the words "legal representatives" or "legal heirs" as synonymous with "children," and therefore as words of purchase and not of limitation; and said: "this language of the opinion was unadvisedly assented to by a majority of the members of the court, and is now disapproved and overruled."

It was held in *Baker v. Scott*, 62 Ill. 88, that the Rule in *Shelley's Case* was in force in *Illinois* as a rule of property, and that the question of intent, in determining whether the rule was applicable in a given case, did not turn upon the quantity of estate intended to be given to an ancestor, but upon the nature of the estate intended to be given to the heirs.

In *Bender v. Fleurie*, 2 Grant Cas. (Pa.) 345, the testator gave to his daughter certain land, in these words: "She shall have it as her own during her life, and then it is to come to the heirs of her body." The court said: "But it is said the testator did not mean to give her an estate-tail. Perhaps he did not. But he has used words which, in law, mean nothing else. If he intended to give but a life estate *voluit non dixit*, we must take what he said, not what he meant. . . . But no court in this State or in England has ever treated the phrase 'heirs of her body' as words of purchase when they are used with reference to the issue of a devisee to whom a life estate is given. They are words of limitation, and as such they create an estate-tail in the first taker, which cannot be cut down, even by the clearest desire that it shall be a life estate only."

So, in *Hileman v. Bouslaugh*, 13 Pa. St. 344, 53 Am. Dec. 474, the court said: "The requisite limitations to the ancestor and his heirs being found, the Rule must be applied. It can never be a question whether the Rule shall be applied or not, whether the author of the limitation intended it to be applied or not;" and again: "The question on a will is not whether the testator in-

tended that the Rule shall not operate,—for this is not subject to his power—but whether he used the words, 'heirs of the body,' as synonymous with the word 'children' or its proper equivalent."

So, the *Indiana* court in *Allen v. Craft*, 109 Ind. 476, 58 Am. Rep. 425, said: "It has seemed to many that there is a conflict between the rule declaring that the intention of the testator must govern and the Rule in *Shelley's Case*; but the appearance of conflict fades away when it is brought clearly to mind that when the word 'heirs' is used as a word of limitation, it is treated as conclusively expressing the intention of the testator. Where it appears that the word was so used, the law inexorably fixes the force and meaning of the instrument. If once it is granted that the word was used in its strict legal sense, nothing can avert the operation of the Rule in *Shelley's Case*; so that the inquiry is, Was the word used as one of limitation? The only method in which an instrument employing the word 'heirs' can be shown not to be within the Rule is by showing that the word was not employed in its strict legal sense."

In *Polk v. Paris*, 9 Yerg (Tenn.) 209, 30 Am. Dec. 400, decided in 1836, which was a case on a deed, the court, by Reese, J., said: "The Rule in *Shelley's Case* is a rule of property and of public policy, not of intention merely, or construction. By this it is not meant to assert that the intention of the grantor is to be altogether excluded, as to the entire instrument, in fixing upon it a construction or interpretation. But it is intended to assert that it matters not how distinctly in point of intention it may appear that the grantor meant that the first taker should have a life estate only, if it further appeared that by the use of the terms, heirs of the body, issue, sons, children, etc., he meant the descendants of the first taker should take in their character of heirs, a descendible estate of inheritance exhausting the lineal stock of the first taker; such purpose, by the operation of the Rule, vests the first taker with the inheritance. In other words, it matters not how strongly or how clearly the grantor may intend that the instrument should not be controlled by the rule of law; yet if the proper construction of the terms which he has used in the entire instrument bring it within the operation of the rule of law, the rule

of law and not his intention must have effect."

In *Doebler's Appeal*, 64 Pa. St. 9, decided in 1869, the court, by Sharswood, J., said: "If the intention is ascertained that the heirs are to take *qua* heirs, they must take by descent, and the inheritance vests in the ancestor. The Rule in *Shelley's Case* is never a means of discovering the intention. It is applicable only after that has been discovered. It is then an unbending rule of law. . . . It declares inexorably that where the ancestor takes a preceding freehold by the same instrument, a remainder shall not be limited to the heirs *qua* heirs as purchasers. . . . It is not competent for the testator to prevent this legal consequence by any declaration, no matter how plain, of a contrary intention. That is a subordinate intent which is inconsistent with, and must, therefore, be sacrificed to, the paramount one. Even if he expressly provides that the Rule shall not apply, that the ancestor shall be tenant for life only and impeachable for waste—if he interpose an estate in trustees to support contingent remainders, . . . or, as in his will, declares in so many words that he shall in nowise sell or alienate as it is intended that he shall have a life interest only, it will be ineffectual to prevent the operation of the Rule."

In *Hageman v. Hageman*, 129 Ill. 164, decided in 1889, the court, by Shope, C. J., said: "The Rule in *Shelley's Case* is a rule of property in this State, and its application to the particular case depends not upon the quantity of the estate intended to be given to the ancestors, but upon the estate devised to the heirs. When the devise is to heirs general, the Rule applies, and is held to conclusively express the intention of the testator, and will necessarily govern and control in determining the estate devised, notwithstanding the expression of an intention on the part of the testator that the ancestor shall take a less estate than the fee."

In *Trumbull v. Trumbull*, 149 Mass. 200, the court, by Devens, J., said of the Rule in *Shelley's Case*: "It was a rule of property and not of construction, and therefore no declaration, however unequivocal when an estate was thus created, that the ancestor should have an estate for life only, or that his estate should be subject to all the incidents of a life estate, or that the heirs

though there be an express declaration that the ancestor shall only have a life estate, yet this expressed intention will not defeat its operation.¹ This principle has unfortunately been more than once overlooked, some cases regarding the Rule as merely one of construction yielding to the manifest intention of the testator.²

should take as purchasers, would be operative." *Citing* *Bowers v. Porter*, 4 Pick. (Mass.) 198.

In *Daniel v. Whartenby*, 17 Wall. (U. S.) 639, the court, by Swayne, J., said: "A declaration, however positive that the Rule shall not apply, or that the estate of the ancestor shall not continue beyond the primary express limitation, or that his heirs shall take by purchase and not by descent, will be unavailing to exclude the Rule, and cannot effect the results. . . . The rule is one of property and not of construction."

"Even, therefore, though there should be an estate for life in express terms, and a devise to issue in remainder on the death of the tenant for life, either expressly or by implication only, as by a devise over for want or in default of issue, unless there is something to contradict unequivocally the presumed intention that the devise over shall not take effect until the whole line of issue is extinct, the rule of law is an unbending one which vests the inheritance in tail in the first taker. The particular intent must give way to the general one. The Rule in *Shelley's Case* is not a rule of construction—not a means of ascertaining the intention of the testator. It presupposes that intention to be ascertained. It is a rule of law which declares inexorably that where the ancestor takes a preceding freehold by the same instrument, whether deed or will, a remainder shall not be limited to his heirs as purchasers. When we determine that by 'issue' he means heirs of the body—the entire line taking in succession by descent—the rule has the same application. If given as an immediate remainder after the freehold, it shall vest as an executed estate of inheritance in the ancestor; if immediately after some other interposed estate, then it shall vest in him as a remainder." *Kleppner v. Laverty*, 70 Pa. 70.

1. 2 Washb. Real Prop. (2th ed.), p. 652; 1 Preston Estates 363; Warner v. Sprigg, 6: Md. 14; Carpenter v. Van Olinder, 127 Ill. 42; 11 Am. St. Rep.

92; Fowler v. Black (Ill. 1891), 26 N. E. Rep. 596; Bullock v. Waterman St. Baptist Soc., 5 R. I. 273.

Doebler's Appeal, 64 Pa. St. 9, decided in 1869, was on a will in which there was a devise of real estate: "I give to my son the block, etc., . . . but he shall nowise sell or alienate any of the property, as it is intended he shall have a life interest only in the same with remainder to his heirs in fee . . . should my son die without heirs," then over. The son contracted to convey certain of the real estate in question in fee. The purchaser refused to complete the contract on the ground that the son could not give a good title, and the son brought a bill in equity. *Held*, that the son took a fee simple by the Rule in *Shelley's Case*, and specific performance was decreed. See also *Clarke v. Smith*, 49 Md. 106.

2. *Brooks v. Evetts*, 33 Tex. 732; *Slemmer v. Crampton*, 50 Iowa 302; *Howell v. Knight*, 100 N. Car. 254; *Blake v. Stone*, 27 Vt. 475; *Smith v. Hastings*, 29 Vt. 240.

In *Indiana* this view of the Rule has apparently obtained the strongest hold. The language of the cases very strongly implies that the Rule will not be permitted to overthrow the manifest intention of the testator. Thus, in *McCray v. Lipp*, 35 Ind. 116, it is said that the Rule is "not inflexible when applied to devises. It yields to the manifest intention of the testator." See also *Siceloff v. Redman*, 26 Ind. 258; *Hull v. Beals*, 23 Ind. 25; *Ridgeway v. Lanphear*, 99 Ind. 251; *Fountain Co. Coal, etc., Co. v. Beckleheimer*, 102 Ind. 76; 52 Am. Rep. 645; *Millett v. Ford*, 109 Ind. 159; *Jackson v. Jackson*, 127 Ind. 346; *Earnhart v. Earnhart*, 127 Ind. 397; 22 Am. St. Rep. 652. All these cases, however, might have been decided upon the ground that the interpretation of the will showed that "children" were meant by the terms used in limiting the subsequent estate, and, therefore, the question of a contest between intention and the Rule was not necessarily involved. And this view of the cases is strengthened by *Allen*

The inquiry, whether the word "heirs," or other term used to designate the takers of the subsequent estate, should be construed in the circumstances of the particular case to mean technically the "heirs" of the ancestor, is totally distinct from the inquiry whether the case is within the Rule. To blend the two inquiries tends to confuse. A failure to keep them distinct and separate may be said to account for much of the apparent confusion in the cases. The first inquiry is purely one of interpretation and has nothing to do with the Rule itself. If it is determined in the affirmative, then the further question arises as to whether or not the Rule applies. If determined in the negative, no question of the application of the Rule can possibly arise.¹

v. Craft, 109 Ind. 480; 58 Am. Rep. 425; and *Conger v. Lowe*, 124 Ind. 368, where it is very distinctly laid down that the Rule will defeat the testator's intention.

In *Belslay v. Engel*, 107 Ill. 182, it is said: "It is at most a technical rule of construction and has always, since the decision in *Perrin v. Blake*, 4 Burr. 2579, given way to the clear intention of the testator or donor, when that intention could be ascertained from the instrument in which the words, supposed to be words of limitation, were used." But this language is disapproved in *Carpenter v. Van Olinder*, 127 Ill. 50; 11 Am. St. Rep. 92.

In *Findlay v. Riddle*, 3 Binn. (Pa.) 139; 5 Am. Dec. 355, the court seemed to lean strongly against applying the Rule when the intention that the first taker should have only the life estate was perfectly plain. But the *Pennsylvania* courts have since unhesitatingly applied the Rule regardless of the intention when the subsequent limitation was to heirs, *qua* heirs. See *Pennsylvania* cases cited in preceding notes.

In *Polk v. Faris*, 9 Yerg. (Tenn.) 209; 30 Am. Dec. 400, the court, by Reese, J., said: "The many vexed questions which have, from time to time, arisen in the application of the Rule, and much of the obscurity and apparent contradiction in the decisions of the courts upon the subject, have probably proceeded from a want of uniform attention to this distinction, or of a just application to it. In wills especially, where intention has always been favorably regarded, and been permitted to exert a controlling influence, the courts have perhaps sometimes erred in not sustaining the Rule with sufficient firmness against the person's supposed intention."

1. 2 Jarm. on Wills (5th Am. ed) 534.* See *infra*, this title, *The Limitation Must Be to the Heirs, Qua Heirs—What Limitations Will Be So Construed*.

Illustrations.—The proper method of applying the Rule in Shelley's Case is this: Interpret the deed or will by the ordinary rules of construction precisely as if the Rule had no existence. Then, having ascertained the testator's intention, look at the Rule, and see whether such intention conflicts with it. If it does, the Rule must be applied, for it is absolute and has no exceptions whatever. *Crockett v. Robinson*, 46 N. H. 454, illustrates this perfectly. The devise was to J and C "to be equally divided between them and their heirs, if they have any lawful heirs at the time of their decease; and if they have no lawful heirs at the time of their decease," to be equally divided between the children of a sister of J and C. The court, without so much as a mention of the Rule in Shelley's Case, proceeded to interpret the will, and, by Perley, C. J., said: "In the construction which, after careful consideration we have given to this will, the intention of the testator was that an estate in one undivided half of the land should go to J for his life, and then to his heirs in the line of descent as a class; . . . that under the term lawful heirs must be included the whole heritable blood of J, and we find the actual intention of the testator to have been that J should take an estate for his life only, and should have no power to dispose of the inheritance. It is upon a devise of such intended operation that we are called on to decide whether J took an estate of inheritance, or for life only." Having interpreted the will, the court then ap-

III. GENERAL REVIEW OF THE RULE—1. The Prior Estate.—The prior estate given to the ancestor must be an estate of freehold,¹ but any estate of freehold is sufficient.² The freehold need not necessarily be in possession, but may be a freehold in remainder. In such a case a merger of it in the inheritance will give rise to an inheritance in remainder, which occupies the place in the order of limitation which would have been occupied by the freehold if it had not been merged.³

plied the Rule in Shelley's Case, saying: "In determining whether the Rule in Shelley's Case shall apply, it is not material to inquire what the intention of the testator was as to the quantity of estate that should vest in the first taker. . . . The material inquiry is, what is taken under the second devise. If those who take under the second devise take the same estate that they would take as his heirs, or as heirs of his body, the Rule applies." Having already determined by interpretation that this was just what the testator did mean, the court without difficulty applied the Rule, and held that J and C took estates tail, which, by the statute of *New Hampshire* abolishing estates tail, were turned into fees simple.

1. Challis' Real Prop. 132; Fearn's Cont. Rem.; 1 Prest. Est. 309; Co. Litt. 319b, 376b; 1 Rep. 104a.

Where the estate to the ancestor is for years only, the Rule does not apply. Tippen's Case, 1 P. Wms. 559; Harris v. Barnes, 4 Burr. 2157; 1 Prest. Est. 309.

A Prior Estate of Freehold Must Be Given to the Ancestor.—Where there was a deed of personal property to husband and wife for life, remainder to the heirs of the wife, it was held that by the law of *Alabama*, the property not being to the wife's separate use, her husband was entitled to it; therefore, the Rule in Shelley's Case did not apply, since the remainder was to the heirs of the wife who took no prior estate of freehold. Price v. Price, 5 Ala. 578.

The testator directed his executors to invest a portion of his estate "for the use of my son H;" that the income should be paid to H during life and "after his death the principal shall go and be paid to his children or children's children in the proper line of descent;" but if he "shall die without leaving children or grandchildren, as aforesaid, or any direct descendants

from his body begotten, then to revert to the testator's estate." It was held that the Rule in Shelley's Case was not applicable, that there was no bequest to H for life with remainder over, but only a bequest to him of the income with a devise over of the principal. The case, therefore, did not fall within the terms of the Rule. Harbester's Estate, 133 Pa. St. 351.

2. Challis' Real Prop. 132; Fearn's Cont. Rem. 28 V. 1; 1 Prest. Est. 313. It may be for life, or in tail, or for the life of another person, or for the joint or several lives of the party and some other person; 1 Prest. Est. 313. Or it may have a collateral limitation, as to a woman during her widowhood. Thus, an estate was limited to husband and wife for their joint lives, and after the decease of either of them to the wife's heirs by the husband begotten, and for the want of such issue, to the wife for life, remainder to the right heirs of the husband forever. After the death of the husband, a contest arose between the wife and the children. Held, that the wife took an estate tail under the Rule in Shelley's Case. It was said that it was "an estate tail executed *sub modo*, not presently by severance of the jointure, as it would be by a several conveyance, but upon the death of him whose life keeps the estates asunder, they are united and executed." Merrill v. Rumsey, 1 Keb. 888; Siderf. 247. Under nearly the same facts in Curtis v. Price, 12 Ves. 89, the decision was the same.

3. Challis, R. P. 124; Brown v. Renshaw, 57 Md. 67; Spader v. Powers, 56 Hun (N. Y.) 153.

Devise to A "after his father's decease, provided his father does not sell said property, which privilege I grant him, provided it is necessary for his maintenance. After the said A's decease the said house and land is to go to his nearest heirs." It was held, the father not selling the property during

The possibility of the freehold estate determining in the lifetime of the ancestor does not affect the working of the Rule.¹ Nor will it have any effect to exclude the Rule that the subsequent estate could not by possibility vest as a remainder in the lifetime of the ancestor.²

2. The Subsequent Estate.—The subsequent limitation may be to the heirs, either general or special; that is, it may be in fee simple, fee tail general, or fee tail special.³ The Rule operates even

his life, that A, under the Rule in Shelley's Case, took a fee simple. *Ryan v. Allen*, 120 Ill. 648.

1. Thus, "a grant to A and B during their joint lives, remainder to Z for life, remainder to A's heirs; here, if B and Z die leaving A, it terminates the freehold estate and the subsequent remainder in the lifetime of the ancestor A, and yet the Rule applies so as to vest the inheritance in A; at least to this conclusion Mr. Fearne comes with irresistible force of reason and authority against the opinion of Mr. Serjeant Rolle." 2 Min. Inst. (3d ed.) 345; citing *Fearne's Cont. Rem.* 30, 33; 2 Th. Co. Litt. 143n (P.); 2 Rolle's Abr. 418.

2. Thus, where the gift is to A and B so long as they shall jointly live, remainder to the right heirs of him that dies first, the Rule will operate. 1 Prest. Est. 315; 1 Co. Inst. 378; *Fearne's Cont. Rem.* 32, *et seq.* In such an event the heirs must derive their title through the ancestor and take by descent, not by purchase. So if the remainder be limited on a contingency which does not happen in the ancestor's lifetime, nevertheless the heirs will take by descent. 2 Washb. on Real Prop. (5th ed.), p. 271.

3. *Challis' Real Prop.* 133; *Fearne's Cont. Rem.* 28; 1 Prest. Est. 263, *et seq.*; *King v. Rea*, 56 Ind. 1; *Allen v. Craft*, 109 Ind. 476; 58 Am. Rep. 425; *Lane v. Utz* (Ind. 1892), 29 N. E. Rep. 772; *Dickson v. Satterfield*, 53 Md. 217; *Fraser v. Chene*, 2 Mich. 81; *Hampton v. Rather*, 30 Miss. 193; *Kleppner v. Laverty*, 70 Pa. St. 70; *Dott v. Cunningham*, 1 Bay (S. Car.) 453; 1 Am. Dec. 624; *Whitworth v. Stuckey*, 1 Rich. Eq. (S. Car.) 404.

Devise to P, "during her natural life, and after her death to the begotten heirs or heiresses of her body forever." It was held that under the Rule in Shelley's Case P took a fee tail which was turned into a fee simple by statute of North Carolina 1784. *Leathers v.*

Gray, 101 N. Car. 162; 9 Am. St. Rep. 30.

Deed to N "during her life, and then to her children share and share alike," *habendum* "to her for life and then to the heirs of her body." It was held that the deed was controlled by the *habendum*, and therefore the Rule in Shelley's Case applied, and N took a fee tail. *Stockton v. Martin*, 2 Bay (S. Car.) 471.

Deed of land to "A and the heirs of her body by B." It was held that by the Rule in Shelley's Case A took a fee tail special which was enlarged to a fee simple by the statute abolishing estates tail. *Tipton v. La Rose*, 27 Ind. 484.

Deed of land to "C for her lifetime, after her death to descend to the heirs of her body." It was held that C took a fee tail under the Rule, enlarged by the *Indiana* statute into a fee simple. *Andrews v. Spurlin*, 35 Ind. 262.

Devise to "M for and during his natural life, and from and after his decease I bequeath the same in fee to the lawful issue of said M; and if he shall decease without such issue, then I give and bequeath the same in fee to the heirs of said M." It was held that by the Rule in Shelley's Case M took a fee tail and that by the *Indiana* statute this was converted into a fee simple. *Gonzales v. Barton*, 45 Ind. 295.

Fee Tail Becomes a Fee Simple.—The fee tail which the ancestor takes under the Rule is by statute in most the United States converted into a fee simple. *ESTATES*, vol. 6, p. 879. *Myar v. Snow*, 49 Ark. 125; *Horsley v. Hilburn*, 44 Ark. 458; *Tipton v. La Rose*, 27 Ind. 484; *Andrews v. Spurlin*, 35 Ind. 262; *Gonzales v. Barton*, 45 Ind. 295; *King v. Rea*, 56 Ind. 1; *Allen v. Craft*, 109 Ind. 476; 58 Am. Rep. 425; *Lane v. Utz* (Ind. 1892), 29 N. E. Rep. 772; *Dickson v. Satterfield*, 53 Md. 217; *Fraser v. Chene*, 2 Mich. 81; *Haldeman v. Haldeman*, 40 Pa. St. 29;

though the subsequent limitation of the estate is contingent.¹ The subsequent limitation may be mediate or immediate. The interposition of other estates between the freehold and the inheritance does not prevent the Rule from operating. Where there are such intermediate estates the ancestor takes simultaneously two distinct estates, a freehold in possession or in remainder, as the case may be, and an inheritance in remainder, the inheritance being subject to the interposed estates, which are in no way affected. When, by the determination or failure of the intermediate estates, the cause which prevents merger is removed, then the two estates will coalesce.²

Kleppner v. Laverty, 70 Pa. St. 70; *Mason v. Ammon*, 117 Pa. St. 127; *Bramble v. Billups*, 4 Leigh (Va.) 90; *Clarke v. Smith*, 49 Md. 106.

In *Illinois*, however, the statute (*Illinois* law of 1872, § 6, p. 283) provides that where an estate tail is created it shall be a life estate in the first taker and a fee simple in his heirs. *Baker v. Scott*, 62 Ill. 86; *Butler v. Huestis*, 68 Ill. 594.

1. 2 Jarm. Wills (6th ed.) *1185; Co. Litt. 378b; 1 Prest. Est. 316.

It has already been pointed out that a remainder to "heirs," etc., is necessarily contingent, but that under the Rule in *Shelley's Case*, the words being construed as words of limitation instead of as creating a remainder, the contingent nature of the inheritance ceases, and it becomes vested. The statement in the text is to be referred, therefore, to a contingency annexed to the remainder itself, in addition to that which has been spoken of as arising out of a remainder to persons not ascertained; and the existence of such contingency does not affect the application of the Rule.

2. "When the limitations to the ancestor and the heirs are immediate, or eventually become so by the determination or failure of the intermediate estates, the several interests imported by these limitations will consolidate, and by merger become one entire estate, giving one undivided time of continuance. When other estates are limited intermediately, the limitation to the heirs will, during the existence of these estates, give to the ancestor an estate of inheritance in remainder, to take effect in possession according to the order in which it is limited; but in subordination to, and after the determination of the intermediate estates by which it is preceded." 1 Prest. Est. 346.

"If the subsequent limitation to the heirs follows immediately, without the interposition of any mesne estates, upon the prior freehold, the freehold is merged in the inheritance, and the specified person takes an estate of inheritance in possession. If any estate sufficient to prevent merger is interposed, or if by reason of any other circumstance, merger is prevented from taking place, he takes two distinct estates, a freehold in possession and an inheritance in remainder.

"The last preceding paragraph assumes that the prior limitation of the freehold is a limitation of a freehold in possession. If the prior freehold itself is in remainder, and an inheritance follows immediately, merger takes place, and the ancestor takes an inheritance in remainder. If interposed estates or any other circumstances prevent merger, the ancestor takes two distinct estates, a freehold in remainder and an inheritance in remainder." *Challis' Real Prop.* 124.

In *Dennett v. Dennett*, 43 N. H. 499, there was a devise to M D "to descend to the youngest son of his body begotten, and from him to the oldest male heir of said youngest son of his body lawfully begotten, and in failure of such issue, then to the heirs of said M D forever." It was held that by the Rule in *Shelley's Case* M D took a fee simple subject to the life estates of the youngest son of M D and of the oldest male heir of said youngest son. The same will was involved in *Dennett v. Dennett*, 40 N. H. 498.

In *Quick v. Quick*, 21 N. J. Eq. 13, which arose on a will, taking effect prior to the *New Jersey* statute, abolishing the Rule in *Shelley's Case* as to wills, there was a devise to E for life, then to E's widow, in case he should leave one, during her widowhood only, "and at the decease of his widow, the

The subsequent estate must be limited to take effect as a technical remainder. The Rule has no application where the estate to the heirs is an executory limitation.¹

3. Heirs Must Be Deduced Solely from Persons Taking Freehold—

a. THE PRINCIPLE.—In order to bring the Rule in Shelley's Case into operation the heirs who are to take the subsequent estate must be deduced exclusively from the person who, as ancestor, takes the prior freehold. If such heirs are to be the common heirs of the body of the person who takes the freehold and of some other person, the Rule does not operate; and the subsequent estate is a contingent remainder by purchase.² By this principle are solved the problems which are presented when the prior freehold is given to several persons, or when the subsequent estate is limited to the heirs of more than one, or when both complications are involved.

b. FREEHOLD TO ONE, REMAINDER TO HEIRS, ETC., OF HIM AND ANOTHER, OR OTHERS.—Where the subsequent limitation in remainder is to the heirs, etc., of the person who takes the free-

said devised plat of land is to go to his (E's) heirs, to be divided among them as the law directs, in case of dying intestate." *Held*, that under the Rule in Shelley's Case, E took a fee simple.

1. 1 Prest. Est. 324; Fearn's Cont. Rem. 276; Challis' Real Prop. 122.

Thus the Rule does not operate where the estate to the heirs is a springing use. *Loyd v. Carew*, Prec. in Chanc. 72; *Show. Cas. in Parl.* 137; Fearn's Cont. Rem. 276; 1 Prest. Est. 324.

"This includes cases in which the prior limitation is executory; because in such cases the subsequent limitation is necessarily also executory." Challis' Real Prop. 122.

So of course if there is a grant or devise "to A and his heirs," or to "A and the heirs of his body," the Rule has no application, and the estate will be a fee simple or a fee tail as the case may be. *Pierson v. Lane*, 60 Iowa 60.

2. 2 Jarm. Wills (6th ed.) *1186; *Gosage v. Taylor*, Sty. Rep. 325; *Denn v. Gillot*, 2 T. R. 431.

Illustrations.—The exact meaning and effect of the statement in the text are well illustrated by the following cases: Devise to a wife for life, remainder to the heirs of her body, begotten by the husband. Here the Rule in Shelley's Case operates, and the wife takes an estate tail special. (*Alpass v. Watkins*, 8 T. R. 516.) But if a devise is to a wife for life, remainder to the heirs to be begotten on the body of the wife by the husband, the Rule in

Shelley's Case will not operate, and the wife will take only a life estate. (*Gosage v. Taylor*, Sty. Rep. 325.) Here the only difference in form is the use of the words "on the body," etc., in the second case, instead of the words "of the body," etc., as in the first. But bearing in mind the principle laid down in the text, it is plain that there is a vital distinction. In the one case the remainder was limited to the heirs of the body of the wife; while in the other case the remainder is really to the heirs of the husband begotten on a particular woman. It is true that the persons answering the description of heirs of the body will in both cases be the same. But in the one case they are deduced exclusively from the wife as ancestor; while in the other they are really not heirs of any kind, but simply individuals pointed out by the fact that they proceed from the common bodies of two specified persons. It, therefore, appears that, strictly speaking, this principle is but another application of what is laid down *infra*, this title, *General View of Rule, The Subsequent Estate Must be to Heirs Qua Heirs*. *Helm v. Frisbie*, 59 Ind. 526.

If both husband and wife take a freehold and the remainder is to the heirs to be begotten on the body of the wife by the husband, the construction will be the same as if the heirs of the body were to issue from both; since they are not in terms required to be of the body of either. Therefore, the Rule

hold and of another, or several other persons, by copulative words¹ in the same clause, there are important differences of construction dependent upon whether such persons can or cannot have a common heir.²

First, where a freehold is given to one person, remainder to the heirs, or heirs of the body of that person and another, or several others, by copulative words, and such persons are incapable of having a common heir of their bodies, the Rule will operate to the extent of that part of the inheritance which would be the share of the heirs, or heirs of the body, of the person who takes the freehold.³

Second, where a freehold is given to one person, remainder to the heirs, or heirs of the body, of that person and another, by copulative words, and such persons are capable of having a common heir of their bodies, the Rule in Shelley's Case does not apply; and the heirs, etc., being the issue of their common bodies, take, by purchase, a contingent remainder in fee simple or fee tail accordingly as the limitation in remainder is to heirs, or heirs of the body.⁴

will apply as explained *infra*, this title, *Freehold to Several, Remainder to their Heirs*.

1. That is, when the language of the gift over after the freehold estate is simply to "the heirs (or heirs of the body) of A and B." When such is the form of the gift, the construction is well settled that, unless such persons are incapable of having a common heir, there is meant an heir proceeding from the common bodies of A and B. If the gift over were by some other form of words the construction of the whole will or deed must determine whether a common heir, or whether heirs proceeding from them separately, is intended. See next note.

2. If the several persons are of the same sex or are so related by consanguinity, or affinity, that they cannot lawfully marry, they are regarded as incapable of having a common heir of their bodies. In all other circumstances they are, in contemplation of law, capable of having such heirs.

The Rule in Shelley's Case operates only when the heirs, etc., who are to take in remainder are to be derived from the person, as ancestor, who takes the prior freehold, and from that person alone. See *supra*, this title, *Statement and Origin*. Hence the necessity of determining in limitations to the heirs of two or more, one only of whom takes a prior freehold, whether a common heir of their bodies was intended; for if a common heir is

meant the Rule is not applicable. The determination of this question is purely a matter of interpretation, precedent to the question of the Rule's application; and, therefore, not strictly involved in the consideration of the Rule itself. It, however, arises more frequently in connection with the Rule than otherwise, and is, therefore, briefly noticed here as a matter of practical convenience.

3. Prest. Est. 321. Thus, if a life estate is given to A, remainder to the heirs of A and B and they cannot have a common heir, the Rule operates upon one-half; therefore, A takes a fee simple in one moiety; and the other moiety is a contingent remainder in fee simple to the heirs of B, with a life estate therein to A. If the remainder were to the heirs of the body of A and B, the inheritance in each case would be in fee tail instead of fee simple.

4. 1 Prest. Est. 334-5; 2 Jarm. Wills (5th Am. ed.) 340. When the two persons are husband and wife, the statement in the text is undoubtedly correct, whether the remainder is to "heirs" or to "heirs of the body." It is also equally certain that such is the construction where the gift is to "heirs of the body" of two who might lawfully intermarry. There might be room for doubt, however, in the event of the remainder being to "heirs" of two who are not husband and wife, but who might lawfully intermarry. Such limitations are

c. FREEHOLD TO SEVERAL, REMAINDER TO THEIR HEIRS, ETC.—Where there is a freehold, either jointly, severally or successively, to two persons who are capable of having a common heir, with remainder to their heirs, or heirs of their bodies, the Rule in Shelley's Case operates; and such persons take a joint inheritance in fee simple or fee tail, accordingly as the remainder is to heirs or heirs of the body.¹

Where there is a freehold jointly to two or more persons who are incapable of having a common heir, with remainder to their heirs, or heirs of their bodies, the Rule in Shelley's Case operates. If the remainder is to heirs, the ancestors take a joint inheritance in fee simple. If the remainder is to heirs of their bodies, the ancestors will each take a several inheritance in fee tail in such part as would be the share of such ancestor's heirs of his body

rarely, if ever, found, except in prenuptial settlements; and there is the same reason in such case to suppose that a common heir is intended as exists where the persons are husband and wife. The statement in the text is, therefore, clearly applicable under such circumstances; but whether the same construction would prevail where the two persons were not in contemplation of marriage, would seem to be open to serious question.

The statement in the text assumes that the limitation is to the heirs of two persons only. In case the remainder were to the heirs of more than two persons, with each or several of whom the person to whom the freehold is given might lawfully intermarry, a very curious question of construction would arise; and would of course have to be decided upon the intention as discoverable from the whole instrument. See 1 Prest. Est. 345.

Devise to testator's wife "during her life, remainder to issue of her body by me begotten, provided also that such issue live to lawful age, and on failure thereof," remainder over. *Held*, that this did not fall within the Rule in Shelley's Case, but the wife took an estate for life with contingent remainder over in event of the death of issue during minority. *Helm v. Frisbie*, 59 Ind. 526.

1. *Cockin's Appeal*, 111 Pa. St. 26; *Steel v. Cook*, 1 Met. (Mass.) 281; *Pressgrove v. Comfort*, 58 Miss. 645.

If the prior freehold were to the two persons jointly, then the freehold and the inheritance being both joint, will merge into a joint inheritance in possession. But if the two persons have

the freehold severally or successively, merger cannot take place, and the ancestors will have a distinct inheritance jointly, in remainder.

In *Crockett v. Robinson*, 46 N. H. 454, which arose upon a will which took effect prior to the statute, there was a devise to J and C "to be equally divided between them and their heirs, if they have any lawful heirs at the time of their decease; and if they have no lawful heirs at the time of their decease," then over to the children of a sister of J and C. It was held that by the Rule in Shelley's Case J and C took estates tail in common, which, by the law of *New Hampshire*, were converted into fee simple.

Devise to husband and wife during their respective lives; after their deaths to their heirs. *Held*, that the husband and wife took a fee simple. *McFeely v. Moore*, 5 Ohio 465; 24 Am. Dec. 314. See also *King v. King*, 12 Ohio 390.

Devise by testator to his daughter, L B, and her husband, J B, "to them during the life of the longest liver of them, and then to their offspring, if any, by my daughter L B, as they shall think best to give it; and in default of such offspring" then over. The daughter died during the testator's lifetime, leaving her husband and children, who were still living at the death of the testator. The children then both died without issue. It was held that by the Rule in Shelley's Case the husband took a fee tail, which was converted into a fee simple by the statute, and the remainder over on failure of issue was barred. *Bramble v. Billups*, 4 Leigh (Va.) 90.

according to the number of joint tenants to whom the freehold is given.¹

Where there is a freehold in common or successively, to two or more persons who are incapable of having a common heir, with remainder to their heirs, or heirs of their bodies, the Rule in Shelley's Case will operate; and such persons will each take a several inheritance, in fee simple or fee tail, as the case may be, to such proportion as would be the share of such ancestor's heirs, etc., according to the number of persons to whom the freehold is given.²

d. FREEHOLD TO SEVERAL, REMAINDER TO HEIRS, ETC., OF ONE OF THEM.—Where the freehold is given to several persons in common, remainder to the heirs, or heirs of the body of one of them, the Rule operates to the extent of the share of him who takes the freehold, according to the number to whom the freehold is given.³

1. In *McFeely v. Moore*, 5 Ohio 464; 24 Am. Dec. 314, there was a devise to W and P of "the use of two tracts of land during their respective lives, but at their decease my will is that these two tracts of land descend to their heirs, to whom I bequeath the same." It was held that, by the Rule in Shelley's Case, W and P took a fee simple.

In *Manchester v. Durfee*, 5 R. I. 549, there were devises to two daughters "to be to them an estate for life, and to the heirs of their bodies after them, and to the heirs and assigns of such heirs forever." It was held that the daughters took a fee tail under the Rule in Shelley's Case.

Devise to testator's children "for the term of their natural lives," and at their death "to the issue of them." It was held the children took a fee tail under the Rule. *Whitworth v. Stuckey*, 1 Rich. Eq. (S. Car.) 404. See also *Corroll v. Burns*, 108 Pa. St. 386.

In *Hageman v. Hageman*, 129 Ill. 164, there was devise to testator's four sons, with the provision that said sons "shall neither of them sell nor mortgage any of the land, . . . but the same shall go to their heirs after them." It was held that the sons took a fee simple.

2. Whether the ancestor's freehold and inheritance will consolidate will be dependent upon the doctrine of merger.

Pierce v. Pierce, 14 R. I. 514, was a devise to M and D. "for and during their natural lives, the use, rents and profits" of two lots of land with one dwelling house partly owned, each lot in the following manner: "Said M

and D each having the use of certain stories of said house separately, but the other improvements and appurtenances of the lots in common, and at the decease" of M and D "all the interest of the deceased . . . shall vest in his or her heirs." It was held that by the Rule in Shelley's Case M and D took a fee simple. It was held, further, that the use of the words "at the decease," instead of "after the decease," was immaterial.

Devise of residue of testator's estate "as follows: viz., one-fourth to my daughter H; one-fourth to my son W; one-fourth to my two grandchildren C and D, and one-fourth to my wife C;" followed by a clause directing that the one-fourth given to H should be so secured to her that she should enjoy it during her natural life, and after her decease then to her right heirs forever. It was held that under the Rule in Shelley's Case H took a fee simple. *Wicker v. Ray*, 118 Ill. 472.

3. 2 Prest. Est. 321. *Carpenter v. Van Olinder*, 127 Ill. 42; 11 Am. St. Rep. 92. Thus, if a life estate is given to A and B in common, remainder to the heirs of A, the operation of the Rule will give a fee simple in one undivided moiety to A; and the other undivided moiety will be a contingent remainder in fee simple to A's heirs, with a life estate therein to B.

Whether the freehold and the inheritance merge, or whether they will remain distinct estates in the ancestor, will depend upon the law of merger, as has been observed before (see *supra*, this title, *General Review of Rule, The Subsequent Estate*), according to

Where the freehold is given to several jointly, remainder to the heirs, or the heirs of the body of one of them, the Rule will operate, and the person to whom the freehold is limited will take an inheritance in the entirety.¹

Where the freehold is given to several successively, remainder to the heirs, or heirs of the body of one of them, the Rule operates, and the one to whose heirs, etc., the remainder is given will take the inheritance, subject to the other freehold estates.²

4. Same Instrument Must Give Both Estates.—Both estates must arise under the same instrument.³

5. Equitable Estates — a. RULE APPLIES TO EQUITABLE ESTATES.—The Rule applies to equitable, as well as to legal limitations; but the prior and the subsequent limitations must both be of the same quality in this respect; either both legal or both equitable.⁴

the time at which the gift to heirs, etc., is to take effect.

1. Whether the ancestor's freehold and his inheritance merge, thus giving him the inheritance in possession *sub modo*; or whether he takes the inheritance by way of remainder, will depend upon the law of merger as applicable to the form of the gift. 1 Prest. Est. 336, *et seq.* Fearne's Cont. Rem. 36.

If the form of the gift connects the limitation to the heirs with the limitation to the ancestors, as to two jointly, "and the heirs, etc.," of one of them (1 Prest. Est. 337), the inheritance and the freehold will merge *sub modo*; "for though they are so far executed in, or blended with the possession as not to be grantable away from or without the freehold by way of remainder, yet they are not so executed into possession as to sever the jointure, or entitle the wife of the person taking the inheritance to dower." Fearne's Cont. Rem. 36. But if there is a distinction between the several limitations, and the times at which they are to confer a right to the possession, as to two jointly and "from and after their decease" to the heirs of one of them (1 Prest. Est. 337), they will not merge, and the ancestor will take two distinct estates, a joint freehold in possession, and an inheritance in remainder. See *supra*, General Review of Rule; The Subsequent Estate.

2. Deed to a trustee in trust to A for life, then to H (the husband of A) for life, then to the issue of A and H, and in default of such issue, then to such persons as H shall appoint by will, and in default of such appointment, then to the right heirs of H. It was held that the estates limited to H and his

heirs being both equitable, the Rule in Shelley's Case applied, and H took a fee simple. The only effect of the power of appointment was to make the fee of H subject to be divested by the exercise of power. *Brown v. Renshaw*, 57 Md. 67.

3. Fearne's Cont. Rem. 71, V. 13. The two estates must be taken "by, under, or as a consequence of the same deed or instrument, so that the several instruments, if there be several, may be parts of the same transaction." 1 Prest. Est. 309.

An estate taken by the ancestor by way of resulting use, is for this purpose, an estate arising under the same instrument. *Challis' Real Prop.* 133; Fearne's Cont. Rem. 41, V. 8; 1 Prest. Est. 309; *Pibus v. Mitford*, 1 Vent. 372; *Wills v. Palmer*, 2 Wm. Bl. 687; or an estate limited under a subsequent exercise of a power contained in the instrument. Fearne's Cont. Rem. 74, V. 14; 1 Prest. Est. 309; *Challis' Real Prop.* 133; *Venables v. Morris*, 7 T. R. 342, or a will and a codicil being part of the will. *Hays v. Foorde*, 2 Wm. Bl. 698; also 1 Prest. Est. 309.

"Where the limitation to the ancestor is by one deed or instrument, and the limitation to the heirs is by another deed or instrument (without any regard to the priority of the instruments to which one or the other of the limitations owes its existence, and under which it is to receive its effect), the Rule has not any application." 1 Prest. Est. 309; *Moor v. Parker*, L. Raym. 37; *Fonnereau v. Fonnereau*, 2 Dougl. 487; *Snowe v. Cuttler*, 1 Lev. 135.

4. *Williams v. Williams*, 11 Lea (Tenn.) 652; *Turner v. Ivie*, 5 Heisk.

(Tenn.) 222; *Green v. Green*, 23 Wall. (U. S.) 486; *Baker v. Scott*, 62 Ill. 86; *Armstrong v. Zane*, 12 Ohio 287; *Taylor v. Lindsay*, 14 R. I. 518; *Fearne's Cont. Rem.* 52, V. 9; 57, V. 10; *Brown v. Renshaw*, 57 Md. 67; *Powell v. Brandon*, 24 Miss. 343. Where the life estate is equitable and the remainder legal the Rule does not apply. *Mannerback's estate*, 133 Pa. St. 342; *Little v. Wilcox*, 119 Pa. St. 439.

Deed of real estate to trustee in trust for a married woman, for her separate use during her life, "and from and immediately after her death, then for the use and benefit of her legal heirs." *Held*, that under this deed the married woman had merely an equitable estate; but that her heirs had a legal estate, and, therefore, the Rule in *Shelley's Case* did not operate, and she took merely an estate for life. This case is particularly valuable on the point that the Rule in *Shelley's Case* will not operate, unless both estates are of the same quality, legal or equitable. *Ware v. Richardson*, 3 Md. 505; 56 Am. Rep. 762.

Where the prior limitation is in form equitable, while the subsequent limitation is in form legal, the Rule will apply, if all the limitations are made in fact equitable by reason that the whole legal estate happens to be outstanding. *Challis' Real Prop.* 134; *In re White*, 7 Ch. Div. 201.

If one estate is in form equitable and the other in form legal, the Rule will apply if both limitations are made in fact legal, by reason that the trust is executed by the Statute of Uses. Thus, where the subsequent limitation was legal, and the prior estate in form equitable, but the trust being passive, because in fact a legal estate, the Rule was applied. *Warner v. Sprigg*, 62 Md. 14.

There is considerable diversity in the various States as to when trusts will or will not be executed into legal estates. (See TRUSTS.) This is, of course, a precedent question of law, which must be settled before the application of the Rule in *Shelley's Case* is considered.

A conveyance in trust for a certain person, and, in case of his death before it expires, for the benefit of his heirs, with discretion to the trustee to turn over the property or the proceeds of a sale thereof to the beneficiary, is an executed trust, and under the Rule in

Shelley's Case gives the beneficiary an estate in fee simple. *Mack v. Champion* (Super. Ct. Cin.), 26 Ohio L. J. 113.

Devise and trust "to hold the same to the separate use of my said daughters during the natural life of my said daughters, and such use as she, notwithstanding any coverture, may direct, and after her death then to the use of her heirs at law." It was held that both limitations being equitable the Rule in *Shelley's Case* applied. *Armstrong v. Zane*, 12 Ohio 287.

Deed of lands to a trustee, "In trust for Z during her natural life, and upon her decease the said premises are to inure and vest in her heirs in fee simple forever; they, the said heirs of said Z, to have and hold the said premises unto them and their heirs and assigns forever." *Held*, that under this deed, Z took an equitable estate, and the heirs a legal estate, and therefore the Rule in *Shelley's Case* did not apply. Hence, Z took a life estate and the heirs a contingent remainder. *Zuver v. Lyons*, 40 Iowa 510.

Devise in these words: "To my daughter S . . . I give the sum of \$2,000, to be invested in lands, for my said daughter to have the income of the same during her life, and at her death to go to the heirs of her body, and if none," then over, and an order to the executor to carry out these directions. *Held*, this was a trust estate in S, and a legal estate in the heirs of her body; therefore, the Rule in *Shelley's Case* was inapplicable. *Hanna v. Hawes*, 45 Iowa 437.

Devise to trustee, "In special trust and confidence for my son H T, and after him in fee to his heirs," with an order to the trustee to pay H T the income, "and in the event of his decease without issue," then over. It was held that H took an equitable estate for life, legal remainder in fee to the heirs of his body. The court, by Ames, C. J., said: "The estate of H T being equitable, and of his heirs, who are to take the fee after him, being legal, the Rule in *Shelley's Case* does not apply." *Thurston v. Thurston*, 6 R. I. 296.

Devise to testator's son, of income during his natural life, and at his death principal to the son's children, with the proviso that "should he die before attaining the age of 21 years without leaving issue at the time of his death," then over; also a provision that the income should not be liable to attach-

b. DOES NOT APPLY TO EXECUTORY TRUSTS NOR MARRIAGE ARTICLES.—The Rule in Shelley's Case is not applicable to executory trusts. Therefore, where the instrument is in the light of a set of instructions merely, and a conveyance under the direction of a court of equity is necessary to carry it into effect, the court will decree a conveyance in such form as will effectuate the intention.¹

ment for debts, etc. (which provision was valid as a spendthrift trust). It was held that the Rule in Shelley's Case was not applicable, because the life estate was equitable and the remainder legal. *Mannerback's Estate*, 133 Pa. St. 342.

Passive Trusts.—H, a single woman, conveyed her estate to a trustee in trust for her own separate use for life, and after her death to convey to whom she should appoint, and in default of appointment "to such person or persons as would be entitled to the same if she had died intestate, seized of the said premises in fee simple, and in such manner and for such quantity of estate as such person or persons would, in such case, be entitled to by law." H afterwards married and subsequently became discoverd. Afterward she petitioned the court for an order on the trustee to convey to her in fee simple. *Held*, that the separate use fell, and that thereby the trust became passive, and, therefore, in fact a legal estate; also that the limitation over in default of appointment was equivalent to a limitation to the "heirs" of H. Therefore, under the Rule in Shelley's Case, H took a fee simple and was entitled to a conveyance from the trustee. *Dodson v. Ball*, 60 Pa. St. 492; 100 Am. Dec. 586. See also *Yarnall's Appeal*, 70 Pa. St. 335.

Conveyance of personal property in trust for S until she arrived at full age or married, and then to deliver them into her possession, and after such delivery, the trustee to see that the slaves were not disposed of, but preserved for the benefit of the heirs of the body of S, in whom, upon her death, they should vest, and if S should die without heirs of her body, then over. It was held that this was a passive trust and the estates of both S and the heirs of her body were legal estates, and that by the Rule in Shelley's Case S took an absolute title. *Carradine v. Carradine*, 33 Miss. 698.

Devise to trustees in trust for testator's sons, and "after the decease of my

said sons, respectively, their shares to go to their several heirs at law." The trust embraced both real and personal property. It was held that this was a dry trust; that therefore the life estate of the sons, and the limitation to their heirs, were both legal, and, under the Rule in Shelley's Case, the sons took a fee simple in the real estate, and absolute title to the personalty. *Warner v. Sprigg*, 62 Md. 14.

Conflict in Early Cases.—At one time it was seriously questioned whether the Rule in Shelley's Case was applicable to any equitable estate. It is shown elsewhere (see text, this page, *General View of Rule; Does Not Apply to Executory Trusts Nor Marriage Articles*) that the Rule does not govern executory trusts. In *Bagshaw v. Spencer*, 1 Ves. 142; 2 Atk. 582; 1 Coll. Jurid. No. 15, Lord Hardwicke took the ground that there was no difference in this respect between an executed and an executory trust, and refused to apply the Rule. This decision, however, was permanently overruled by Lord Northampton in *Wright v. Pearson*, 1 Eden 119, and by Lord Thurlow in *Jones v. Morgan*, 1 Bro. C. C. 206. Since then it has never been doubted that the Rule in Shelley's Case was fully applicable to equitable estates. See 4 Kent's Com. 219, 220.

1. 1 Prest. Est. 355, 387, *et seq.*; 4 Kent's Com. 218.

Executory Trusts.—"Trusts executory are peculiar to marriage articles, and to those instruments, whether deeds or wills, in which, by the express provisions of the instrument, the trustees are to convey, settle, or assure the lands on which the instrument is to operate; or to purchase lands with money intrusted to be laid out in a real estate; thereby showing that the parties have a further conveyance in their prospect and contemplation. The mere circumstance that the party covenants to do an act or directs a conveyance to be made will not of itself make the trust executory. The conclusion that a trust is executed or executory must depend on the

The same is true in respect to marriage settlements; since they are always considered as raising executory trusts, unless, previous to the marriage, they have been carried into execution by a settlement in fact.¹

6. Applies to Personal Property.—While, strictly speaking, the Rule in Shelley's Case is applicable only to real estate, the same principles are applied, by analogy, to similar dispositions of personal property, and to the same extent.²

7. The Limitation Must Be to Heirs Qua Heirs—*a. THE PRINCIPLE.*—In order to bring the Rule in Shelley's Case into operation the subsequent estate must be limited to the heirs *qua* heirs of the first taker. That is to say, it must be given to the heirs or heirs of the body as an entire class or denomination of persons; and not merely to individuals embraced within such class.³

inquiry whether another instrument be in the contemplation of the party as the act which is to give full and complete effect to the particular object he has in view." 1 Prest. Est. 387. See TRUSTS.

1. Marriage Articles.—When a settlement is made previous to the marriage, without any reference to the articles, such articles are annulled and no resort can be had to them. But if it appears on the face of the settlement that the parties have the articles in their contemplation, and that the settlement was made in pursuance of and with a view to perform the articles, then a court of equity will resort to them, and decree an execution of the articles by limitations in strict settlement, so as to insure effect to the intention of the parties. 1 Prest. Est. 356. See MARRIAGE SETTLEMENTS, vol. 14, p. 538.

2. Powell v. Brandon, 24 Miss. 345; *Hampton v. Rather*, 30 Miss. 193; *Polk v. Faris*, 9 Yerg. (Tenn.) 209; 30 Am. Dec. 400; *Machen v. Machen*, 15 Ala. 373; *Hammer v. Smith*, 22 Ala. 433; *Mason v. Pate*, 34 Ala. 379; *Smith v. McCormick*, 46 Ind. 135; *Pressgrove v. Comfort*, 58 Miss. 644; *Dott v. Cunningham*, 1 Bay (S. Car.) 453; 1 Am. Dec. 624; *Horne v. Lyeth*, 4 Har. & J. (Md.) 435; *Watts v. Clardy*, 2 Fla. 369; *Compare Siceloff v. Redman*, 26 Ind. 251.

"The Rule in Shelley's Case is applied to grants of personalty, rather by way of analogy . . . than as a Rule *stricti juris*, and that it therefore yields more readily to an apparent intention when so applied than when it is applied to a grant of realty. . . . Where personal and real estate are

given in the same class, and in the same words, and there is nothing to indicate a different intent in relation to the personal matter from that manifested respecting the real estate . . . the words are to be construed in the same manner as applicable to both species of property." *Taylor v. Lindsay*, 14 I. R. 518.

A devise of personal property (a leasehold) to J for life "with remainder over to the heirs of her body if she should have any, but in case she should die without such heirs, then the remainder to C." It was held that the Rule in Shelley's Case applied and J took the property absolutely. *Hughes v. Nicklas*, 70 Md. 484; 14 Am. St. Rep. 377.

Devise of personal property (term of years) to C "during her natural life, after her decease I give the same to the heirs of my said daughter C." It was held that the Rule in Shelley's Case was applicable to personal property and that C took the whole unexpired interest in the term. *Horne v. Lyeth*, 4 Har. & J. (Md.) 431.

3. Guthrie's Appeal, 37 Pa. St. 9; *Kuntzleman's Estate*, 136 Pa. St. 142; 20 Am. St. Rep. 909; *Helm v. Frisbee*, 59 Ind. 526; *Handy v. McKim*, 64 Md. 560; 1 Prest. Est. 278, *et seq.*; *Fearne's Cont. Rem.* 197, *et seq.*

The text is really but a different form of stating that the Rule applies only when, in the subsequent limitation to the "heirs," etc., of the ancestor, the words "heirs" or "heirs of the body" are used in their technical sense. Therefore, where "heirs," etc., is employed improperly, as a mere *descriptio personarum*, the Rule has no application.

Conversely in those instruments, such as wills, where technical words are not necessary to create an estate of inheritance, if there is meant a limitation which should in proper legal phrase have been expressed by the technical term "heirs" or "heirs of the

When the Limitation Is to "Heirs," etc.—If the term "heirs," etc., is used without modification of any sort, there is no difficulty, since there is then no reason to suppose that it was used in any other than its technical sense. But if there are words of superadded limitation, or other words of reference or qualification, interpretation becomes necessary. To use the language of Fearne, if heirs *qua* heirs are meant, two things must concur: "The one is that the person to claim the inheritance after the ancestor is to claim as heir *eo nomine*, and under that description, whoever such person may be; and the other, that the effect of the limitation is not confined to the person first so claiming, or his representatives; but directed equally through all other persons successively answering the same relative description of heirship, general or special, to the ancestor referred to; and entitling them *eo nomine*, or in that character only." Fearne's Cont. Rem. 197.

It is evident that the first branch of this distinction will exclude all those cases where the words "heirs of the body," etc., are, by other words of reference or qualification, explained or restrained; as well as those cases where, on account of words subjoined, the persons to take cannot take as heirs or by virtue of that description, by reason of a distributive direction amongst several not constituting an heir, or some other mode irreconcilable with the course of a descent. The latter branch of the distinction excludes all those cases wherein the import of the word "heir," etc., is by annexed words of limitation confined to the first, next, or one individual heir, etc.; as well as those where words of limitation superadded to the words "heirs," etc., denote a different species of heirs from that described by the first words. At the same time it admits all those cases where, though the testator inserts trustees to support contingent remainders, or imposes restrictions against alienations, or restrains the successive heirs to estates for life, yet he does not fix on or stop at any particular heir, but appears to have the

whole line of heirs, etc., equally in the extent of his contemplation. Adapted from Fearne's Cont. Rem. 198.

On this point it is well said in 1 Prest. Est. 283: "The intention that the heirs should or should not take by purchase, ought not to form any part of this preliminary inquiry. The single point to be decided is, in what manner they are to take; generally, without exception, as a class of inheritable persons, and as the successive heirs of the person to whom the preceding estate of freehold is limited; or partially, as individuals selected out of the class of heirs, and for an estate which so far as it depends on the gift to the heirs, because they, as heirs, etc., of their ancestor, are the donees, will determine with their deaths; and so far as it is of an inheritable quality, will entitle those heirs only, who, deducting their pedigree from these individuals are to look up to them as their common stock, from whom their descent is to be derived."

In *Stonebraker v. Zollickoffer*, 52 Md. 154; 36 Am. Rep. 364, there was a devise to one for life and after his death to his "children." It was held that by its very terms the rule was inapplicable. To the same effect *Oyster v. Oyster*, 100 Pa. St. 538; 45 Am. Rep. 388; *Keim's Appeal*, 128 Pa. St. 480; *Cannon v. Bony*, 59 Miss. 289; *May v. Ritchie*, 65 Ala. 602; *Turner v. Ivie*, 5 Heisk. (Tenn.) 222; *Smith v. Chapman*, 1 Hen. & M. (Va.) 240.

In *Burges v. Thompson*, 13 R. I. 712, there was a devise to T "for his use during the period of his natural life, and upon his decease, to his heirs at law, him surviving, share and share alike." It was held that construction of this will showed that the testator used the words "heirs at law" not in its technical sense, but to point out individuals, and that, therefore, the Rule in *Shelley's Case* was not applicable, and T took only a life estate. The court by Durfee, C. J., said: "The Rule is inflexible when the words are used with nothing to qualify them, but if they are used in connection with explanatory words, which show they were used, not with technical accuracy,

body," such technical meaning will be given to whatever form of words may have been used and the Rule will operate.¹

b. WHAT LIMITATIONS WILL BE SO CONSTRUED.—The question whether or not the terms of limitation used in a devise or grant were intended by the testator or grantor as the equivalent of the technical words "heirs" or "heirs of the body," and to embrace an entire class or denomination of persons, and not merely the individuals who constitute that class is, as has been repeatedly said, one of construction, and must in every instance be determined by the ordinary rules of interpretation, applicable to devises and conveyances, before the Rule in Shelley's Case can be applied. These rules of interpretation have been set out in other articles in this work,² but many illustrations will be found in the note.³

but inartificially to denote particular persons, then they will be permitted to have effect accordingly, especially in wills. . . . Can we then hold that this language and these provisions of the will, considered as indications that the word 'heirs' was used to designate particular persons, are strong enough to overcome the presumption that the word was technically used?"

1. *Simpers v. Simpser*, 15 Md. 160.

On this point the court by Strong, J., in *Haldeman v. Haldeman*, 40 Pa. St. 29, said: "The real question is, whether the language . . . imports the same thing, according to the true and actual intent of the testator, as a devise to the 'heirs.' . . . Where a testator intends the estate to go to the whole body of persons in legal succession, constituting, in law, the entire line of descent lineal, he evidently means the same thing as if he had said 'issue' or 'heirs of the body;' or if he intends it to go to the whole line of descent, lineal and collateral, he means the same thing as if he had used the term 'heirs,' which, as a word of art, describes precisely the same line of descent."

Two *Pennsylvania* cases are excellent illustrations of this doctrine. In the one, *Yarnall's Appeal*, 70 Pa. St. 335, the subsequent limitation was to "such person or persons as would be entitled to the same" in case the life tenant had "departed this life intestate seized thereof in fee." It was held that this was equivalent to a limitation to "heirs" and the Rule was applied. In the other case, *Kuntzleman's Estate*, 136 Pa. St. 142, the subsequent limitation was precisely the same except that the mother and the husband of

the life tenant were to be excluded. It was held that the restriction to a portion only of those who would have been legally comprehended under the term "heirs," prevented the limitation from being given that meaning, and reduced it to a mere *descriptio personarum*; consequently the Rule had no application.

It thus appears that the Rule in Shelley's Case is to be invoked only when the subsequent limitation is to the technical "heirs," etc., of the person taking the prior freehold. Whether or not such is really the nature of the remainder is purely a preliminary question of construction, and in fact forms no part of the law concerning the Rule. See *supra*, this title, *Not a Rule of Intention*.

Devise to M "and at her death to her child, children, or other lineal descendants." It was held that child, children, etc., were used as equivalent to heirs of the body, consequently the Rule in Shelley's Case operated and M took an estate tail. *Mason v. Ammon*, 117 Pa. St. 127.

2. No matter what words are used, the Rule applies or not accordingly as the real meaning was or was not a limitation to technical "heirs" or "heirs of the body." For the rules of construction and interpretation by which the sense of the language used is determined, see *ISSUE*, vol. 11, p. 870; *REMAINDERS*, vol. 20, p. 829; *WILLS*. See also *CHILD—CHILDREN*, vol. 3, p. 229; *DEEDS*, vol. 5, p. 423; *ESTATES*, vol. 6, p. 875; *INTERPRETATION*, vol. 11, p. 507; *LEGACIES AND DEVISES*, vol. 13, p. 7.

3. "Heirs," etc., Construed to Mean "Children."—In the following cases the

terms "heirs" or "heirs of the body," etc., were construed as equivalent of "children," and therefore the Rule was held inapplicable. *Shimer v. Mann*, 99 Ind. 202; 50 Am. Rep. 82; *Ridgeway v. Lanphear*, 99 Ind. 251; *Eldridge v. Eldridge*, 41 N. J. Eq. 89; *Criswell v. Grumbling*, 107 Pa. St. 408; *Howell v. Knight*, 100 N. Car. 254; *Hadlock v. Gray*, 104 Ind. 596; *Conger v. Lowe*, 124 Ind. 368; *Foust v. Jackson*, 56 N. H. 357; *Bunuel v. Evans*, 26 Ohio St. 409; *Zebach v. Smith*, 3 Binn. (Pa.) 69; 5 Am. Dec. 352; *Conger v. Lowe*, 124 Ind. 368; *Earnheart v. Earnheart*, 127 Ind. 397; 22 Am. St. Rep. 652; *Pryor v. Duncan*, 6 Gratt. (Va.) 27; *May v. Ritchie*, 65 Ala. 604; *Loving v. Hunter*, 8 Yerg. (Tenn.) 4.

Devise "to the heirs of the body of Sarah B. (testator's daughter), she, the said Sarah, to have the use and benefit thereof during her life, but not to sell or dispose of the same." *Held*, that the entire will showed that by "heirs of the body" the testator meant "children;" therefore, the rule in Shelley's Case did not apply. *Roberts v. Ogbourne*, 37 Ala. 174. See also devise in these words: "In trust for my said daughters during their natural lives, and to the heirs of their bodies forever." *Held*, that the Rule in Shelley's Case did not apply, since construction of the will showed that "heirs of their bodies" was used in the sense of "children." *Ward v. Saunders*, 2 Swan (Tenn.) 174.

In *Millett v. Ford*, 109 Ind. 159, the remainder was to "heirs;" but it was decided that interpretation of the whole will showed that "heirs" was used in the sense of the word "children," and the Rule was therefore held inapplicable.

Devise to a grandchild "during her natural life," with a provision "in case any of said grandchildren should depart this life without issue of their body, then all their share. . . . shall be equally divided among all my grandchildren and their legal representatives, and the title thereto thereafter so vest forever. It is my will that no title in fee to any of said land shall vest in my said grandchildren, and I declare it to be my will that they shall only have a life estate therein, and that the fee simple shall vest in their legal heirs." *Held*, that the Rule in Shelley's Case did not apply; the grandchild took only a life estate. *Belslay v. Engel*, 107 Ill. 182. The decision in this case was in a

later case approved, on the ground that "legal heirs" was used in the will in the sense of "children;" but the language of the court, which had seemed to place the decision upon the ground of carrying out the intention of the testator, was condemned, the court by Scholfield, J., saying: "This language of the opinion was unadvisedly assented to by a majority of the members of the court, and is now disapproved and overruled." *Carpenter v. Van Olinder*, 127 Ill. 42; 11 Am. St. Rep. 92. Compare these two cases in relation to the effect of intention upon the Rule in Shelley's Case.

In *Self v. Tune*, 6 Munf. (Va.) 470, there was a deed to W and M (husband and wife) "for and during their natural lives or that of the longest liver of them," and after the decease of them both "to be equally divided among the heirs of her body and in default of such heirs then over." *Held*, that the Rule in Shelley's Case did not apply, since the provision for equal division between heirs of the body was inconsistent with an estate tail, and showed that "children" was meant by the words "heirs of the body." See also *Bradley v. Misby*, 3 Call (Va.) 50.

Where an estate is devised to a certain person "or his heirs" at the happening of a certain event, the word "heirs" will be construed as a word of purchase, and not of limitation, if it sufficiently appears that the term was used to designate particular persons who might stand in that relation at the happening of the event, and not the whole line of heirs in succession. *Ebey v. Adams*, 135 Ill. 80; 10 L. R. A. 162.

Heirs Held to Have Been Used Technically.—Deed conveying land to M "during the term of her natural life, and to descend to her heirs in equal proportions, the said M, the maker of this deed, included, after death." The covenants of warranty were to "said party of the second part and her heirs." *Held*, under the Rule in Shelley's Case, M took a fee simple. *Taney v. Fahnley*, 126 Ind. 88.

The language of a devise to D was: "it is my will . . . that he shall have the benefit of all the interest or proceeds thereof, as long as he shall live, and after his natural death the principal shall fall to his lawful heirs." There were a number of other provisions in the will which were claimed to indicate that "heirs" was used in

the sense of "children." *Held*, that the Rule in Shelley's Case applied and D took a fee simple. *Hochstedler v. Hochstedler*, 108 Ind. 506.

"Children" Held Equivalent to "Heirs of the Body."—Devise to N "and at her death to her child, children, or their lineal descendants." It was held that "child," "children," etc., were used as equivalent to "heirs of the body," and, consequently, the Rule in Shelley's Case operated and N took an estate tail. *Mason v. Ammon*, 117 Pa. St. 127.

Devise to testator's three daughters "during their natural lives the income or profit arising out of each of their share of the residue, and after the death of either, then to go and descend to the child, and if children, share and share alike. Should, however, either of my daughters . . . die and leave no lawful issue, then such share or portion is to fall back again to the residue and form part of the same." The heirs made partition, and as to one piece of the real estate, two of the daughters conveyed their title to the third daughter, who contracted to convey in fee to H. The deed tendered was refused by H on the ground of defect of title. *Held*, that construction of the whole will showed that the word "children" was used as equivalent to "heirs of the body," and therefore the Rule in Shelley's Case operated. The daughters took estates tail enlarged into a fee simple by the *Pennsylvania* statute. *Haldeman v. Haldeman*, 40 Pa. St. 29.

"Children" Held to have Been Used in Its Primary Sense.—In the following cases it was held that the term "children" was used in its technical sense, and not as equivalent of "heirs," and therefore the Rule in Shelley's Case did not apply. *Stump v. Jordan*, 54 Md. 619; *Bannister v. Bull*, 16 S. Car. 220; *Smith v. Smith*, 24 S. Car. 304; *Oyster v. Knull*, 137 Pa. St. 448; *Donnelly v. Turner*, 60 Md. 81; *In re Griffin's Estate* (Pa. 1890), 22 Atl. Rep. 91; *Patterson v. Wilson*, 64 Md. 193; *Tate v. Townsend*, 61 Miss. 316; *Belslay v. Engel*, 107 Ill. 182.

Deed to A and B "for and during their natural lives, and after their decease I give the same to their children, the heirs of their bodies, forever." *Held*, that annexing "heirs of their bodies" to the word "children" was not sufficient to change its meaning, and the Rule did not apply. *Doe v. Jackman*, 5 Ind. 283.

A deed to A during her natural life, and to her children and assigns forever. *Held*, that the remainder being to "children," the Rule in Shelley's Case did not apply. *Sorden v. Gatewood*, 1 Ind. 107.

In the following cases the subsequent estate in remainder was to "children," and in several of them there were expressions seeming to indicate that "children" was used in the sense of "heirs;" but it was decided they were not sufficient to overcome the technical meaning of the word; therefore, the Rule in Shelley's Case did not apply. *McMahon v. Newcomer*, 82 Ind. 565; *Ridgeway v. Lanphear*, 99 Ind. 251; *Jackson v. Jackson*, 127 Ind. 346.

Devise to C during her natural lifetime and at her death . . . to her children, if she have any; in the event of her death without lawful issue," then over. *Held*, that the Rule in Shelley's Case did not apply. The phrase "in the event of her death without lawful issue," is not sufficient to change the meaning of the word "children" to "heirs of the body." *Stump v. Jordan*, 54 Md. 619.

Devise to the testator's married daughter of "the use and life estate in her own proper person, but without power to convey the same to any other person for any period or term," and after the decease of the said daughter "to such of her children or their heirs as may survive her as tenants in common." That is, the child or children of any deceased child of hers shall hold the same interest and right that the deceased parent would have held if living." *Held*, that there was nothing in this will to indicate that the testator had used the word "children" in any other sense than its primary one as a word of purchase; therefore the rule did not apply, and the daughter took only a life estate. *Guthrie's Appeal*, 37 Pa. St. 9.

Conveyance by deed of land to B, "during her natural life," free from the debts, etc., of her husband, "and at her death to go to the children of her body." *Held*, that children of her body did not mean "heirs of her body," and therefore the Rule in Shelley's Case did not apply, and the children took as purchasers in fee simple. *Beacroft v. Strawn*, 67 Ill. 28.

Superadded Words.—"Where the limitation of the freehold to the ancestor is followed by a limitation to his

heirs but accompanied by words of qualification, or superadded limitation; *e. g.*, Grant to A for life, remainder to the heirs of A now living; or remainder to the heirs of A, share and share alike, as tenants in common; or remainder to the sons of A, and their heirs; or remainder to the heir of A, and the heirs male of the body of such heir; or remainder to such persons as shall, at the life-tenant's death, answer the description of heirs at law of the life-tenant. In all these cases the subsequent words of limitation are, in general, words of purchase, creating a remainder in the party to whom the limitation is made, which will be vested if the person is ascertained, and contingent if he is not ascertained." 2 Minor's Inst. 404, citing Fearne's Rem. 150, *et seq.*; Fearne's Rem. 178-9, 210; 2 Co. Litt. 145, n. (P.); 4 Kent's Com. 220; Archer's Case, 1 Co. 66 b; Lewis Bowles' Case, 11 Co. 30 a; Doe v. Laming, 2 Burr. 1100; Taylor v. Cleary, 29 Gratt. (Va.) 448, 452-3. See also Shreve v. Shreve, 43 Md. 382; Boykin v. Ancrum, 28 S. Car. 486; 13 Am. St. Rep. 698.

"Let it be remembered, however, while such is in general the construction of the foregoing limitation, that where a clear manifestation of an intent that the persons who are to take the so-called remainder are the heirs or heirs of the body of the first taker, in indefinite succession, the Rule in Shelley's Case is applicable, notwithstanding the superadded words of modification." 2 Minor's Inst. 404, citing Jesson v. Doe, 2 Bligh P. C. 1; Moore v. Brooks, 12 Gratt. (Va.) 135, 143, *et seq.*; Hall v. Smith, 25 Gratt. (Va.) 70, 72, *et seq.*

Devise to S "during her life without control of her husband, and at her death to the heirs of her body and their heirs and assigns forever." *Held*, the superadded words took the case out of the Rule, and S took only a life estate. Dott v. Willson, 1 Bay (S. Car.) 457. See also Lemacks v. Glover, 1 Rich. Eq. (S. Car.) 141.

In Warners v. Mason, 5 Munf. (Va.) 24, there was a devise to W "during his natural life, and then to his heirs lawfully begotten of his body—that is, born at the time of his death or nine calendar months thereafter, and for want of such heirs," then over. *Held*, that the Rule in Shelley's Case did not apply. The explanation annexed to heirs, etc., showed that the testator meant "children."

In Andrews v. Lothrop (R. I. 1890), 20 Atl. Rep. 97, the devise was "during his natural life and after his decease to his heirs, their heirs and assigns forever." It was held that the superadded words did not affect the construction and that "heirs" was used in its technical sense and that the Rule applied. In support of this the court cited Manchester v. Durfee, 5 R. I. 549; 2 Jarm. Wills, ch. 37; Goodwright v. Pullyn, 2 Ld. Raym. 1437; Wright v. Pearson, 1 Amb. 358; Den v. Shenton, 1 Cowp. 410; Measure v. Gee, 5 B. & Ald. 910; 7 E. C. L. 300; Kinch v. Ward, 2 Sim. & S. 409; Osborne v. Shrieve, 3 Mason (U. S.) 391; Morris v. Ward, 36 N. Y. 587; 3 Greenl. Cruise 346.

In *North Carolina* it was held, before the abolition of the Rule that the addition "share and share alike to be equally divided," etc., to "heirs" would take the devise out of the Rule. Mills v. Thorne, 95 N. Car. 362; Ward v. Jones, 5 Ired. Eq. (N. Car.) 400; Jenkins v. Jenkins, 96 N. Car. 259.

Other Instances of Construction.—Devise of land to testator's son W, "during his natural life, and from and after his decease . . . to my grandson C, eldest son of the said W, and from and after the decease of my said grandson C, then to remain to the first son of my said grandson and the heirs of the body of such first son lawfully issuing . . . ; and for default of such issue, then I give the same to my grandson T, second son of the said W, for and during the term of his natural life, and after his decease to remain to his issue in tail in such manner as I have limited the same to my grandson C and his issue; and for default of such issue, then to the third son of the said W in like manner; and in default of such issue, remainder to testator's life heirs." *Held*, that the Rule in Shelley's Case did not apply, and T took only an estate for life. This decision is based upon the ground that the words "to his issue in tail" in the devise to T were controlled by the next following words, "in such manner as I have limited to my grandson C," which, therefore, show that by those words he meant "first son," etc. This case is a particularly valuable presentation of the Rule. Lyles v. Digges, 6 Har. & J. (Md.) 364; 14 Am. Dec. 281.

Devise to testator's son "W E for and during the term of his natural life. . . . At the death of said W E, I

IV. STATUTES ABOLISHING THE RULE.—The Rule in Shelley's Case has at one time obtained in nearly all of the United States as a part of the common law.¹ The Rule has been abolished by statute in a majority of the States; in some, the abolition only extending to cases arising under wills, in others, both to wills and

give and devise said lands in fee simple to the person who would have inherited the same from the said W E had he owned the same in fee simple at the time of his death, the same to go to said persons in the same manner and in the same proportions as though said W E had owned the same in fee simple at the time of his death; but the provisions of this item should only vest in the said W E a life estate in said lands and nothing more." *Held*, that the Rule in Shelley's Case did not apply, and that W E took only a life estate. *Earnhart v. Earnhart*, 127 Ind. 397; 22 Am. St. Rep. 652. This case was decided upon the ground that "the words used in making disposition of the remainder are words of purchase descriptive of the persons to whom the fee is devised." The correctness of the decision was certainly very doubtful. Those thus taking in remainder clearly took as heirs; an intention that they should take as purchasers could not prevent the application of the Rule.

Devise to testator's children "for the term of their natural lives, to be divided among them share and share alike, the children of deceased parents, representing such deceased parents; and finally upon (their) decease . . . to the issue of them and their heirs forever." *Held*, the Rule did not apply, and the children took only life estates. *McIntyre v. McIntyre*, 16 S. Car. 290.

Devise to testator's daughter for her sole and separate use for life, and after her death for the use "of such persons as would be entitled to the same by the laws of the commonwealth of *Pennsylvania* if my said daughter had survived her mother and husband, and died intestate, seised and possessed of the said premises, and for such estate and estates as such person or persons would in such case be entitled to by the laws aforesaid." The daughter's husband died, therefore the separate use trust fell. Afterward the mother died. The daughter then claimed the whole estate absolutely, on the ground that since her mother and husband were both dead, the parties to take at her (the

daughter's) death were her right heirs, and that the Rule in Shelley's Case operated. *Held*, that such a devise over would ordinarily signify the same as "heirs," but that the exclusion of the mother and husband, who would otherwise be entitled, showed that the testator did not intend to limit the remainder to the right heirs, but only to certain of them; therefore the Rule was not applicable. *Kuntzleman's Estate*, 136 Pa. St. 142; 20 Am. St. Rep. 909.

Devise to testator's daughters "during their natural life," and after their death "to be the absolute property of the issue of their bodies forever." *Held*, the Rule did not apply, and the daughters took only a life estate. *Myers v. Anderson*, 1 Strobh. Eq. (S. Car.) 346; 47 Am. Dec. 537.

1. *Alabama*.—*Price v. Price*, 5 Ala. 578; *Machen v. Machen*, 15 Ala. 375; *Hanner v. Smith*, 22 Ala. 433; *May v. Ritchie*, 65 Ala. 602; *Lenoir v. Rainey*, 15 Ala. 667; *Martin v. McRee*, 30 Ala. 116; *McQueen v. Logan*, 80 Ala. 304.

Arkansas.—*Patty v. Goolsby*, 51 Ark. 61; *Moody v. Walker*, 3 Ark. 147; *Maulding v. Scott*, 13 Ark. 88; 56 Am. Dec. 298; *Roane v. Rives*, 15 Ark. 328; *Denson v. Thompson*, 19 Ark. 66; *Horsley v. Hilburn*, 44 Ark. 458; *Myar v. Snow*, 49 Ark. 125.

California.—*Norris v. Hensley*, 27 Cal. 439; *Estate of Utz*, 43 Cal. 200.

Connecticut.—*Goodrich v. Lambert*, 10 Conn. 448; *Bishop v. Selleck*, 1 Day (Conn.) 299.

Delaware.—*Griffith v. Derringer*, 5 Harr. (Del.) 284.

Florida.—*Russ v. Russ*, 9 Fla. 105; *McLeod v. Dell*, 9 Fla. 427; *Watts v. Clardy*, 2 Fla. 369.

Georgia.—*Wilkerson v. Clark*, 80 Ga. 367; 12 Am. St. Rep. 258.

Illinois.—*Baker v. Scott*, 62 Ill. 86; *Brislane v. Wilson*, 63 Ill. 173; *Butler v. Huestis*, 68 Ill. 594; *Ryan v. Allen*, 120 Ill. 648; *Carpenter v. Van Olinder*, 127 Ill. 42; 11 Am. St. Rep. 92; *Hageman v. Hageman*, 129 Ill. 164.

Indiana.—*Siceloff v. Redman*, 26 Ind. 251; *Andrews v. Spurlin*, 35 Ind. 262; *Gonzales v. Barton*, 45 Ind. 295; *Allen v. Craft*, 109 Ind. 476; 58 Am. Rep.

425; *Earnhart v. Earnhart*, 127 Ind. 397; 22 Am. St. Rep. 652; *Small v. Howland*, 14 Ind. 592; *McCray v. Lipp*, 35 Ind. 116; *Hochstedler v. Hochstedler*, 108 Ind. 506; *Shimer v. Mann*, 99 Ind. 190; 50 Am. Rep. 82; *Fountain Co. Coal, etc., Co. v. Becklenheimer*, 102 Ind. 76; 52 Am. Rep. 645; *Taney v. Fahnley*, 126 Ind. 88.

Maryland.—*Hughes v. Nicklas*, 70 Md. 484; 14 Am. St. Rep. 577; *Thomas v. Higgins*, 47 Md. 439; *Shreve v. Shreve*, 43 Md. 382; *Warner v. Sprigg*, 62 Md. 14.

Massachusetts.—*Bowers v. Porter*, 4 Pick. (Mass.) 198; *Steel v. Cook*, 1 Met. (Mass.) 281; *Wight v. Baur*, 7 Cush. (Mass.) 105; *Richardson v. Wheatland*, 7 Met. (Mass.) 169; *Putnam v. Gleason*, 99 Mass. 454.

Michigan.—*Fraser v. Chene*, 2 Mich. 81.

Mississippi.—*Powell v. Brandon*, 24 Miss. 343; *Kirby v. Calhoun*, 8 Smed. & M. (Miss.) 462; *Carroll v. Renich*, 7 Smed. & M. (Miss.) 798; *Hubbard v. Selser*, 44 Miss. 705; *Divrell v. Carlisle*, 48 Miss. 691.

Missouri.—*Tesson v. Newman*, 62 Mo. 198; *Riggins v. McClellan*, 28 Mo. 29.

New Hampshire.—*Dennett v. Dennett*, 40 N. H. 498; *Dennett v. Dennett*, 43 N. H. 499; *Crockett v. Robinson*, 46 N. H. 454.

New Jersey.—*Den v. Laquear*, 4 N. J. L. 342; *Kennedy v. Kennedy*, 29 N. J. L. 185; *Quick v. Quick*, 21 N. J. Eq. 13.

New York.—*Brant v. Gelston*, 2 Johns. Cas. (N. Y.) 384; *Kingsland v. Rapalye*, 3 Edw. Ch. (N. Y.) 1; *Cushney v. Henry*, 4 Paige Ch. (N. Y.) 348; *Schoonmaker v. Sheely*, 3 Den. (N. Y.) 485; *aff'g* 3 Hill (N. Y.) 165.

North Carolina.—*Leathers v. Gray*, 101 N. Car. 162; 9 Am. St. Rep. 30; *Jenkins v. Jenkins*, 96 N. Car. 254; *Mills v. Thorne*, 95 N. Car. 362; *King v. Utley*, 85 N. Car. 59; *Folk v. Whitely*, 8 Ired. (N. Car.) 133; *Weatherly v. Armfield*, 8 Ired. (N. Car.) 25; *Hollowell v. Kornegay*, 7 Ired. (N. Car.) 261; *Floyd v. Thompson*, 4 Dev. & B. (N. Car.) 479; *Allen v. Pass*, 4 Dev. & B. (N. Car.) 77; *Ham v. Ham*, 1 Dev. & B. Eq. (N. Car.) 598; *Sanders v. Hyatt*, 1 Hawks (N. Car.) 247; *Davidson v. Davidson*, 1 Hawks (N. Car.) 163.

Ohio.—*McFeely v. Moore*, 5 Ohio 464; 24 Am. Dec. 314; *Armstrong v. Zane*, 12 Ohio 287; *King v. King*, 12

Ohio 390; *Carter v. Reddish*, 32 Ohio St. 1.

Pennsylvania.—*James's Claim*, 1 Dall. (Pa.) 47; *Findlay v. Riddle*, 3 Binn. (Pa.) 139; 5 Am. Dec. 355; *Bassett v. Hawk*, 118 Pa. St. 94; *Keim's Appeal*, 125 Pa. St. 480; *Henderson v. Walthour* (Pa. 1888), 15 Atl. Rep. 893.

Rhode Island.—*Bullock v. Waterman St. Baptist Soc.*, 5 R. I. 273; *Manchester v. Durfee*, 5 R. I. 549; *Jillson v. Wilcox*, 7 R. I. 515; *Burges v. Thompson*, 13 R. I. 712; *Pierce v. Pierce*, 14 R. I. 514; *Taylor v. Lindsay*, 14 R. I. 518.

South Carolina.—*Dott v. Cunningham*, 1 Bay (S. Car.) 453; 1 Am. Dec. 624; *Whitworth v. Stuckey*, 1 Rich. Eq. (S. Car.) 404; *McIntyre v. McIntyre*, 16 S. Car. 293.

Tennessee.—*Polk v. Faris*, 9 Yerg. (Tenn.) 210; 30 Am. Dec. 400.

Texas.—*Hancock v. Butler*, 21 Tex. 804; *Hawkins v. Lee*, 22 Tex. 544; *O'Brien v. Hillburn*, 22 Tex. 616; *Brooks v. Evetts*, 33 Tex. 732.

Virginia.—*Roy v. Garnett*, 2 Wash. (Va.) 9; *Callis v. Kemp*, 11 Gratt. (Va.) 78.

West Virginia.—*Chippis v. Hall*, 23 W. Va. 504.

Iowa.—There has been no direct decision upon the question whether the Rule in *Shelley's Case* was adopted as a part of the common law. Several cases have arisen in which the Rule was invoked, but in all of them it was decided that the Rule did not apply. The court, however, seemed to assume that the Rule was in force. *Zuver v. Lyons*, 40 Iowa 510; *Hanna v. Hawes*, 45 Iowa 437; *Slemmer v. Crampton*, 50 Iowa 302; *Pierson v. Lane*, 60 Iowa 60.

Kentucky.—It was held in *Turman v. White*, 14 B. Mon. (Ky.) 450, that the Rule in *Shelley's Case* was never in force in *Kentucky*. The court by *Marshall, C. J.*, said: "As there is no reported case in which this court has applied the Rule with the effect of determining by it the rights of property involved, it cannot be said to have become a rule of property here. . . . A single manuscript decision withheld from publication, as if of doubtful authority, is the only instance in which the Rule has been directly applied and carried out by this court." See also *Williamson v. Williamson*, 18 B. Mon. (Ky.) 329, and see *Kentucky Rev. St.* 1852, ch. 80, p. 10.

Maine.—*Maine* was separated from

deeds.¹ It may be questioned whether many of these statutes are comprehensive enough to accomplish their object. Thus, the Rule applies where the ancestor takes any estate of freehold, with remainder to his heirs, etc.; while many of the statutes abolishing it only embrace by their terms those cases where the ancestor's estate is for his life. The terms of these statutes, therefore, would not be applicable where the prior estate is to the ancestor

Massachusetts in 1820, after the statute had been abolished in the latter State (see *infra*, next note, *Massachusetts*). The Rule, therefore, was never in force. *Pratt v. Leadbetter*, 38 Me. 9; *Hamilton v. Wentworth*, 58 Me. 101. *Maine* Rev. St. of 1883, ch. 13, § 6, provides that a conveyance "or devise of land to a person for life and to his heirs in fee, or by words to that effect, shall be construed to vest an estate for life only in the first taker and a fee simple in his heirs." As to the nature of the remainder which the heirs take under this statute, see *Read v. Fogg*, 60 Me. 479; *Read v. Hilton*, 68 Me. 139; *Hunt v. Hall*, 37 Me. 366.

1. *Alabama*.—The Rule is abolished both as to deeds and wills. *Alabama* Code, 1876, § 2183.

California.—The Rule is abolished both as to deeds and wills. See *California* Civ. Code, §§ 779, 1335.

Connecticut.—In 1821, a statute was passed with the purpose of abolishing the Rule. It provides that "all grants or devises of an estate in lands to any person for life and then to his heirs shall be only an estate for life in the grantee or devisee." *Connecticut* Gen. Stat., § 2953.

Effect of Statute.—This statute abolishes the Rule, both as to deeds and wills. By its terms, however, it refers only to real estate; and it might be open to question whether the Rule is not still in force as to personal property. In *Leake v. Watson*, 60 Conn. 498, which was a devise largely of personal property, this point was not raised, but it seemed to be taken for granted that the Rule was also abolished as to personal property.

It appears that the abolition of the Rule in *Connecticut* has the effect, by reason of the statute in that State against perpetuities, of defeating the intention of the testator more completely than could the Rule in Shelley's Case itself. Thus, in the recent case of *Leake v. Watson*, 60 Conn. 498, there was a devise to testator's daughter

for life, "the remainder to go to her heirs forever." *Held*, since the remainder cannot vest until the daughter's death, and since the persons who will then take may be neither persons who were in being at the death of the testator nor the children of such persons, that the gift is obnoxious to the *Connecticut* statute against perpetuities (forbidding a gift which does not necessarily vest in some person living at the death of the testator or in the children of such person); and the remainder was void; and that, there being no gift over, there was an intestacy after the life estate.

In *Leake v. Watson*, 60 Conn. 498, the court, by Torrance, J., says: "There may be such gift in form at least which will not be obnoxious to the statute against perpetuities, as 'a devise to A for life, and then a gift of the remainder to his heirs in fee, is good to-day, if by heirs the testator means the children of A.'" Since such a case as the one proposed never did fall within the Rule in Shelley's Case, which by its very terms is only applicable when the remainder is to heirs *qua* heirs, this attempt of the legislature to effectuate the presumed intention of testators, by abolishing the Rule in Shelley's Case, would seem to have been even worse than useless.

North and South Dakota.—The Rule was abolished, as to wills at least, before the separation of these States. *Comp. Laws Dakota*, 1887, 3361.

Georgia.—In *Wilkerson v. Clark*, 80 Ga. 367; 12 Am. St. Rep. 258, the court, by Bleckley, C. J., said: "The Code, by §§ 2248, 2249 and 2250, abrogates the Rule in Shelley's Case—wipes it out utterly as a rule of law in limitations over. But this is only as to conveyances executed since the Code went into effect."

Kansas.—The Rule in Shelley's Case has been abolished as to wills. *Kansas* Gen. St., 1889, § 7256.

Massachusetts.—In 1791 a statute was passed for the purpose of abolishing

the Rule as to wills. *Massachusetts* Stat. of 1791, ch. 60, § 3. This was afterwards extended to deeds. *Massachusetts* Rev. Stat., ch. 59, § 9; *Massachusetts* Pub. Stat., ch. 126, § 4.

Effect of Statute.—In *Bowers v. Porter*, 4 Pick. (Mass.) 198, the court expressed a doubt whether the statute extended to cases where the estate for life should not be created by express terms; and also whether the remainder should not be expressly, and not by implication only, to the heirs in fee simple. Although the statute in terms only abolishes the Rule when the remainder "is in fee," yet it has been held to apply as well to cases where the remainder was in fee tail. *Trumbull v. Trumbull*, 149 Mass. 200; *Steel v. Cook*, 1 Met. (Mass.) 281.

Where the Rule in Shelley's Case is prevented by the statute from operating, the heirs take a contingent remainder; their estate vests only upon the death of the life tenant. *Putnam v. Gleason*, 99 Mass. 454; *Richardson v. Wheatland*, 7 Met. (Mass.) 169; *Lavery v. Egan*, 143 Mass. 389. Compare *Bowers v. Porter*, 4 Pick. (Mass.) 198. Although the remainder to the heirs after the termination of the life estate is contingent, the children of such life tenant (heirs apparent) take a vested interest in such contingent remainder, which is assignable. Heirs presumptive, however, have a mere possibility which is not assignable. This is in accordance with the ordinary rules applicable to contingent remainders. *Putnam v. Story*, 132 Mass. 205. See also REMAINDERS, vol. 20, p. 829.

The abolition of the Rule in Shelley's Case does not affect the construction of a devise over after the subsequent estate. *Trumbull v. Trumbull*, 149 Mass. 200.

Michigan.—The Rule is abolished both as to deeds and wills. Howell's Annot. *Michigan* Statutes, § 5544. *Gaukler v. Moran*, 66 Mich. 353.

Minnesota.—The Rule is abolished both as to deeds and wills. Gen. St. *Minnesota*, 1891, § 3984.

Mississippi.—In 1822 the legislature passed an act concerning conveyances, which provided, in section 24, that "every estate in land or slaves, which now is or shall hereafter be created an estate in fee tail shall be an estate in fee simple . . . provided that any person may make a conveyance or devise of lands to a succession of donees then living, and the heirs or heirs of the body

of the remainder-man, and in default thereof, to the right heirs of the donor in fee simple." And in section 26, that "every contingent limitation in any deed or will made to depend upon the dying of any person without heirs or heirs of the body, or without issue or issue of the body, or without children or offspring, or descendants or other relative, shall be held and interpreted a limitation to take effect when such person shall die not having such heir or issue, or child or offspring, or descendant or other relative, as the case may be, living at the time of his death, or born to him within ten months thereafter, unless the intention of such limitation be otherwise expressly and plainly declared on the face of the deed or will creating it." See *Mississippi* Code, 1880, § 1201.

It has been held that section 26 quoted above has no effect upon a deed or will, where it expressly, or as plainly, appears that it was the intention by the use of those words to create a fee tail. *Powell v. Brandon*, 24 Miss. 343; *Hampton v. Rather*, 30 Miss. 193; *Dibrell v. Carlisle*, 48 Miss. 691. The effect of this section, therefore, is only to provide a statutory interpretation in those cases where it was formerly doubtful whether or not the subsequent estate was limited to specific individuals, or to a certain class of heirs. Under such doubtful cases the statute at once provides for an interpretation, which takes the case out of the Rule in Shelley's Case, the only difference being, that before the statute, whether or not the Rule would apply, would depend upon the court's interpretation of the given words.

The proviso to the 24th section, quoted above, has been considered as an abolition of the Rule, so far as concerns real estate, but is held not to include personal property. *Powell v. Brandon*, 24 Miss. 343; *Hampton v. Rather*, 30 Miss. 193; *Dibrell v. Carlisle*, 48 Miss. 691; *Carradine v. Carradine*, 33 Miss. 699. As to personal property, the Rule is, therefore, still in force, subject to the statutory interpretation referred to above.

Missouri.—In *Tesson v. Newman*, 62 Mo. 198, it is said: "The Rule in Shelley's Case has no existence with us since the enactment of the statute."

Montana.—The Rule is abolished as to wills. Comp. St. *Montana*, 1887, 11 Div., § 492 (p. 389).

New Hampshire.—"No express

devise of any estate for life or other limited estate, shall be enlarged or construed to pass any greater estate by reason of any devise to the heirs or issue of any such person." *New Hampshire* Gen. Laws, ch. 193, § 5. This statute was passed in 1843, and affects the Rule only as to devises. It is still in force as to deeds. *Crockett v. Robinson*, 46 N. H. 454. See also *Cloutman v. Barley*, 62 N. H. 44.

In *Sanborn v. Sanborn*, 62 N. H. 631, this statute was discussed and applied, and it was said by the court that it should receive a liberal interpretation.

New Jersey.—In *New Jersey* the Rule is abolished as to wills. *New Jersey* Sts. tit. 10, ch. 2, § 10. But still applies to deeds. See *Quick v. Quick*, 21 N. J. Eq. 13.

Effect of Statute.—In *Demarest v. Den*, 22 N. J. L. 599, it was decided that under this statute, the children of the life taker, living at the death of the testator, take a vested remainder, subject to open and let in after-born children. This reversed the decision in the same case, *sub tit.*, *Den v. Demarest*, 21 N. J. L. 525, which had held that the remainder was contingent. See also *Akers v. Akers*, 23 N. J. Eq. 26.

The questions which would arise under this statute, in the event of the life tenant dying without leaving any issue, are suggested in *Demarest v. Den*, 22 N. J. L. 599, particularly in the dissenting opinion, and in *Den v. Demarest*, 21 N. J. L. 525. No case involving this has as yet arisen.

New York.—The Rule is abrogated both as to deeds and wills. 1 *New York* Rev. Sts. 725, § 28.

Nature of Remainder.—The effect of the *New York* statute abolishing the Rule without more, would be simply to make the subsequent estate a contingent remainder.

But the whole doctrine of contingent and vested future interests has been modified in *New York* by the provisions of the code, and the nature of the estate must therefore be determined with reference thereto. *Moore v. Littel*, 41 N. Y. 66, *affirming* 40 Barb. (N. Y.) 488.

A complete investigation of the subject does not, therefore, properly fall under this title (see REMAINDERS, vol. 20, p. 829; WILLS). It may be stated briefly, however, that the subsequent estate, under the law of *New York*, is a vested interest or remainder, subject to be divested by the death of the heir

before the death of the life tenant. It is, therefore, alienable, and liable to sale on execution. *Moore v. Littel*, 41 N. Y. 66, *affirming* 40 Barb. (N. Y.) 488; *House v. McCormick*, 57 N. Y. 310, and subject to dower; *House v. Jackson*, 50 N. Y. 161, the rights of the purchaser, creditor or widow being, of course, subject to be divested in the same manner by the death of the heir prior to the decease of the life tenant. *Moore v. Littel*, 41 N. Y. 66, *affirming* 40 Barb. (N. Y.) 488; *House v. Jackson*, 50 N. Y. 161.

Those who sustain the character of heirs at the death of the life tenant take by purchase under the original deed or will, and therefore are not bound by any conveyance or covenant of those through whom they derive their status as heirs. Thus, land was conveyed to J "for and during his natural life, and after his death to his heirs." During the lifetime of J one of his children, F, conveyed, with warranty, her interest under the deed, and afterwards, while J still lived, died, leaving a daughter. Held, that at the death of J the daughter was entitled to take F's share, and was not bound by her mother's conveyance. *Moore v. Littel*, 41 N. Y. 66, *affirming* 40 Barb. (N. Y.) 488. The above case is only one of several in which the same deed was litigated, and the series (cited below) contains a full discussion of the question arising as to the nature of the remainder. *Moore v. Littel*, 41 N. Y. 66, *affirming* 40 Barb. (N. Y.) 488; *Sheridan v. House*, 4 Keyes (N. Y.) 569; 4 Abb. App. Dec. (N. Y.) 218; *House v. Jackson*, 50 N. Y. 161; *Jackson v. Sheridan*, 50 N. Y. 660; *Powers v. Wheeler*, 50 N. Y. 660; *House v. McCormick*, 57 N. Y. 310.

In *Taggart v. Murray*, 53 N. Y. 233, there was a devise to C for life, "at her death to pass to her heirs, and if she leaves no heirs," C to have a power of appointment. This will was interpreted as using "heirs" in the sense of "children." See also in particular *Byrnes v. Stilwell*, 103 N. Y. 453; 57 Am. Rep. 760, as to the nature of the remainder to "children." On the general question of vested and contingent interests, closely related to the point under consideration, see *Barlow v. Barlow*, 2 N. Y. 386; *Brown v. Lyon*, 6 N. Y. 419; *Post v. Post*, 47 Barb. (N. Y.) 72; *Bundy v. Bundy*, 38 N. Y. 410; *Livingston v. Greene*, 52 N. Y. 118; *Smith v. Scholtz*, 68 N. Y. 41; *Ham v.*

for the life of another, nor, indeed, where he took any freehold

Van Orden, 84 N. Y. 257; *Hennessey v. Patterson*, 85 N. Y. 91; *Nellis v. Nellis*, 99 N. Y. 514.

North Carolina.—Statute abolished the Rule both as to deeds and wills. Code N. Car., § 1829.

Ohio.—Statute abolished the Rule as to wills. *Ohio Rev. St.* 1854, ch. 122; Rev. St., § 5968.

The very important question as to whether the remainder to the heirs under this statute is vested or contingent has not been litigated. It seems probable from the Ohio cases involving remainders, that the ordinary rules applying to contingent remainders would be applied. See *Gilpin v. Williams*, 25 Ohio St. 283; *Bunnell v. Evans*, 26 Ohio St. 409.

Rhode Island.—The only statute of *Rhode Island* affecting the Rule in *Shelley's Case* was passed in 1798, and is in these words: A devise to any person "and to the children or issue generally of such devisee in fee simple shall not vest a fee tail estate in the first devisee, but an estate for life only, and the remainder shall on his decease vest in his children or issue generally agreeable to the direction in such will." *Rhode Island Pub. Stat.*, ch. 182, § 2.

Effect of the Statute.—This statute is strictly construed and is held to have no effect upon the Rule except in cases which fall literally within the words of the statute.

In *Manchester v. Durfee*, 5 R. I. 549, there were devises to daughters "to be to them an estate for life and to the heirs of their bodies after them, and to the heirs and assigns of such heirs forever; but in case any of said daughters shall die without leaving issue surviving them," then over; it was held that the statute did not apply and that the daughters took a fee tail under the Rule in *Shelley's Case*. The court by Ames, C. J., said: "Are we to read the latter provision of this section as applicable only to wills in which the words 'children' or 'issue' of the life tenant are used to describe who is to take the remainder, . . . or as applicable also to wills in which after an estate for life to one the remainder is given to his or her 'heirs of the body'? . . . Was it designed to include only the particular cases named in it, or by interpretation all

other analogous cases? We adopt the narrow interpretation of the section." See also *Bullock v. Waterman St. Baptist Soc.*, 5 R. I. 273; *Cooper v. Cooper*, 6 R. I. 261; *Williams v. Angell*, 7 R. I. 145; *Pierce v. Pierce*, 14 R. I. 514; *Taylor v. Lindsay*, 14 R. I. 518; *Burges v. Thompson*, 13 R. I. 712; *Thurston v. Thurston*, 6 R. I. 296; *Andrews v. Lothrop* (R. I. 1890), 20 Atl. Rep. 97; *Browning's Petition*, 16 R. I. 441.

Tennessee.—The Rule was abolished in 1852 both as to deeds and wills. Code of 1858, § 2008; Mill. & Bert. Code, § 2514.

Virginia.—The Rule has been abolished by statute as to deeds and wills of both real and personal property. *Virginia Act of 1887*, § 2423. An earlier statute intended to abolish the Rule referred only to where the prior estate was to any person for his life, remainder to his heirs, etc. *Virginia Code* 1873, ch. 112, § 11. It was pointed out by Professor Minor in his *Institutes* that this left the Rule in force where some other freehold than a life estate was given to the first taker. In order to cover this point the new code was changed. 2 Min. Ins. (2d ed.) 405.

In *Hood v. Haden*, 82 Va. 588, the testatrix had power under the will of her deceased husband to appoint the land in question among their children, but no power to appoint it to the heirs of such children. She, by her will, gave the land to two of the children for their lives and after their death to their heirs. It was held that the statute assaying to abolish the Rule in *Shelley's Case* applies only where the grantor or testator is competent to and does vest in the heirs the remainder in fee simple after an estate for the ancestor's life, and, therefore, in this case the appointment of the land by the testatrix to the heirs of the appointees being in excess of her power the Rule still operated, and the children took a fee simple.

Washington.—The Rule is abolished as to wills. Hill's Ann. Code, § 1473, p. 514.

West Virginia.—The Rule is abolished as to deeds and wills. *West Virginia Code* 1891, ch. 71, § 11.

Wisconsin.—The Rule is abolished both as to deeds and wills. Rev. Stat. 1878, ch. 95, § 2052.

estate save only for his own life.¹ And, again, most of the statutes refer only to real estate, and, if strictly construed, would leave the Rule still operative as to personalty.²

The Rule still applies to all conveyances taking effect before the enactment of the statute abolishing it.³

SHELLS.—See MANUFACTURE, vol. 14, p. 262.

1. "The statutes of *Virginia*, imitating those of *New York*, have very much circumscribed the application of this famous and, upon the whole, judicious, rule of property. They declare that 'where any estate, real or personal, is given by deed or will to any person for his life, and after his death to his heirs, or to the heirs of his body, the conveyance shall be construed to vest an estate for life only in such person, and a remainder in fee-simple in his heirs, or the heirs of his body.' (V. C. 1873, ch. 112, § 22; 4 Kent's Com. 232). If the intent of this statute was to abolish the Rule, as it would seem to have been, it has imperfectly accomplished the result. The Rule applies to all cases where the ancestor takes any estate of freehold, with remainder to his heirs, etc., whilst the statute prescribes a different construction only in those cases where the limitation to the ancestor is for his life. The terms of the statute, therefore, would not be applicable where the limitation is to the ancestor for the life of another, nor, indeed, for any other freehold estate, save only for his own life." 2 Minor's Inst. 405. See statutes cited in preceding note.

2. *Powell v. Brandon*, 24 Miss. 343; *Hampton v. Rather*, 30 Miss. 193; *Dibrell v. Carlisle*, 48 Miss. 691; *Carradine v. Carradine*, 33 Miss. 699.

3. *Leathers v. Gray*, 101 N. Car. 162; 9 Am. St. Rep. 30; *Quick v. Quick*, 21 N. J. Eq. 13; *Wilkerson v. Clark*, 80 Ga. 367; 12 Am. St. Rep. 258; *Hurst v. Wilson*, 89 Tenn. 270; *Williams v. Williams*, 11 Lea (Tenn.) 652; *Turner v. Ivie*, 5 Heisk. (Tenn.) 222; *Kingsland v. Rapelye*, 3 Edw. Ch. (N. Y.) 1; *Schoonmaker v. Sheeley*, 3 Den. (N. Y.) 485; *affirming* 3 Hill (N. Y.) 165; *Cushney v. Henry*, 4 Paige Ch. (N. Y.) 345; *Tallman v. Wood*, 26 Wend. (N. Y.) 9; *affirming* *Wood v. Burnham*, 6 Paige (N. Y.) 513; *Spader v. Powers*, 56 Hun (N. Y.) 153; *Carter v. Reddish*, 32 Ohio St. 1.

In *McQueen v. Logan*, 80 Ala. 304, the court said: "The real question in this case is, whether Payne's deed, in its proper interpretation falls within the Rule in Shelley's Case—a rule of interpretation, under the common law which prevailed when this deed was made, but was repealed in this State by the Code of 1852. As said in 2 Washb. Real Prop. *268, the peculiarity of such estate is, that 'while in form the estate has two parts, a particular one for life, with a contingent remainder to the heirs of the tenant who takes the particular estate, it is constructively a single estate of inheritance in the first taker. The form of limitation of such estates is to the grantee or devisee for life, and after his death to his heirs, or the heirs of his body, either mediately or immediately, both estates being created by the same deed or devise.

As we have said, this rule of interpretation is not now the law of *Alabama*. It was changed a third of a century ago. Code of 1876, § 2183. Only deeds or wills executed before the adoption of our first Code—January, 17, 1853—are governed by it. Few cases will hereafter come before us which can feel its influence. *Alabama* can now share with *New York* in the touchingly beautiful tribute paid to it by the learned and classical Kent, 4 Com. *283. We will, therefore, abstain from any elaborate consideration of its principles. The question is not an open one in this court. We have three well considered decisions, pronounced on titles not distinguishable in principle from Mr. Payne's deed under which plaintiffs claim, in each of which the Rule in Shelley's Case was held to apply, and that the absolute title vested in the first taker. *Lenoir v. Rainey*, 15 Ala. 667; *Hammer v. Smith*, 22 Ala. 433; *Martin v. McRee*, 30 Ala. 116. See, also, *Williamson v. Mason*, 23 Ala. 488; *McVay v. Ijams*, 27 Ala. 238; *Mason v. Pate*, 34 Ala. 379; *Roberts v. Ogbourne*, 37 Ala. 174." See statutes cited *supra*.

SHERIFFS.—(See also ARREST, vol. 1, p. 719; ATTACHMENT, vol. 1, p. 894; BAIL, vol. 2, p. 1; BOND, vol. 2, p. 448; CORONER, vol. 4, p. 171; COURTS, vol. 4, p. 447; DE FACTO OFFICERS, vol. 5, p. 93; DEPUTY, vol. 5, p. 623; ESCAPE, vol. 6, p. 884; EXECUTIONS, vol. 7, p. 117; FORTHCOMING BOND, vol. 8, p. 565; INDEMNITY CONTRACTS, vol. 10, p. 402; JURY AND JURY TRIAL, vol. 12, p. 318; SERVICE OF PROCESS, vol. 22, p. 107; SHERIFF'S SALES, vol. 22, p. 570.)

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I. GENERAL NATURE OF OFFICE.—The sheriff is the chief executive officer of the county.¹ He executes the mandates and carries into effect the judgment of courts within his own county,² is the custodian of the county jail,³ has charge of prisoners pending trial,⁴ and executes the sentence of the court. He is the chief conservator of the peace within his own county, and may arrest on view all persons breaking or attempting to break the peace.⁵ It is his duty to pursue and arrest criminals,⁶ and, at common law, to seize all escheats, wrecks, and estrays.⁷ At common law his judicial functions were considerable,⁸ but in the United States are confined generally to inquests or writs of inquiry to estimate damages.⁹ His jurisdiction is generally bounded by his own county,¹⁰ but he may do some mere ministerial acts out of his county.¹¹ He may appoint deputies to

1. A county officer representing the executive or administrative power of the State within his county. Bouv. L. Dict.

2. *Dinkgrave v. Sloan*, 13 La. Ann. 393.

3. 1 Bl. Com. 345. See also the statutes of the various States.

4. *State v. Reiss*, 12 La. Ann. 166. He has no power to take security. *State v. Howell*, 11 Mo. 613; or bail for their appearance. *State v. Walker*, 1 Mo. 546.

5. *U. S. v. Pignel*, 1 Cranch (C. C.) 310; *Cayles v. Hurtin*, 10 Johns. (N. Y.) 85. He is not liable to a party injured by his own neglect to preserve

the peace. *South v. Maryland*, 18 How. (U. S.) 396.

6. 1 Bl. Com. 343.

7. 1 Bl. Com. 343.

8. 1 Bl. Com. 342.

9. See the statutes of the various States. To the point that, in the United States, the duties of the sheriff are exclusively executive and ministerial, see *Merrill v. Gorham*, 6 Cal. 41; *Attorney-General v. Squires*, 14 Cal. 12.

10. *State v. Finn*, 4 Mo. App. 352; *Kinter v. Jenks*, 43 Pa. St. 445; *Runk v. St. John*, 29 Barb. (N. Y.) 585.

11. Such as making out a panel or a return, or assigning a bail bond. He

assist him in his ministerial but not in his judicial work.¹ It is his duty as an officer of court to attend its sessions.² He gives bond with sureties for the faithful discharge of his duties.³

could also at common law, when commanded by *habeas corpus*, carry a prisoner out of his county, and if a prisoner escaped, on fresh pursuit could capture him in another county.

1. Bacon Abr. Sheriff H. 3; McWilliams v. Richland County, 6 Ill. App. 333; Day v. Justices, 3 B. Mon. (Ky.) 198.

The deputy cannot act until sworn into office. Lee v. Eval, 1 N. J. L. 283. He may be removed by the sheriff at any time. Hoge v. Trigg, 4 Munf. (Va.) 150. And may resign. Caines v. Lindsey, 4 Ohio 88. The sheriff cannot delegate to another the power to appoint a deputy for him. Perkins v. Reed, 14 Ala. 536.

At common law the sheriff could appoint his deputy by parol. McGee v. Eastis, 3 Stew. (Ala.) 307; State v. Allen, 5 Ired. (N. Car.) 36. In some States his appointment must be in writing under seal. Edmunds v. Barton, 31 N. Y. 495. And in some the commissions must be recorded. Coffin v. Chase, 13 Me. 72; Putman v. State, 49 Ark. 449; Ferris v. Smith, 24 Vt. 27. It has been held, however, that if a person has acted generally as a deputy sheriff with the sheriff's knowledge and consent, the sheriff is liable for the official acts of such person, though he may not have given him any express authority. Bosley v. Farquar, 2 Blackf. (Ind.) 61; Mann v. Martin, 82 Ky. 242.

Special Deputy.—The sheriff generally has power to appoint a person to do a particular act, as to serve a certain writ, although he may not have been a general deputy or have taken the oath. Proctor v. Walker, 12 Ind. 660; Allen v. Smith, 12 N. J. L. 159; but the appointment must be indorsed on the writ. Guyman v. Burlingame, 36 Ill. 201; Miller v. M'Millan, 4 Ala. 527; People v. Moore, Dougl. (Mich.) 11.

A deputy sheriff can appoint such special deputy. Hunt v. Burrell, 5 Johns. (N. Y.) 137; New Albany, etc., R. Co. v. Grooms, 9 Ind. 243; Thrift v. Fitz, 7 Ill. App. 55; or by his return adopt such special deputy's act. Clark v. Gary, 11 Ala. 98.

If the special deputy be selected by the plaintiff, the sheriff is not liable to

the plaintiff for the defaults of such deputy. Skinner v. Wilson, 61 Miss. 90; but he will be liable to the defendant and to third persons. Barrett v. Seward, 22 Vt. 176.

The office of deputy cannot be the subject of sale. Carlton v. Whitcher, 5 N. H. 196; Cardigan v. Page, 6 N. H. 183; Hall v. Gavitt, 18 Ind. 390; but in *Connecticut* it was held that a contract between a sheriff and his deputy, that the latter shall pay the former a certain sum per annum in consideration of his appointment, was not illegal. De Forest v. Brainerd, 2 Day (Conn.) 528.

The general deputy is authorized to perform all ministerial duties of the sheriff. State v. Wilson, 12 La. Ann. 189. He is a general agent for the sheriff. Ramsey v. Strobach, 52 Ala. 513; but the sheriff is not legally bound to know all that is known by his deputies. West River Bank v. Gorham, 38 Vt. 649. In some States the deputy can only act in the name of his principal. Ryan v. Eads, 1 Ill. 168; but in others he is recognized as a distinct officer, and his doings are certified in his own name. Eastman v. Curtis, 4 Vt. 616; Dayton v. Lynes, 30 Conn. 351. And see generally DEPUTY, vol. 5, p. 623.

2. Murfree on Sheriffs, §§ 425-430. In some of the States—*e. g.*, in *Alabama*, *Arkansas* and *Missouri*—the statutes so require.

Where a statute expressly provided that he should attend, it was held that his presence in court was not necessary either for organization or continuance. McGubbe v. State, 17 Ga. 497.

3. See, as to the requirement of a bond, the statutes of the various States. Murfree on Sheriffs, §§ 43-45; BONDS, vol. 2, p. 448; *infra*, this title, *The Bond*.

Ignorance of the sheriff as to what his duties are does not excuse him. York v. Cloptan, 22 Ga. 362. Nor is it an excuse that he was not actually corrupt. Cantine v. Clark, 41 Barb. (N. Y.) 629.

In *State v. Brunst*, 26 Wis. 412; 7 Am. Dec. 84, it was held that constitutional provisions for the election of sheriff implied an establishment of

He may summon the power of the county (*posse comitatus*) to assist him in the performance of his duties.¹

II. ELECTION; APPOINTMENT; TERMINATION.—Generally, in the States of the Union, the sheriff is elected by the people of the county. He must fulfill the statute qualifications,² which are generally that he shall be a male citizen of the State,³ a resident of the county in which he is chosen, and at least twenty-one years of age.⁴ He may be ineligible by holding office incompatible with that of sheriff.⁵

the office with duties substantially as generally known when such constitution was adopted, and that the legislature could not take from the sheriff an important portion of such duties. In many States he is tax collector *ex officio*. *Bailey v. Lockhart*, 4 Yerg. (Tenn.) 567; *Fulkerson v. State*, 14 Mo. 49.

It is generally provided that he shall not make writs. *Winchell v. Pond*, 19 Vt. 198.

1. *Posse Comitatus*.—A sheriff may summon aid to assist him without previously having attempted to levy and been resisted. *Bell v. North*, 4 Litt. (Ky.) 133. And after resistance. *Sutton v. Allison*, 2 Jones (N. Car.) 339; *Cayles v. Hurton*, 10 Johns. (N. Y.) 85.

He may summon the power of the county on mesne process; but is not bound to. *Houser v. Hampton*, 7 Ired. (N. Car.) 333. See also *Sutton v. Allison*, 2 Jones (N. Car.) 339; *Coyle v. Hurtin*, 10 Johns. (N. Y.) 85.

To resist a member of the *posse comitatus* is to resist the sheriff. *Thraillkill v. Daly*, 16 Neb. 114.

Private individuals, when called on by the sheriff to assist in making an arrest, must respond. *Coleman v. State*, 63 Ala. 93; *State v. Shaw*, 3 Ired. (N. Car.) 20; *Comfort v. Commonwealth*, 5 Whart. (Pa.) 437; *State v. Hailey*, 2 Strobb. (S. Car.) 73; *McMahan v. Green*, 34 Vt. 69. And, sometimes, are made liable to indictment if they do not. *State v. Deniston*, 6 Blackf. (Ind.) 277. See 1 East P. C. 80; 1 Bishop Cr. Law, § 469.

2. Where ownership of real and personal estate was a required qualification, all votes for him previous to such ownership were held illegal and void in *Hatcheson v. Tilden*, 4 Har. & M. (Md.) 279; that in such case the election is only voidable, was held in *State v. Anderson*, 1 N. J. L. 318.

3. An alien is ineligible. *State v. Smith*, 14 Wis. 497; *Scott v. Strobach*, 49 Ala. 477.

4. But a deputy sheriff who is a minor is a *de facto* officer and a service by him is not illegal. *Irving v. Edrington*, 41 La. Ann. 671.

5. *Bunting v. Wilk*, 27 Gratt. (Va.) 144.

Under the laws of *Alabama* the same person could not hold the office of sheriff and member of the general assembly at the same time, yet a member of assembly may be elected sheriff and his acceptance of the latter office does not vacate the former, though it furnishes ground to compel him to elect which office he will retain. *Scott v. Strobach*, 49 Ala. 477.

Where the statute declares that his office shall become vacant on his failure to file or renew bond, such a failure does not, *per se*, vacate the office. Until due judgment of forfeiture, his acts are good as to third persons. *Clark v. Ennis*, 45 N. J. L. 69; *Flaton v. State*, 56 Tex. 93; *Catching v. Davis*, 3 B. Mon. (Ky.) 91; *Vann v. Pipkin*, 77 N. Car. 408; *McCracken v. Todd*, 1 Kan. 148; *Brown v. Grover*, 6 Bush (Ky.) 1; *contra*, *Bosworth v. Heys*, 46 Ga. 635.

Where he applies to the court for induction into office he must have done everything necessary on his part to make his title complete. *Thomason v. Justices*, 3 Humph. (Tenn.) 233; and, having done this and having a *prima facie* right to office, the court should approve his sureties. *In re Ewing*, 4 Phila. (Pa.) 370.

A clause in a constitution forbidding re-election applies only to those sheriffs who shall be elected after adoption of that instrument. *State v. Giles*, 1 Chand. (Wis.) 112.

In *Tennessee*, the appointment of a defaulter is null and void. *Newman v. Justices*, 6 Humph. (Tenn.) 4.

Although an appointment is void yet

The term of the office of sheriff is variously limited by statute in different States. In many, he holds office until his successor is qualified to act.¹ His removal in certain events and provision for a temporary successor in case of vacancy are generally subjects of statutory regulation.²

At common law the sheriff who began the execution of a writ was obliged to finish, though meanwhile his term expired.³ If unexecuted, he should hand over process to his successor.⁴

In some States an outgoing sheriff must transfer all process, including those in which levies have been made.⁵

On the death of the sheriff, at common law, the coroner succeeded to the office.⁶

his acts as *de facto* officer may be good. *People v. Roberts*, 6 Cal. 214; *Bates v. Dyer*, 9 Humph. (Tenn.) 162.

1. *Akers v. State*, 8 Ind. 484; *Collins v. Call*, 3 Dev. (N. Car.) 457; *Curtis v. Kimball*, 12 Wend. (N. Y.) 275.

2. If the sheriff is removed, this is no obstacle to his re-election, if there is no statute to the contrary. *Gordan v. State*, 43 Tex. 330.

He is not entitled to trial by jury on proceedings for his removal. *Davis v. State*, 35 Tex. 118; *State v. Richmond*, 29 La. Ann. 705; *Bruner v. Bryan*, 50 Ala. 522; *Vann v. Pipkin*, 77 N. Car. 408; *Carrothers v. Russell*, 53 Iowa 346; 36 Am. Rep. 222.

Under a constitutional provision for his removal for "crime, incapacity or negligence," it was held that intoxication was a cause for removal. *McComas v. Krug*, 81 Ind. 327.

The misconduct of a deputy is not a ground for removing the sheriff, where there is no evidence that the sheriff sanctioned the misconduct. *State v. Budd*, 39 La. Ann. 232.

3. *Clerk v. Withers*, 6 Mod. 293; and is the rule in this country independent of statute. *Campbell v. Cobb*, 2 Sneed (Tenn.) 18; *State v. Parchmen*, 3 Head (Tenn.) 609; *Colyer v. Higgins*, 1 Duv. (Ky.) 6; 85 Am. Dec. 601; *Bondurant v. Buford*, 1 Ala. 359; 35 Am. Dec. 33; *Welsh v. Joy*, 13 Pick. (Mass.) 477; *State v. Hamilton*, 16 N. J. L. 153; *Doliver v. Collingwood*, 15 R. I. 510; *Ferguson v. Lee*, 9 Wend. (N. Y.) 258; *Rogers v. Darnaby*, 4 B. Mon. (Ky.) 238. But he must have begun the service of the particular writ before his term expired. *Cotton v. Atkinson*, 53 Ark. 98. He is not entitled to serve final process when he had served mesne process and before he levied execution his term expired.

Fletcher v. Morrel, 78 Mich. 176; *Tunstall v. Withers*, 86 Va. 892; *Wolf v. Taylor*, 68 Tex. 660.

But if a deputy vacates office, he is not entitled to complete unfinished process in his hands. *Ferguson v. Lee*, 9 Wend. (N. Y.) 258.

If the sheriff absconds, a deputy may act until the office is declared vacant. *Ballance v. Loomis*, 22 Ill. 82; *Kent v. Roberts*, 2 Story (U. S.) 591; *Johnson v. Foran*, 58 Md. 148.

The sheriff has the right to keep property on which he has levied attachment until it is demanded of him on execution, though, in the meantime, his term has expired. *Tukey v. Smith*, 18 Me. 125; 36 Am. Dec. 704. See also, to the same effect, *McKay v. Harrower*, 27 Barb. (N. Y.) 463.

4. *Lawson v. Orear*, 4 Ala. 156; *Dunnica v. Coy*, 28 Mo. 525; 75 Am. Dec. 133; *Fondrin v. Planters' Bank*, 7 Humph. (Tenn.) 447; *Sauvinet v. Maxwell*, 26 La. Ann. 280.

In *Pennsylvania*, the successor completes unfinished business. *Leshey v. Gardner*, 3 W. & S. (Pa.) 314; 38 Am. Dec. 764.

5. *Fockler v. Martin*, 32 Iowa 117; *Matthis v. Pollard*, 3 Ga. 1; *Fowble v. Rayberg*, 4 Ohio 45; and if he delivers goods seized by him to his successor, who sells, he is still liable if the original taking was a trespass. *Duke v. Vincent*, 29 Iowa 308. But the incoming sheriff would not be liable for goods seized by his predecessor, without proof that the incoming sheriff had received them or bound himself for their production. *Ballew v. Bobb*, 13 La. Ann. 375; *McKay v. Leonard*, 17 Iowa 569; *McKay v. Thorington*, 15 Iowa 25.

6. This rule has prevailed in some of the *United States*. *People v. Phoenix*,

An officer can justify his acts only as an officer¹ *de jure*, but his acts as a *de facto* sheriff may be good as to third persons.²

III. POWERS, DUTIES, AND LIABILITIES—1. Process.³—In civil actions there must be a writ in existence at the time process is executed to justify.⁴ If the process is regular on its face and issued by a court of competent jurisdiction, it is his duty to obey its mandates with reasonable diligence⁵ within his jurisdiction,⁶ and he is protected in so doing.⁷

6 Cal. 92; McCluskey v. McNeeley, 8 Ill. 578; Greenup v. Stoker, 12 Ill. 24. See CORONER, vol. 4, p. 171.

In *Massachusetts*, the senior deputy sheriff succeeds. Opinion of Justices, 126 Mass. 603. The deputy succeeds. McCluskey v. McNeeley, 8 Ill. 578.

In *New York* the under sheriff and sheriff's estate and securities become his sureties. Newman v. Beckwith, 61 N. Y. 205; but where the office becomes vacant by any other reason than death the under sheriff cannot perform the duties of sheriff. Paddock v. Cameron, 8 Cow. (N. Y.) 212.

The sheriff may complete the execution of a process begun by a deputy before his death. Ingersoll v. Sawyer, 2 Pick. (Mass.) 276.

1. Defending, in replevin, a taking by virtue of an execution must show he was an officer *de jure*. Vaughan v. Owens, 21 Ill. App. 249.

2. Service by him was held good where made so soon after his successor was qualified that it could not have been generally known he was succeeded, Flournoy v. Clements, 7 Ala. 535; but if his authority has notoriously ceased, the reason for rule ceases. King v. Corp., 6 East 368; Charitable Assoc. v. Baldwin, 1 Met. (Mass.) 359.

The validity of his acts cannot be questioned in a collateral proceeding. Stickney v. Stickney, 77 Iowa 699; Morse v. Calley, 5 N. H. 223; and can only be questioned by those directly affected by his acts. Moore v. Graves, 3 N. H. 408; and where he failed to qualify or file bond. Dunphy v. People, 25 Mich. 10. Acting under a void appointment, *de facto* sheriff may be good as to third persons. People v. Roberts, 6 Cal. 214; so, where he was ineligible. Bates v. Dyer, 9 Humph. (Tenn.) 162; Farmers', etc., Bank v. Chester, 6 Humph. (Tenn.) 458; State v. Anderson, 1 N. J. L. 318.

Where he has not renewed his bond the sureties on the original bond may be liable. Dunphy v. People, 25 Mich. 10; Ramsey Co. v. Brisbin, 17 Minn. 451.

3. See also SERVICE OF PROCESS.

4. Hall v. Roche, 8 T. R. 187; Norcross v. Nunan, 61 Cal. 640. A delivery of a writ to a sheriff after an arrest does not justify. Where a sheriff was requested by telegraph to attach, which he did, the writ being then on its way to him, it was held that it did not justify him. Wales v. Clark, 43 Conn. 183.

5. Cole v. Parker, 7 Iowa 167; 71 Am. Dec. 439; People v. Palmer, 46 Ill. 398; 95 Am. Dec. 418; Lawson v. State, 10 Ark. 28; 50 Am. Dec. 238; Lindsay v. Armfield, 3 Hawks (N. Car.) 548; 14 Am. Dec. 603; Fletcher v. Bradley, 12 Vt. 22; 36 Am. Dec. 324; Whitney v. Butterfield, 13 Cal. 335; 73 Am. Dec. 584; unless otherwise directed by the plaintiff or his attorney. Patton v. Hamner, 28 Ala. 618.

6. He must see whether writ is enforceable in his county. People v. Van Eps, 4 Wend. (N. Y.) 387; Chiles v. Hoy, 6 T. B. Mon. (Ky.) 47; Bickerstaff v. Doub, 19 Cal. 109.

7. Where a plaintiff has made a mistake in the affidavit and writ and amount of his claim in petition, and the sheriff who makes the attachment releases property on the defendant paying the amount named in the writ and costs, the sheriff is not liable to the plaintiff, though he afterwards recovers judgment for a larger amount. Page v. Belt, 17 Mo. 263; Ethridge v. Milling, 15 La. Ann. 513; Barr v. Boyles, 96 Pa. St. 31.

It is immaterial to the sheriff that the judgment does not correspond to the execution, Camp v. Mosely, 2 Fla. 171; Burton v. Sweaney, 4 Mo. 1; Davis v. Cooper, 6 Mo. 148; Kleissendorf v. Fore, 3 B. Mon. (Ky.) 473; Keys v. Gannis, 3 Nev. 548; Hill v. Haynes, 54 N. Y. 153; or whether there is any judgment or not. Farley v. Lee, 4 Dev. & B. (N. Car.) 169; 32 Am. Dec. 680.

He was protected by his process, valid on its face, where he had made levy on fee bill, though costs had been taxed

If the process is issued by a court not having authority, but this does not appear on the face of process, the sheriff is protected.¹ It is not his duty to question apparently regular process,² nor is it his right,³ unless it is absolutely void, when he may serve it, but is not bound to.⁴ This protection is personal to the

against another person, *Miller v. Weida*, 41 Ind. 199; where costs were erroneously taxed and indorsed on the execution, *Kothan v. Priest*, 34 Kan. 179; where there were irregularities in proceeding before judgment, *Norcross v. Nunan*, 61 Cal. 640; where execution issued on an erroneous judgment, *Smith v. People*, 99 Ill. 445; where a warrant erroneously issued, *Donahue v. Shed*, 8 Met. (Mass.) 526; *State v. Hamilton*, 9 Mo. 794; for not arresting where he was directed so to do, and process justified it, he may show that defendant was exempt, *Cody v. Quinn*, 6 Ired. (N. Car.) 191; 44 Am. Dec. 75; *Chase v. Plymouth*, 20 Vt. 469; 50 Am. Dec. 52; *McComb v. Reed*, 28 Cal. 281; 87 Am. Dec. 115; *Martin v. Hall*, 70 Ala. 421; *Bensel v. Lynch*, 44 N. Y. 162; *Roth v. Duvall*, 1 Idaho 149; *Albee v. Ward*, 8 Mass. 79; *Jordan v. Porterfield*, 19 Ga. 139; 63 Am. Dec. 301; *Loomis v. Wheeler*, 21 Wis. 271; *Stevenson v. McLean*, 5 Humph. (Tenn.) 332; *Newbury v. Munshower*, 29 Ohio St. 617; *Reid v. Stegman*, 99 N. Y. 646; *Crocker on Sheriffs*, §§ 284, 286; *Earl v. Camp*, 16 Wend. (N. Y.) 562; *State v. Manley*, 11 Lea (Tenn.) 636.

In *Earl v. Camp*, 16 Wend. (N. Y.) 562, the court by Cowen, J., said: "These cases go to the utmost length and the true length in the protection of ministerial officers. The law imposes various duties upon them on delivering to them the process of the superior or inferior courts, or the warrants of officers to the discharge of which they are absolutely bound, provided there is jurisdiction; and though there be a total want of such jurisdiction, if it be not apparent on the face of the process, the law will not put them to inquire and judge of the case. In general, they ought not to look beyond the process, and in no case need they do so. . . . In no case where he becomes satisfied there is a want of jurisdiction is he bound to act in any way. He has a discretion, if he choose to exercise it; and if he refuses in the first instance, the party cannot make him accountable."

In selling goods of deceased defend-

ant on execution issued less than one year after his death, *Clark v. May*, 11 Mass. 243; where, since date of judgment, defendant has been declared a bankrupt, *Whitworth v. Clifton*, 1 M. & R. 531; *Tarlton v. Fisher*, 2 Doug. 671; and has obtained his discharge and officer knew it, *Wilmarth v. Burt*, 7 Met. (Mass.) 257; *Hall v. Lyon*, 37 Ga. 636. In *Wilmarth v. Burt*, 7 Met. (Mass.) 257, the court by Shaw, C. J., said: "It would paralyze the action of an officer and often defeat the service of legal process if he were bound to stop and try the genuineness and validity of a certificate of discharge under a bankrupt or insolvent law." If the officer does suspend proceedings on production of defendant's discharge in insolvency it is at his own risk. *Orange Co. Bank v. Dubois*, 21 Wend. (N. Y.) 351. He is protected, though the affidavit on which process was founded is not in compliance with the statute, *Melcher v. Scruggs*, 72 Mo. 406; or though there was irregularity in the proceedings prior to the attachment, *Budder v. Spangler*, 12 Colo. 216; and though he acts on a judgment rendered against one dead, *Bragg v. Thompson*, 19 S. Car. 572; or arrests on process not disclosing exemption, *Carle v. Delesdernier*, 13 Me. 363; *Swift v. Chamberlain*, 3 Conn. 543; *Chase v. Fish*, 16 Me. 132.

1. *Whipple v. Kent*, 2 Gray (Mass.) 410; 61 Am. Dec. 470, where the necessary affidavit was issued by a magistrate who was also attorney of record for the plaintiff, but this did not appear on the face and the officer had no knowledge of it, it was held that he was not liable. *Chase v. Ingalls*, 97 Mass. 524.

2. *Perdue v. Dodd*, 1 Lea (Tenn.) 710; *Hatch v. Saunders*, 66 Mich. 181.

3. *Rogers v. Marlborough Co.* (S. Car. 1890), 11 S. E. Rep. 383; *Noble v. Whetstone*, 45 Ala. 361; *Newman v. Elam*, 30 Miss. 507; *Whitworth v. Clifton*, 1 M. & R. 331; *Tarlton v. Fisher*, 2 Doug. 671; *Martin v. Hall*, 70 Ala. 421.

4. *Barber v. Benson*, 9 Vt. 171; *Cutler v. Wadsworth*, 7 Conn. 11; *Perdue v. Dodd*, 1 Lea (Tenn.) 710.

officer and no defense to the wrongdoer under color of whose process the officer acts.¹ The sheriff's knowledge of facts in relation to a cause of action does not affect his duty or liability.² The rule is one of protection merely and the officer cannot build a title on such process.³

If the process is only voidable and not void it is the sheriff's duty to serve it,⁴ if the error is such that it may be amended,⁵ or is cured by the failure of the proper party to take advantage of it. He is not protected in serving process void on its face,⁶ whether for apparent lack of jurisdiction⁷ or for want of material allegations in the process.⁸

Execution recited judgment of one day and the record showed that it was rendered on another. *Watson v. Watson*, 9 Conn. 140; 23 Am. Dec. 324.

1. *Tuttle v. Wilson*, 24 Ill. 561; *Housh v. People*, 75 Ill. 491.

2. *Watson v. Watson*, 9 Conn. 140; 23 Am. Dec. 324; *Ramey v. State*, 20 Tex. App. 455. He must execute it, though he knows it is malicious and obtained on unreasonable grounds. *Rice v. Miller*, 70 Tex. 613; and return the writ to court. *Wright v. Marvin*, 59 Vt. 437.

3. *Wilson v. Sawyer*, 37 Ala. 631. If he sues to recover property his writ must show a valid writ. *Clark v. Norton*, 6 Minn. 412; *Earl v. Camp*, 16 Wend. (N. Y.) 562. Where regular execution was issued on a void judgment and the officer sold, it was held that he could not keep fees out of the proceeds of sale. *Clark v. Lamb*, 76 Ala. 406.

4. *Rogers v. Marlborough Co.* (S. Car. 1890), 11 S. E. Rep. 383; *Towle v. State*, 3 Fla. 202; *Fletcher v. Mott*, 1 Aik. (Vt.) 339; *French v. Willet*, 4 Bosw. (N. Y.) 649; *Stoddard v. Tarbell*, 20 Vt. 321; once served, then altered by inserting a different date and return day, without consent of defendant therein is not thereby rendered void so as to excuse officer who served it from serving it again when delivered to him for that purpose. *Forsyth v. Campbell*, 15 Hun (N. Y.) 235; *Reams v. McWail*, 9 Humph. (Tenn.) 542; *Bissell v. Kip*, 5 Johns. (N. Y.) 89; *Cable v. Cooper*, 15 Johns. (N. Y.) 152; *Martin v. Hall*, 70 Ala. 421; *Milburn v. State*, 11 Mo. 188; 47 Am. Dec. 148.

5. As in the case of a writ returnable on the wrong date, *Archibald v. Thompson*, 2 Colo. 388; *Samples v. Walker*, 9 Ala. 276; or a writ tested out of term, *Jones v. Cook*, 1 Cow. (N. Y.)

309; or a writ without seal, *People v. Dunning*, 1 Wend. (N. Y.) 16; but not where the court holds that this makes the writ void, *Boal v. King*, 6 Ohio 11, writ directed to wrong officer. *Walden v. Davidson*, 15 Wend. (N. Y.) 575. Execution issued after time limited, *Ontario Bank v. Hallett*, 8 Cow. (N. Y.) 192; writ varying from judgment. *Parmelee v. Hitchcock*, 12 Wend. (N. Y.) 96. This latter would not be so where such writ was void. *Boal v. King*, 6 Ohio 11.

An attachment regular on its face is not void because the complaint does not set up a cause of action which would warrant issuance of an attachment. *McComb v. Reed*, 28 Cal. 281; 87 Am. Dec. 115.

6. *Groome v. Forrester*, 5 M. & S. 314; *Branwell v. Penneck*, 7 B. & C. 536; 14 E. C. L. 97; *Savacool v. Boughton*, 5 Wend. (N. Y.) 172; 21 Am. Dec. 181; *Humphrey v. Case*, 8 Conn. 104; 20 Am. Dec. 95; *Clark v. Bond*, 7 Baxt. (Tenn.) 288; *Hall v. Howd*, 10 Conn. 520; 27 Am. Dec. 696.

7. *Hall v. Howd*, 10 Conn. 520; 27 Am. Dec. 696; *Huddleston v. Spear*, 8 Ark. 406. He must decide at his peril whether court issuing it had jurisdiction. *State v. McDonald*, 3 Dev. (N. Car.) 468; *Howard v. Clark*, 43 Mo. 344; *Batchelder v. Currier*, 45 N. H. 460; *Prince v. Thomas*, 11 Conn. 476; *Camp v. Moseley*, 2 Fla. 171; and, where the court had general jurisdiction, whether writ disclosed the lack of it in the particular case. *Gurney v. Tufts*, 37 Me. 130; 58 Am. Dec. 777; *Wise v. Withers*, 3 Cranch (U. S.) 331; *Pearce v. Atwood*, 13 Mass. 324; *Stevens v. Wilkins*, 6 Pa. St. 260; *Fisher v. McGirr*, 1 Gray (Mass.) 45; *Grumon v. Raymond*, 1 Conn. 47; 6 Am. Dec. 200.

8. *Com. v. Martin*, 105 Mass. 178; *Grumon v. Raymond*, 1 Conn. 47; 6

If a court having jurisdiction issues a writ against specific property, the officer is protected in taking it,¹ whoever owns it,² if he takes it from the defendant in writ,³ although the plaintiff had no claim.⁴

The sheriff cannot serve a writ to which he is a party,⁵ or in which he is interested;⁶ and if, in such case, the writ issues to the coroner or other officer, it need not disclose on its face the reason why it is not issued to the sheriff.⁷ He should indorse the date of its receipt on the writ.⁸

He must come within the class of officers to whom the writ is directed;⁹ but if he does not, and yet would have had authority to serve the writ, some authorities say that if properly

Am. Dec. 200; *Updyke v. Wheeler*, 37 Mo. App. 680.

1. If court had jurisdiction to issue writ. *Buck v. Colbath*, 3 Wall. (U. S.) 343; *Watkins v. Page*, 2 Wis. 92; *Shipman v. Clark*, 4 Den. (N. Y.) 446; 47 Am. Dec. 265; *Griffith v. Smith*, 22 Wis. 646; 99 Am. Dec. 90; *Bullis v. Montgomery*, 50 N. Y. 355; *State v. Cave*, 49 Mo. 129; *State v. Crow*, 11 Ark. 642; *Philips v. Spotts*, 14 Neb. 139; *Wallace v. Holly*, 13 Ga. 389; 58 Am. Dec. 518.

2. *Boyden v. Frank*, 20 Ill. App. 169; *Sample v. Broadwell*, 87 Ill. 617.

3. *Billings v. Thomas*, 114 Mass. 570. If the process commands him to take property from the possession of the defendant it does not justify him in taking it from a stranger, *Lyon v. Goree*, 15 Ala. 360; *King v. Oser*, 4 Duer (N. Y.) 431; *Stimpson v. Reynolds*, 14 Barb. (N. Y.) 506; *Carpenter v. Lott*, 31 Hun (N. Y.) 349; where a replevin writ ran against goods in the possession of A at B and C an officer got the goods at the place specified and apparently in the possession of A, but another officer had legal possession. *Held*, C not liable in trespass to other officer. *Osgood v. Carver*, 43 Conn. 24; but in *Wallace v. Holly*, 13 Ga. 389; 58 Am. Dec. 518, the court held that he was bound to levy a mortgage *fi. fa.* on mortgaged property described in process, though in possession of a third person holding adversely to the mortgagor.

4. *Watson v. Watson*, 9 Conn. 140; 23 Am. Dec. 324; *Cannon v. Sipples*, 39 Conn. 507.

5. *Bingham on Execution*, § 222; *Thayer v. Ray*, 17 Pick. (Mass.) 166; *Riner v. Stacy*, 8 Humph. (Tenn.) 288. Nor can a sheriff or his deputy

serve a writ to which another deputy is a party. *Dane v. Gilmore*, 51 Me. 544. But the service would be good unless defendant took advantage of it by proper pleading. *Gage v. Graffam*, 11 Mass. 181; *contra*, that it is void. *Magness v. Stewart*, 2 Coldw. (Tenn.) 309.

6. Nor enforce, as an officer, a judgment assigned to him. *Carpenter v. Stilwell*, 11 N. Y. 61; *Barker v. Remick*, 43 N. H. 238; *Evarts v. Georgia*, 18 Vt. 15; *McLeod v. Harper*, 43 Miss. 42; *Bank of Rutland v. Parsons*, 21 Vt. 199.

7. *Bastard v. Trutch*, 3 A. & E. 451; 30 E. C. L. 131.

8. And is liable for a failure so to do if the plaintiff is damaged, *Abbott v. Edgerton*, 30 Vt. 208; if not so indorsed the fact may be shown by parol, or if indorsed, the fact may be contradicted, *Hester v. Keith*, 1 Ala. 316; *Fletcher v. Pratt*, 4 Vt. 182; *Ulrich v. Dreyer*, 2 Watts (Pa.) 303. In *Pennsylvania* if not indorsed thereon it may be shown by parol, *Hale's Appeal*, 44 Pa. St. 438; but if he does indorse, it is conclusive. *Person's Appeal*, 78 Pa. St. 145. In *Texas* the statute liability for omitting it, is in cases where several writs have been received against one person. *De Witt v. Dunn*, 15 Tex. 106. In *North Carolina*, the statute requires him to mark the day on which the writ was actually delivered to him. *Duncan v. Philpat*, 64 N. Car. 479; *Hathway v. Freeman*, 7 Ired. (N. Car.) 109.

9. *Russel v. Hubbard*, 6 Barb. (N. Y.) 654; *Brier v. Woodbury*, 1 Pick. (Mass.) 366; or service would be void. *Wood v. Crosby*, 2 Hill (S. Car.) 520; *Witt v. Kaufman*, 25 Tex. Supp. 384.

directed, it may be amended.¹ He may justify under a superseded process if he does not know that it is superseded,² and likewise under a paid process.³

He is not liable for what he has done on an abandoned process.⁴

2. Summons to Appear.—A sheriff must make a reasonable effort to serve a summons.⁵

3. Where Several Writs.—In the absence of any lien it is the sheriff's duty to levy first the execution first delivered to him and to apply the proceeds of the assets seized to that execution, as against such as came into his hands at a later date.⁶ Where the judgment is a lien, it is the duty of the sheriff to apply the proceeds to the writ having the oldest lien.⁷

1. Freeman on Executions, § 65; Hearsey v. Bradbury, 9 Mass. 95.

2. Buffandeau v. Edmondson, 17 Cal. 436; Spencer v. Long, 39 Cal. 700; Johnson v. Fox, 51 Ga. 270. Notice to him must be official. Foster v. Wiley, 27 Mich. 244; 15 Am. Rep. 185.

3. Luddington v. Peck, 2 Conn. 701; but if the process is indorsed "satisfied" and he levies, he is liable. Barnard v. Stevens, 2 Aik. (Vt.) 429; 16 Am. Dec. 733; and if he knows that it has been paid. Stanley v. Nutter, 16 N. H. 22.

4. Houseman v. Stewart, 28 Ala. 684.

A taking under a valid attachment cannot be converted into a tort where the attachment is discharged. In Williams v. Ives, 25 Conn. 573, it was said to be the duty of the sheriff on discovering that a writ valid on its face was issued without authority from the plaintiff, to restore the property to the owner, and make a true return of facts on the process to the court.

5. State v. Finn, 87 Mo. 310; Heymann v. Cunningham, 51 Wis. 506.

It is no defense that the plaintiff's attorney did not, by examining the papers, see the sheriff's neglect. Ivey v. Colquitt, 63 Ga. 509. The sheriff should go to the defendant's house to see whether he is absent or not. Hinnan v. Borden, 10 Wend. (N. Y.) 367. Where the statute provided that service should be made at any time before the return day, service on that day was held not void but voidable. Meisse v. McCoy, 17 Ohio St. 225; but held void in State v. Kennedy, 3 Harr. (Del.) 22.

If the defendant is personally served but is mis-named he can only escape by plea in abatement; but if mis-named where a copy of the writ is left at his residence he is not bound by the judg-

ment. Journey v. Dickerson, 21 Iowa 308.

6. Hutchinson v. Johnson, 1 T. R. 729; Drew v. Lajson, 11 A. & E. 537; Jones v. Atherton, 7 Taunt. 56; Freeman on Executions, § 197; Rogers v. Edmunds, 6 N. H. 70; Rust v. Pritchett, 5 Harr. (Del.) 260; Moore v. Fitz, 15 Ind. 43; Weaver v. Wood, 49 Cal. 297; Asberry v. Noland, 2 J. J. Marsh. (Ky.) 441; Million v. Com., 1 B. Mon. (Ky.) 310; 36 Am. Dec. 580; Knox v. Webster, 18 Wis. 406; 86 Am. Dec. 779; May v. Buckhannon River Lumber Co., 70 Md. 448.

Where several persons apply to sheriff to replevy goods he must exercise his discretion in choosing between them. Kirk v. Morris, 40 Ala. 225.

7. Com. v. Straton, 7 J. J. Marsh. (Ky.) 90; Polk Co. v. Sypher, 17 Iowa 358; 85 Am. Dec. 568; State v. Rhyne, 89 N. Car. 64; Freeman on Ex., § 196; but if the creditor give him money with directions to apply it to a junior execution he must so apply it. Rudy v. Com., 35 Pa. St. 166; 88 Am. Dec. 303.

Where a writ was given to a deputy sheriff February 4th, and return was made "*nulla bona*," and a writ issued to another creditor, which was levied February 9, and money was made on it and paid over, the sheriff not knowing of the first execution, it was held that he was not liable. Russell v. Lawton, 14 Wis. 202; 80 Am. Dec. 769.

Where the senior execution was lodged in the sheriff's office and entered in full on his books, this was held notice to him of such execution, State v. Boles, 18 S. Car. 534; he is not liable to the holder of a senior execution where, holding two writs, he

Where there are conflicting claims to the fund, in many States he has the right to bring the money into court.¹ If he undertakes to decide claims he does so at his peril.²

Where he has several executions under one of which he has levied, and such levy is discharged by the plaintiff in the execution or by payment of the debtor, he must retain the property and sell it to satisfy the other executions.³

4. **Arrest.**⁴—The sheriff cannot arrest in civil proceedings without a writ;⁵ and he must exhibit it if requested.⁶ If the defendant is misnamed in the writ, the sheriff cannot arrest him;⁷ and is liable for arresting the wrong person, though he has the same name as the defendant.⁸

levies and sells goods of the debtor, and the senior creditor takes the debtor on *ca. sa.* and discharges him, *Strong v. Linn*, 5 N. J. L. 799.

An officer receiving an execution against a firm for an individual debt, and subsequently one for a partnership debt, is liable to the plaintiff in the partnership execution, if he does not levy first for the partnership debt after receiving instructions to do so. *Trowbridge v. Cushman*, 24 Pick. (Mass.) 310.

1. *Stebbins v. Walker*, 14 N. J. L. 90; *Whitaker v. Petway*, 4 Ired. (N. Car.) 182. If he pays according to terms of a judgment of court he is protected. *Hill v. Rasicat*, 34 Minn. 270.

2. *McComb v. Read*, 28 Cal. 281; 87 Am. Dec. 115. An officer attaching property satisfied therewith a judgment fraudulently obtained, contrary to the instructions of a subsequent attaching creditor, by which means the subsequent attaching creditor lost his debt. *Held*, that the officer was liable. *Fairfield v. Baldwin*, 12 Pick. (Mass.) 388.

A belief by the officer that he had already levied the senior execution on sufficient property is no excuse for paying over funds. *Ohlson v. Pierce*, 55 Wis. 207.

If he applies proceeds to a senior execution which by a private arrangement between the parties has been paid, he is not liable to a claimant under a junior execution. *Burnett v. Gentry*, 32 S. Car. 597.

3. *Leach v. Pine*, 41 Ill. 66; 89 Am. Dec. 375. But if there are several attachments and the officer neglects to levy in any suit by the last attaching creditor against the officer, the officer may show as a defense that

the judgment of the prior attaching creditors to whom he is liable, would absorb the whole value of the goods. *Commercial Bank v. Wilkins*, 9 Me. 28; *Smith v. Hogan*, 4 Ala. 93.

4. Where the sheriff is directed to arrest the defendant on civil process authorizing it, and neglects to arrest, though he might do so if he acted with due diligence, he is liable to the plaintiff. *Deliesshire v. King*, Harp. (S. Car.) 357; *Goodrich v. Starr*, 18 Vt. 227; *Murphy v. Troutman*, 5 Jones (N. Car.) 379.

5. *Hall v. Roche*, 8 T. R. 187.

6. *Com. v. Field*, 13 Mass. 321.

7. *Wilkes v. Looch*, 2 Taunt. 399; *Kelley v. Lawrence*, 10 Jur. N. S. 636; as, if Daniel S. G. is arrested on process against Samuel S. G., *Gurnsey v. Lovel*, 9 Wend. (N. Y.) 319; unless he is known by either name. *Griswold v. Sedgwick*, 1 Wend. (N. Y.) 132; *Mead v. Haws*, 7 Cow. (N. Y.) 332; but misnomer in an execution, if personal service of original writ, in which same misnomer appeared, was had on the defendant, does not affect the officer. *Smith v. Bowker*, 1 Mass. 76; *Crawford v. Satchwell*, *Strange* 1218.

8. *Hallowell, etc., Bank v. Howard*, 14 Mass. 184. If he arrests the defendant on valid process he may detain him on other writs in his hands. *Hooper v. Lane*, 3 Jur. N. S. 1026; but one arrested on invalid process cannot be served with other bailable process at the suit of the same plaintiff, while in custody on that illegal arrest. *Pelletier v. Wash. Bank*, 2 Gratt. (Va.) 291.

An officer arresting a man for crime may make searches of money or other articles of value found upon the prisoner, by means of which, if left in his

5. **Escape.**¹—Apart from any peremptory provision of statute, the sheriff, where a defendant in custody on civil process escapes, is liable to the plaintiff to the extent of the value of such custody.²

possession, he might procure his escape, and will not be liable in so doing if he acts in good faith for his own safety or that of the public, or from a regard for the security of the prisoner. *Closson v. Morrison*, 47 N. H. 482.

The officer has a right to tie a prisoner if he believes it necessary to secure him. *State v. Stalcup*, 2 Ired. (N. Car.) 50.

Bail.—By Stat. 23, Hen. VI, ch. 9, which is part of the common law in the *United States*, sheriffs were compelled to admit to bail upon reasonable surety, persons in custody by force of writ on mesne process, and taking this bond was a defense to a motion for an attachment for not having the body on the return day. *Rex v. Sheriff*, 7 T. R. 239; *Hill v. Bolt*, 4 T. R. 352. If sufficient bail is offered the sheriff must accept it, and is liable if he does not, *Creswell v. Houghton*, 6 T. R. 355; *Gibbs v. Randlett*, 58 N. H. 407; but he is not obliged to travel around with the prisoner to procure bail. *Page v. Staples*, 13 R. I. 306.

Under the above statute he must have taken two sureties, *Rex v. Sheriff of London*, 2 Bing. 227; *Long v. Billings*, 9 Mass. 479; *Rice v. Hosmer*, 12 Mass. 129; *Lane v. Smith*, 2 Pick. (Mass.) 281; to a contract under seal, *Peyton v. Mosely*, 3 T. B. Mon. (Ky.) 80. If he takes the sureties required and they are good at the time, but afterwards become insolvent, he is not liable, *Rice v. Hosmer*, 12 Mass. 127; *Stevens v. Boyce*, 9 Johns. (N. Y.) 292; *Sherwood v. Pearl*, 1 Tyler (Vt.) 314; *Bradt v. Holden*, 12 R. I. 335.

If the statute requires it to run to sheriff, it is void if it runs to the deputy. *Conant v. Sheldon*, 4 Gray (Mass.) 300; *Smith v. Adams*, 12 Met. (Mass.) 564; *Rogers v. Reeve*, 1 T. R. 422. In some States, by statute, bail may be given by sureties indorsing their names on the writ, *Jacobs v. Stevens*, 57 N. H. 610; *Stoughton v. Barrett*, 20 Vt. 385. The sheriff, if he allows the debtor to depart on receipt of an undertaking not recognized by statute, is liable for an escape, *Fuller v. Prest*, 7 T. R. 109; *Rogers v. Reeves*, 1 T. R. 418; and if the sheriff,

for such reason, is compelled to pay the debt he cannot recover money so paid. *Pitcher v. Bailey*, 8 East 171. The officer is bound to make diligent search for the body and property of the debtor, when the execution is delivered to him, though bail has been given. *Kidder v. Parlin*, 7 Me. 80. Unless his return shows this, the bail will not be charged, *Rowell v. Hoit*, 8 N. H. 38; and this return cannot be made until the return day. *Niles v. Field*, 2 Met. (Mass.) 327; *Bull v. Clarke*, 2 Met. (Mass.) 587.

Special Bail.—In some States the sheriff is liable as special bail if he allows an arrested debtor to depart, and bail is not given or justified or the signature of a surety is forged. *Metcalf v. Stryker*, 31 Barb. (N. Y.) 62; *Hart v. Lanier*, 3 Hawks. (N. Car.) 244; *Gray v. Hoover*, 4 Dev. (N. Car.) 445; *Townsend v. Stoddard*, 26 Ga. 430; *Marsh v. Bancroft*, 1 Met. (Mass.) 497. It has been held that a sheriff, for not taking bail for a person notoriously insolvent, before allowing him to depart, was only liable in nominal damages. *Eaton v. Ogier*, 2 Me. 46; *Weld v. Bartlett*, 10 Mass. 470. As to special bail the sheriff's powers are commensurate with that of any bail, and he may arrest the defendant. *Bronson v. Noyes*, 7 Wend. (N. Y.) 188; *Brady v. Brundage*, 59 N. Y. 310. If an arrest is unauthorized, no action will lie for neglecting to take sufficient bail. *Mason v. Hutchings*, 20 Me. 77. And see generally *ARREST*, vol. 1, p. 719; *BAIL*, vol. 2, p. 1.

1. See also, *ESCAPE*, vol. 6, p. 844.

2. *State v. Falls*, 63 N. Car. 188; *Faulkner v. Bartley*, 6 Ark. 150; *State v. Baden*, 11 Md. 317; *Crawford v. Andrews*, 6 Ga. 244; *Chase v. Keyes*, 2 Gray (Mass.) 214; *Hootman v. Shriner*, 15 Ohio St. 43; *Arden v. Goodacre*, 11 C. B. 883; *McRae v. Clarke*, L. R., 1 C. P. 403. If the defendant is in custody on mesne process, the plaintiff must prove an indebtedness; and this is not maintained by evidence of a claim barred by the Statute of Limitations. *Slocum v. Riley*, 145 Mass. 370.

Insolvency of the debtor is not a bar,

At common law, in case of a voluntary escape,¹ the defendant was discharged and the sheriff became liable to the plaintiff for the debt.² If the escape was negligent or involuntary and the debtor was in custody before action was brought by the plaintiff against the sheriff, such recaption was a bar.³

It is no defense that the jail is out of repair;⁴ that there is no jail,⁵ or that he used due care in keeping the prisoner;⁶ but it is a defense that the process on which the defendant is held is void,⁷ or that the escape was caused by the act of the plaintiff or his attorney.⁸

6. Attachment and Execution—*a. IN GENERAL.*—The sheriff is bound to act with diligence⁹ on receipt of process, and execute it

Wolverton v. Com., 7 S. & R. (Pa.) 273; *Currie v. Worthy*, 3 Jones (N. Car.) 315; but is admissible in mitigation, *Barnes v. Willett*, 35 Barb. (N. Y.) 514.

In *New York*, when the sheriff becomes liable as special bail, insolvency of the debtor is not admissible in mitigation.

If the debtor is insolvent, damages can be only nominal. *Hotchkiss v. Whitten*, 71 Me. 577.

1. If on mesne process, the sheriff could have recaptured him, *Atkinson v. Matteson*, 2 Term Rep. 172; *Lewis v. Morlan*, 2 B. & A. 56; and if he had the defendant at the return day of the writ, it was sufficient. *Stone v. Woods*, 5 Johns. (N. Y.) 183.

2. *Hopkinson v. Leeds*, 78 Pa. St. 396; *Lash v. Ziglar*, 5 Ired. (N. Car.) 702; *Sheriff of Essex Case*, Hob. 202; *Stone v. Wilson*, 10 Gratt. (Va.) 529; and no defense that the defendant returned into custody and was in court on return day, *U. S. v. Brent*, 1 Cranch (C. C.) 525; or that the defendant's discharge was ordered by a court not having jurisdiction, *Schaffer v. Riseley*, 44 Hun (N. Y.) 6; otherwise if the court had jurisdiction. *Hathaway v. Holmes*, 1 Vt. 405. After a voluntary escape the sheriff could not retake him on that writ, *Atkinson v. Jameson*, 5 T. R. 25; if the defendant voluntarily returned to the sheriff, the plaintiff might sue the sheriff for the escape or affirm the original commitment, *Browning v. Rittenhouse*, 38 N. J. L. 279; *James v. Pierce*, 2 Lev. 132; *Rawson v. Turner*, 4 Johns. (N. Y.) 469; and opposing a debtor's discharge in insolvency would show an election to affirm and discharge the sheriff, *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477; 5 Am. Dec. 291; *contra*,

Currie v. Worthy, 3 Jones (N. Car.) 315; *Hopkinson v. Leeds*, 9 Phila. (Pa.) 5; insolvency of debtor no defense for sheriff in voluntary escapes. *Hopkinson v. Leeds*, 78 Pa. St. 396; *State v. Hamilton*, 33 Ind. 502.

3. *Chambers v. Gambier*, 2 Comyns 554; *Adams v. Turrentine*, 8 Ired. (N. Car.) 147; *Ballou v. Kip*, 7 Johns. (N. Y.) 175; *Stone v. Wilson*, 10 Gratt. (Va.) 529.

4. *Kepler v. Barker*, 13 Ohio St. 177; *Smith v. Hart*, 1 Brev. 146; *Slemaker v. Marriott*, 5 Gill & J. (Md.) 406; *Richardson v. Spencer*, 6 Ohio 13; *Brown Co. v. Butt*, 2 Ohio 348.

5. *Hall v. Hall*, 1 Root (Conn.) 124.

6. *State v. Mullen*, 50 Ind. 598.

7. *Bensel v. Lynch*, 44 N. Y. 62; *Hitchcock v. Baker*, 2 Allen (Mass.) 431; *Gorton v. Frizzell*, 20 Ill. 291; *Borrodale v. Leek*, 9 Barb. (N. Y.) 611; *Governor v. Stribling*, 2 Blackf. (Ind.) 24; but not where it is merely voidable, *Renick v. Orser*, 4 Bosw. (N. Y.) 384; *Howard v. Crawford*, 15 Ga. 423.

8. *Dexter v. Adams*, 2 Den. (N. Y.) 646; *Van Wormer v. Van Woust*, 10 Wend. (N. Y.) 356; *Noble v. Beatty*, 4 Bibb (Ky.) 507.

9. As to due diligence, see *Adams v. White*, 2 Ala. 37; *Hallett v. Lee*, 3 Ala. 28; *Andrews v. Keep*, 38 Ala. 315; *Finnigan v. Jarvis*, 8 U. C., Q. B. 210; *Harris v. Murfree*, 54 Ala. 161; as to diligence, *Hunter v. Phillips*, 56 Ga. 634; *Wakefield v. Moore*, 65 Ga. 268; *Henry v. Com.*, 107 Pa. St. 361; as to active diligence, *Harwell v. Worsham*, 2 Humph. (Tenn.) 524; 37 Am. Dec. 572; as to diligence such "as a reasonable man would exercise," *Crosby v. Hungerford*, 59 Iowa 712; as to utmost expedition, *Lindsay v. Armfield*, 3 Hawks (N. Car.) 548; 14 Am. Dec. 603; as to reasonable diligence, *Har-*

according to its terms, in the absence of instructions.¹ If the commands of the writ are general and the plaintiff gives special instructions, these should be followed.² If no special instructions are given, he should still make reasonable search and inquiry for the defendant or his property.³ It is no excuse that the plaintiff did not inform him of property.⁴ But if he has a reasonable doubt of the defendant's title, he may require a bond of indemnity before proceeding,⁵ and where he has this doubt he should notify

grave v. Penrod, 1 Ill. 401; 12 Am. Dec. 201; Dunlap v. Berry, 5 Ill. 327; 39 Am. Dec. 413; as to ordinary diligence, Green v. Lowell, 3 Me. 373; Barnes v. Thompson, 2 Swan (Tenn.) 313; as to strict degree of diligence, McKinney v. Craig, 4 Sneed (Tenn.) 577; to use all reasonable endeavors. Ashby v. Gill, 14 B. Mon. (Ky.) 20. He is to act in each case honestly and diligently, but with due regard to his other duties. If he has been required to make all possible effort in one case, he might lose the opportunity of executing every other process in his hands; the fact that the defendant has property does not alone fix the sheriff with liability for a failure to act, if he has been diligent in searching for it. Barnes v. Thompson, 2 Swan (Tenn.) 313.

1. In the *New England* States the sheriff is not required to attach on mesne process unless directed by the plaintiff to do so, Smith v. Judkins, 60 N. H. 127; Hubbel v. Kingman, 52 Conn. 17; Palmer v. Gallup, 16 Conn. 556; in *Maine* not unless so directed in writing, Betts v. Norris, 15 Me. 468; Kimball v. Davis, 19 Me. 310; Connor v. Madden, 57 Me. 410; and this writing may be quite informal. Abbott v. Jacobs, 49 Me. 319. Elsewhere in the *United States* if the writ clothes him with authority and the circumstances of the case permit, it is his duty to attach without special instructions to do so, Ransom v. Halcott, 18 Barb. (N. Y.) 56; after the writ has been delivered to him—he cannot attach before, Wales v. Clark, 43 Conn. 183; Seiber v. Switzer, 35 Ohio St. 661; but in *New England* if he has attached without instructions the attachment is good, and he is bound to hold it and levy the execution on it, Davis v. Richmond, 14 Mass. 473; Start v. Sherwin, 1 Pick. (Mass.) 521.

2. Unless they are likely to harass the debtor and there is other property. Waples on Attachment. If directed to

attach specific property, he must do so, unless in a case where he has a right to demand indemnity as a perquisite, Perkins v. Pitman, 34 N. H. 261; and, if no question of indemnity arises, he is liable for not levying unless he can prove that the defendant did not own the property or that it was not subject to levy. People v. Palmer, 46 Ill. 398; 95 Am. Dec. 418; Hunter v. Maddox, 1 Hann. N. B. 162; Marshall v. Simpson, 13 La. Ann. 437; Levy v. Shockley, 29 Ga. 710; West v. St. John, 63 Iowa 287.

3. Albany City Bank v. Dorr, Walk. (Mich.) 318; State v. Fitzpatrick, 6 Mo. 185; Green v. Lowell, 3 Me. 373; Henry v. Com., 107 Pa. St. 361; Ford v. Dyer, 26 Miss. 243; Taylor v. Wimer, 30 Mo. 129; Quotation, Freeman on Executions, vol. 2, 252.

4. Albany City Bank v. Dorr, Walk. (Mich.) 317; Vance v. McNairy, 3 Yerg. (Tenn.) 171; Cases, Freeman on Executions, § 252. But if the plaintiff does so inform him, the failure to act at once raises a presumption of negligence against him, Kimball v. Davis, 19 Me. 310; Hunter v. Phillips, 56 Ga. 634; Smith v. Judkins, 60 N. H. 127; Tucker v. Bradley, 15 Conn. 46; and attaches a stricter liability. Jenkins v. Troutman, 7 Jones (N. Car.) 169.

5. See INDEMNITY CONTRACTS, vol. 10, p. 402. And its refusal by the plaintiff in such cases will warrant the officer in not seizing or holding. Freeman on Executions, § 275. At common law, when the officer had doubts of the defendant's title to the property, the return day of the writ was extended until the plaintiff gave the officer a bond of indemnity. Freeman on Executions, § 254; and where there are several writs and some of the defendants will not furnish indemnity, only those who comply have their liens preserved. Burnett v. Handley, 8 Ala. 685; Smith v. Osgood, 46 N. H. 178; Davidson v. Dallas, 8 Cal. 228; Griffin v. Hasty, 94

the plaintiff so that a bond may be given.¹ Indemnity is implied from directions to serve in a particular manner.² The sheriff may show, as a defense for not levying, notwithstanding the bond, that the property belonged to a third person.³

If he seizes property of a third person where the writ does not run against it, generally he becomes at once a trespasser, and, in the absence of a statute, the owner may sue him at once.⁴

N. Car. 438. In *Marsh v. Gold*, 2 Pick. (Mass.) 289, the court by Parker, C. J., said: "An officer, called upon to serve a precept either by attaching property or arresting the person, if there be any reasonable grounds for doubting his authority to act in any particular case, has the right to ask for indemnity. He is not obliged to serve process in civil actions at his own peril when the plaintiff in the suit is present, and may take the responsibility upon himself. It has been decided that the sheriff has a right to require indemnity of the creditor when he shall be directed to attach chattels, the title to the property in which may be questionable. *Marshall v. Hosmer*, 4 Mass. 63. The same rule exists when the sheriff shall be directed to arrest the body of any one, and he has reasonable doubts of the identity of the person. There can be no reason why the same principle should not apply where there may be doubts of the lawfulness of the arrest on other grounds. The cases cited to show the illegality of this promise show satisfactorily that a contract entered into with an officer to indemnify him against the consequences of a breach of official duty is void; but it is no breach of official duty for an officer to hesitate to serve civil process where his proceedings may make him a trespasser until he shall have security of indemnification from the creditor. Actions have frequently been maintained upon such contracts and they are neither immoral, unjust, nor illegal in any respect."

1. *Sage v. Dickenson*, 33 Gratt. (Va.) 361; *State v. Langdon*, 57 Mo. 353. Where the officer levied with notice of an adverse claim, under promise of indemnity, he is liable for the property, if it belonged to the defendant, although no indemnity is given, if he did not demand it. *Miller v. Com.*, 5 Pa. St. 294; and on grounds stated in the text he may refuse to proceed without bond even after levy. *Smith v. Osgood*, 46 N. H. 178; *Jessop v. Brown*, 2 Gill & J. (Md.) 404; *Patterson v. Anderson*, 40 Pa. St. 359; 80 Am. Dec.

579; *Hamblet v. Herndon*, 3 Humph. (Tenn.) 34; *Com. v. Watmough*, 6 Whart. (Pa.) 117; *Com. v. Vandyke*, 57 Pa. St. 34.

2. *Ranlett v. Blodgett*, 17 N. H. 298; 43 Am. Dec. 603; *contra*, *State v. Koontz*, 83 Mo. 323; *Corson v. Hunt*, 14 Pa. St. 510; 53 Am. Dec. 568; *Stone v. Pointer*, 5 Munf. (Va.) 287; and, unless objected to at the time, is sufficient to oblige him to pursue the plaintiff's instructions. *Mullings v. Bothwell*, 29 Ga. 706; *Levy v. Shockley*, 29 Ga. 710. There is no implied indemnity if the process is given to him without instructions how to serve. *Nelson v. Cook*, 17 Ill. 443; *Weld v. Chadbourne*, 37 Me. 221.

3. *Freiberg v. Johnson*, 71 Tex. 558; *Com. v. Vandyke*, 57 Pa. St. 34; *contra*, *Evans v. Thurston*, 53 Iowa 122; *Harrison v. Allen*, 40 N. J. L. 556; *State v. Sandlin*, 44 Ind. 504.

Where the officer took a bond of indemnity, it was held that he was estopped from alleging the exemption of property inventoried by him. *Baker v. Brintnall*, 52 Barb. (N. Y.) 188.

See also, on the general subject, *INDEMNITY CONTRACTS*, vol. 10, p. 402.

4. *State v. McBride*, 81 Mo. 349; *Rhodes v. Patterson*, 3 Cal. 469; *James v. Thompson*, 12 La. Ann. 174; *Lentz v. Chambers*, 5 Ired. (N. Car.) 587; 44 Am. Dec. 63; *Siedenbach v. Riley*, 36 Hun (N. Y.) 211; *Hanchett v. Williams*, 24 Ill. App. 96; *Walcot v. Pomeroy*, 2 Pick. (Mass.) 121; *Grinnel v. Phillips*, 1 Mass. 530; *Owings v. Frier*, 2 A. K. Marsh. (Ky.) 268; 12 Am. Dec. 393; *Jamison v. Hendricks*, 2 Blackf. (Ind.) 94; 18 Am. Dec. 131; *Philips v. Harris*, 3 J. J. Marsh. (Ky.) 122; 19 Am. Dec. 166; *Sanders v. Chandler*, 26 Minn. 273. In *Minnesota* it was held that he was not liable until after the claim was made and a reasonable time had elapsed for the plaintiff to furnish indemnity. *Williams v. McGrade*, 13 Minn. 174; and that in a suit against him, he could make his indemnities co-defendants. *Leaser v. Getman*, 30 Minn. 321.

generally without demand.¹ He may show, however, if the third person acquired title from the defendant in the attachment suit or in the execution, that the transfer was a fraud as to creditors of the defendant,² or that goods of the

The sheriff would be liable where he completed a levy made by his predecessor. *Freeman v. Apple*, 99 Pa. St. 261; or where, property having been delivered to him by his predecessor, he refuses to deliver it to the owner on demand. *Vaughn v. Allgaier*, 27 Mo. App. 523.

He may seize the whole property on a writ against one tenant in common, *Veach v. Adams*, 51 Cal. 609; but he cannot sell the whole property, *Bernal v. Hovious*, 17 Cal. 541; *Sheppard v. Shelton*, 34 Ala. 652; *Heald v. Sargeant*, 15 Vt. 506; and he cannot seize and sell partnership property on process against an individual partner. *Bogue v. Stell*, 1 Phila. (Pa.) 90; *Serrine v. Briggs*, 31 Mich. 443.

The claimant has this right of action in many States whether he appeared in the attachment proceedings to protect his property or not, *Trieber v. Blocher*, 10 Md. 14; or whether he demanded a release of property or not, *Bodega v. Perkerson*, 60 Ga. 516; *Shuff v. Morgan*, 9 Mart. (La.) 592; and, in some cases, even though he has receipted for or given a delivery bond for the property, *Turner v. Lytte*, 59 Md. 199; *Johns v. Church*, 12 Pick. (Mass.) 557; 23 Am. Dec. 651; *Williams v. Morgan*, 50 Wis. 548; *Morse v. Hurd*, 17 N. H. 246; *Carpenter v. Dresser*, 72 Me. 377; 39 Am. Rep. 337.

In many States, when a claimant appears, a method is provided by statute for determining rights, and, if the decision is against the claimant, the officer is not liable for proceeding with his levy, although the claimant was the real owner. *Capital Lumbering Co. v. Hall*, 9 Oregon 93; *Schroeder v. Clark*, 18 Mo. 184; *Cassell v. Williams*, 12 Ill. 387; *Patty v. Mansfield*, 8 Ohio 370; *Zacharias v. Totton*, 90 Pa. St. 286; *Philips v. Harriss*, 3 J. Marsh. (Ky.) 122; 79 Am. Dec. 166.

In other States the determination as to the claimant's title does not conclude the claimant, but justifies the officer in not proceeding unless he obtains indemnity. *Platt v. Sherry*, 7 Wend. (N. Y.) 236; *Curtis v. Patterson*, 8 Cow. (N. Y.) 67; *Strong v. Pat-*

terson, 6 Cal. 237; *Perkins v. Thornburgh*, 10 Cal. 189.

Under many of these statutes, the claimant is free to resort to his common-law remedies, and cannot be compelled to submit his claim to be investigated by the statutory method. *Moore v. Samuel*, 13 Tex. 120; *Steele v. Farber*, 37 Mo. 71; *Jones v. Wilson*, 16 Ohio St. 420; *Pike v. Colvin*, 67 Ill. 227.

In some States the officer may begin proceedings and compel the claimant to try title in the manner provided by the statute. *Philips v. Harriss*, 3 J. J. Marsh. (Ky.) 122; 19 Am. Dec. 166; *State v. Sandlin*, 44 Ind. 504. In *Ohio* if the proceeding is begun by the officer and found against the claimant it does not bar him from suing the officer. *Jones v. Carr*, 16 Ohio St. 420.

1. *Boulivare v. Craddock*, 30 Cal. 190; *Moore v. Murdock*, 26 Cal. 514; *Woodbury v. Long*, 8 Pick. (Mass.) 543; 19 Am. Dec. 545; *Owings v. Frier*, 2 A. K. Marsh. (Ky.) 268; 12 Am. Dec. 393; *Jamison v. Hendricks*, 2 Blackf. (Ind.) 94; 18 Am. Dec. 131; but where the property was in possession of the defendant in the writ in the attachment suit, a demand was held necessary. *Killey v. Scannell*, 12 Cal. 73.

2. *Pease v. Anderson*, 44 Ill. 218; *Rinchey v. Stryker*, 31 N. Y. 140; *Bolander v. Genbry*, 36 Cal. 105; *Ellassar v. Hunter*, 26 Cal. 279; and he need not first have the transfer set aside. *State v. McBride*, 81 Mo. 349; *Pierce v. Hill*, 35 Mich. 194; 24 Am. Rep. 541; *Harris v. Williams*, 51 Cal. 528; but if he has taken it under an order of attachment in proceedings which are discharged he cannot then defend his seizure on the ground that the transfer to the holder from whom he took it was fraudulent. *Simpson v. Voss*, 31 Kan. 227. He must show that the process is regular, *Noble v. Holmes*, 5 Hill (N. Y.) 194; *Thornburgh v. Hand*, 7 Cal. 554; *Mathews v. Densmore*, 43 Mich. 461; *Williams v. Eikenberry*, 25 Neb. 721; *White v. Jones*, 38 Ill. 159; *Hines v. Chambers*, 29 Minn. 7; *Hornberger v. Brandenberg*, 35 Minn. 401; *Newton v. Brown*,

third person were fraudulently intermingled with the debtor's goods.¹

If he levies on exempt property, his liability varies in different States. In some he is justified until claim of execution is made, and, if the defendant does not claim his privilege, the sheriff must levy,² while in others he must take notice of executions,³ and in others he must inform the debtor of his privilege and give him a chance to select.⁴

² Utah 126; if levied, an execution must show a valid judgment as well as execution, *Ford v. McMaster*, 6 Mont. 240; *Jansen v. Acker*, 23 Wend. (N. Y.) 480; the officer must show the indebtedness of the defendant, *Damon v. Bryant*, 2 Pick. (Mass.) 411; *Rinchev v. Stryker*, 28 N. Y. 45; *Brichman v. Ross*, 67 Cal. 601; *Howard v. Manderfield*, 31 Minn. 337; *Bogert v. Phelps*, 14 Wis. 88; *Oberfelder v. Kavanaugh*, 21 Neb. 483; *Keys v. Gannis*, 3 Nev. 548; *Trowbridge v. Bullard*, 81 Mich. 451; and that the debt was due, *Sanford Mfg. Co. v. Wiggin*, 14 N. H. 441; but judgment in the action would be evidence of indebtedness if the court had jurisdiction: *Hines v. Chambers*, 29 Minn. 7.

¹ *Daumiel v. Gorham*, 6 Cal. 43; *Robinson v. Holt*, 39 N. H. 557; 75 Am. Dec. 233; and he is not liable to the owner until he identifies his property and demands its return, *Wilson v. Lane*, 33 N. H. 466; and if he does not, the officer is justified in selling the whole, *Lewis v. Whittemore*, 5 N. H. 364; 22 Am. Dec. 466; although the general rule is that the person at fault should be the loser, *Willard v. Rice*, 11 Met. (Mass.) 493; 45 Am. Dec. 226; *Weil v. Silverstone*, 6 Bush (Ky.) 698; *Treat v. Barber*, 7 Conn. 274; *Slattery v. Stewart*, 45 Ill. 293. Some courts require the presence of fraud to justify the officer. In *Smith v. Sanborn*, 6 Gray (Mass.) 134, the court by Merrick, J., said: "It is only in cases where the intermixture has been caused by the willful or unlawful acts of one of the proprietors, and the several parcels have thereby become so confused or mingled together that they can be no longer identified that his interest in them is lost," and these courts also say that if the intermixture is not fraudulent, the sheriff is liable if he takes a third person's goods, although such person refused to point out the debtor's goods, *Davis v. Stone*, 720 Mass. 228; *Smith v. Sanborn*, 6 Gray (Mass.) 134; *Foot v. People*, 14 Ill.

App. 280; *Beach v. Schmultz*, 2 Ill. 185; *Treat v. Barber*, 7 Conn. 274; but the officer may require a third person to point out his own goods, *Tufts v. McClintock*, 28 Me. 424; 48 Am. Dec. 501; and it is the officer's duty first to make inquiry as to ownership, *Carlton v. Davis*, 8 Allen (Mass.) 96; *Smith v. Sanborn*, 6 Gray (Mass.) 134.

² *Tirrel v. State*, 66 Ala. 575; *Boesker v. Pickett*, 81 Ind. 554; *State v. Boulden*, 57 Md. 314; *Oliver v. White*, 18 S. Car. 235; *Watson v. Lederer*, 11 Colo. 577; *Tullis v. Orthwein*, 5 Minn. 377; *Sullivan v. Farley*, 11 Daly (N. Y.) 157; *Barton v. Brown*, 68 Cal. 11; but in some of these States if that property is such that the officer knew that it was exempt, he is held liable for taking it. *Lynd v. Pickett*, 7 Minn. 184; 82 Am. Dec. 79; *Frost v. Mott*, 34 N. Y. 253; and the rule in *North Carolina* seems to be that he can levy on any property, unless he knows that it is exempt. *State v. Keenan*, 94 N. Car. 296. In *Nebraska* the filing of an inventory by debtor is essential to maintain an action and is essential to the sheriff for taking exempt property. *Mann v. Welton*, 21 Neb. 541. In *New York* the sheriff is liable for seizing property clearly exempt, but if doubtful he can seize and hold until the value is determined by appraisers.

³ *Frost v. Shaw*, 3 Ohio St. 270; *Gilman v. Williams*, 7 Wis. 329; 76 Am. Dec. 219; *Elliott v. Whitmore*, 5 Mich. 532; *Woods v. Keyes*, 14 Allen (Mass.) 236; 92 Am. Dec. 766; *Meadow v. Wise*, 41 Ark. 285; *Parsons v. Thomas*, 62 Iowa 319; and of exemptions for heads of families, *Ross v. Lister*, 14 Tex. 469; *Denny v. White*, 2 Coldw. (Tenn.) 283; 88 Am. Dec. 596; and must show the consent of the defendant to levy on other exemptions. *State v. Haggond*, 1 Humph. (Tenn.) 390.

⁴ *State v. Barada*, 57 Mo. 562; *Shear v. Reynolds*, 90 Ill. 238; and if the defendant directs the officer to levy on certain property he waives his

b. INSUFFICIENT LEVY.—An officer, although he has already levied, may continue to levy, prior to the return day, until he satisfies the writ;¹ and it is his duty to levy on sufficient property to satisfy the writ and costs, making a proper allowance for depreciation in price consequent on a forced sale.²

c. EXCESSIVE LEVY.—The sheriff is liable to the defendant for an excessive levy.³

right to claim that it was exempt. *People v. Johnson*, 4 Ill. App. 346; *State v. Bacon*, 20 Mo. App. 403. In *Mississippi* in case of doubt he may decide by three disinterested witnesses if it is exempt; failing to do this he is responsible as a trespasser if he levies on exempt property, *Perry v. Lewis*, 49 Miss. 443.

1. *Moses v. Thomas*, 26 N. J. L. 124; *Van Waggoner v. Moses*, 26 N. J. L. 570; *Denvrey v. Fox*, 22 Barb. (N. Y.) 522; *Indiana Cent. R. Co. v. Bradley*, 15 Ind. 23; *Marshall v. Morris*, 13 Ga. 185; *Pugh v. Calloway*, 10 Ohio St. 488.

2. *Griffin v. Ganaway*, 8 Ala. 625; *Lawson v. State*, 10 Ark. 28; 50 Am. Dec. 238; *McKinney v. Craig*, 4 Sneed (Tenn.) 577; *Governor v. Powell*, 9 Ala. 83; *Lynch v. Com.*, 6 Watts (Pa.) 495; 31 Am. Dec. 490. He is not bound to do this at his peril, but should not only show that he believed and had reasonable grounds for believing that he had seized sufficient property, but he should also go further and show that he used such diligence and discretion as govern men in the management of their own business. *French v. Snyder*, 30 Ill. 339; 83 Am. Dec. 193. If he could have obtained enough property and does not, he is liable, unless, after seizure, there was an unforeseen depreciation, *Ransom v. Halcott*, 18 Barb. (N. Y.) 56; *Governor v. Carter*, 3 Hawks (N. Car.) 328; 14 Am. Dec. 588; and also if he takes only enough at the invoice price without allowing for depreciation of forced sale, *Dewitt v. Oppenheimer*, 51 Tex. 108; and, if he is not familiar with the values of such property he should obtain the opinion of competent persons and should not take the opinion of the debtor. *Adams v. Spangler*, 17 Fed. Rep. 133; *Alexander v. State*, 42 Ark. 41. If his levy is insufficient he is liable immediately to an action. *Hall v. Tomlinson*, 5 Vt. 228; and the measure of damage is the actual injury and not the

amount of execution, unless that measures the injury. *Governor v. Cartwright*, 7 B. Mon. (Ky.) 298.

3. *Dezell v. Odell*, 3 Hill (N. Y.) 215; 38 Am. Dec. 628; *Jones v. Davis*, 2 Ala. 730; *Ventris v. Brown*, 24 U. C. C. P. 345; *Harrison v. Harwood*, 31 Tex. 650; *Sexey v. Adkinson*, 40 Cal. 408; *Hillard v. Wilson*, 65 Tex. 286; *Atcheson v. Hutchison*, 51 Tex. 203. In *Handy v. Clippert*, 50 Mich. 355, the court, by Cooley, J., said: "The officer is, or should be a minister of justice, not of oppression; he should execute every writ put into his hands in such a manner so as to do as little mischief to the defendant as possible." He was held liable where he levied on jewelry worth \$800 for a debt of \$21, *Cook v. Jenkins*, 30 Iowa 452; where he levied on a steamboat worth \$35,000 for a debt \$109. *Silver v. McNiel*, 52 Mo. 518; where he levied on a valuable horse for a bill of \$20, when he could easily have taken a common horse and by ordinary inquiry could have learned the value of the horse he took. *Vance v. Vanarsdale*, 1 Bush (Ky.) 504; but where there is property of uncertain value, he is not to be deemed guilty of misconduct because the quantity levied on turns out to be largely in excess of the demand. *Sexey v. Adkinson*, 40 Cal. 408; and where he is liable for an excessive levy he is not a trespasser *ab initio* for all the property, but only for the excess beyond that which he might lawfully have taken. *Wentworth v. Sawyer*, 76 Me. 434; and where the writ commanded him to attach \$200 worth of property and he attached realty worth \$4000 as well as personal property, it was held that he was not liable, having acted in good faith, and he was not culpably negligent in not ascertaining that the real estate was not unincumbered. *Davis v. Webster*, 59 N. H. 471.

When the property fails to bring enough to satisfy the writ, this is a refutation of a charge that the levy was excessive, *Lynn v. Sisk*, 9 B. Mon. (Ky.)

d. DELAY IN LEVY.—He must make an immediate levy, if possible, where the circumstances known to him require it,¹ or where he has received special instructions to act,² or where he had the means and opportunity of acting.³ Each case depends on its circumstances.

135; *Ingram v. Belk*, 2 Strobb. (S. Car.) 207; 47 Am. Dec. 591; an excessive levy is not void; until set aside it is valid. *Campau v. Godfrey*, 18 Mich. 27; *Dezell v. Odell*, 3 Hill (N. Y.) 215; 38 Am. Dec. 628; *Brown v. Allen*, 3 Head (Tenn.) 429; *Pugh v. Callo-way*, 10 Ohio St. 488. Sometimes, in harsh cases, both levy and sale have been set aside, *Cook v. Jenkins*, 30 Iowa 452; *Tiernan v. Wilson*, 6 Johns. Ch. (N. Y.) 411; *Stead v. Course*, 4 Cranch (U. S.) 403; but, generally parties are left to their legal remedies. *Campau v. Godfrey*, 18 Mich. 27; 100 Am. Dec. 133. Where the defendant points out property to be taken he cannot object to the levy as being excessive. *Cornelius v. Burford*, 28 Tex. 202; 91 Am. Dec. 309. If the officer is convinced that the levy is excessive he may release the excess, *Black v. Nettles*, 25 Ark. 606; in levying on a part of a large quantity of property he may take possession and retain possession of the whole, so far as may be necessary to separate and dispose of the part levied on. *Morgan v. Spangler*, 14 Ohio St. 116; and it has been held, though the levy was excessive, yet if there was only enough sold to pay execution the debtor had no cause of action. *Drake v. Murphy*, 42 Ind. 82. In the absence of proof to the contrary he may be presumed, at a sale of land under execution, to have complied with the requirements of the law in not selling more than was necessary to satisfy the execution, where the land is divisible. *Banks v. Bales*, 16 Ind. 423; and if levy and sale were excessive that it could be ratified by the defendant, by writing valid within the Statute of Frauds. *Pepper v. Com.*, 6 T. B. Mon. (Ky.) 27.

1. *Tucker v. Bradley*, 15 Conn. 46; *Hunter v. Phillips*, 56 Ga. 634; *Kit-tredge v. Bellows*, 7 N. H. 399; *Whitney v. Butterfield*, 13 Cal. 335; 73 Am. Dec. 584; *Lindsay v. Armfield*, 3 Hawks (N. Car.) 548; 14 Am. Dec. 603. A writ of arrest was placed in the hands of a sheriff at nightfall, with notice that an absconding debtor was in a hotel in a city near the State line,

intending to abscond before daylight, such being the fact; and, the debtor having escaped into another State because the sheriff failed to search for him, it was held that the sheriff was liable. *Philips v. Ronald*, 3 Bush (Ky.) 244; 96 Am. Dec. 216. A sheriff was held negligent where, having a writ against a resident of another State, known by the sheriff to be in his county on a temporary visit, and also informed that he would be in a particular place on a certain day in his county, he failed to be present at such time and place without excuse, when, if he had been there, he might have arrested the defendant. *Jenkins v. Troutman*, 7 Jones (N. Car.) 169.

2. *French v. Kemp*, 64 Ga. 749; *Barnard v. Ward*, 9 Mass. 269. When a sheriff received a writ of assistance and went with the plaintiff to the premises for the purpose of putting him in possession, but, for reasons not stated, in opposition to the plaintiff's wishes and against his protestations, declined to take any action, and on a subsequent day executed the writ, but in the mean time the occupants had damaged the premises, the sheriff was held liable for this damage. *Chapman v. Thornburgh*, 17 Cal. 87; 76 Am. Dec. 571.

3. Where, four days before his term expired, the sheriff received an execution and had the means and opportunity of levying and neglected to do so, thereby prejudicing the plaintiff, he was held liable, *State v. Roberts*, 12 N. J. L. 114; 21 Am. Dec. 62; and where, living within ten miles of the defendant, he delayed to levy for eight days, within which time the defendant made an assignment, *Hearn v. Parker*, 7 Jones (N. Car.) 150; where the defendant carried on business a mile and a half from the court house, and execution was delivered April 25th to the officer, who saw the defendant and was told the debt would be paid, but the officer did nothing further, though the defendant had plenty of property easily found, and on April 29th the defendant made an assignment and the plaintiff lost his debt, the officer was

c. **FAILURE TO LEVY.**—If the plaintiff or another points out to the officer property belonging to the debtor, or if the officer knows of it,¹ or if, by exercising due diligence, he might have found it within his district, he is liable for failure to levy.² If he has been diligent, he is not liable for such failure, even though the debtor had property which might have been levied on.³

The fact that the creditor did not give notice that the defendant resided in the county or had property therein, is no excuse of itself for not levying.⁴

held negligent. *Elmore v. Hill*, 51 Wis. 365. When an attachment was handed to the sheriff very early in the morning, with special instructions to levy upon real estate known to him, he being then at the county seat of the county in which the land was, where he remained long enough to have made the attachment and have filed the statute notice and then went to a town twenty-two miles distant for the purpose of attaching personal property, where he levied on land in the afternoon, prior to which time, and after he left the county seat, a mortgage on the land was executed by which the creditor failed to collect on his debt, the sheriff was held liable. *Springett v. Colerick*, 67 Mich. 362.

1. Apart from any question of indemnity he should levy on it, and a bare suspicion that the defendant does not own it will not justify the officer in refusing to levy, *Marshall v. Simpson*, 13 La. Ann. 437; nor will the idle assertions of third persons justify such refusal, *Dunlap v. Berry*, 5 Ill. 327; 39 Am. Dec. 413; nor is it an excuse that he was informed "by the debtor and his wife and neighbors that property in his possession belonged to his wife," *Robertson v. Bealer*, 3 Port. (Ala.) 385; nor that there was a general report of the defendant's insolvency, *Parks v. Alexander*, 7 Ired. (N. Car.) 412.

2. *Henry v. Com.*, 107 Pa. St. 361; *Andrews v. Keep*, 38 Ala. 315; *Crouse v. Bailey*, 10 N. Y. 273; *Howe v. White*, 49 Cal. 658; *Taylor v. Wimer*, 30 Mo. 126; *Watkinson v. Bennington*, 12 Vt. 404; *Van Winkle v. Udall*, 1 Hill (N. Y.) 559; *Pinney v. Levy*, 38 Ga. 141. This duty to levy generally continues until the return day, *Henry v. Com.*, 107 Pa. St. 361; *Lyendecker v. Martin*, 38 Tex. 287; and the sheriff is liable even though the property which he should have levied on was not enough to pay the debt in full,

Com. v. Hurt, 4 Bush (Ky.) 66; *State v. Neff*, 74 Ind. 146; and he should take the debtor's property, though in the possession of a third person. *Emanuel v. Cocke*, 6 Dana (Ky.) 212; *James v. Thompson*, 12 La. Ann. 174. He should not return execution without making inquiries to ascertain if the defendant had property subject to it. *Henry v. Com.*, 107 Pa. St. 361. These inquiries should be made at the residence of the defendant. *Hinnan v. Borden*, 10 Wend. (N. Y.) 367; *Parks v. Alexander*, 7 Ired. (N. Car.) 412. The fact that he does not make inquiries of the plaintiff concerning the defendant's whereabouts does not show negligence. *Kock v. Coats*, 43 Mich. 30.

It is no defense for neglecting to levy on goods attached on mesne process that he had previously sold the goods without the consent of the creditor and received the money. *Fairbanks v. Stanley*, 18 Me. 296. Where the defendant's title to real estate was not of record and there was nothing to show that he was in actual possession or that a reasonably diligent inquiry by the sheriff would have disclosed his ownership, he was held not liable for failure to levy. *Force v. Gardner*, 43 N. J. L. 417. Nor is he liable where the defendant owned personal property, unless it appears that such property was in his jurisdiction subject to levy and in the defendant's possession, or so situated that a reasonable inquiry by the sheriff would have discovered that the defendant owned it. *State v. Neff*, 74 Ind. 146.

3. *State v. Neff*, 74 Ind. 146; *Fisher v. Gordon*, 8 Mo. 386; *Jacobs v. McDonald*, 8 Mo. 565; *Green v. Lowell*, 3 Me. 373. Though, when the creditor shows that there was property, the burden is on the officer to relieve himself. *Bonnell v. Bowman*, 53 Ill. 460.

4. *Tomlinson v. Rowe*, Hill & D.

It is a defense that the judgment is void;¹ that the execution was stayed;² that the property did not belong to the debtor,³ or that the sheriff's apparent neglect was induced by acts or instructions of the plaintiff.⁴

Supp. (N. Y.) 410; but the sheriff is not liable if the plaintiff's counsel, when applied to to point out property, withholds information that would have enabled the officer to make a levy. *Batte v. Chandler*, 53 Tex. 613.

1. *Albee v. Ward*, 8 Mass. 79; *Hill v. Wait*, 5 Vt. 124; *Com. v. Watmough*, 6 Whart. (Pa.) 117; *Newburg v. Munshower*, 29 Ohio St. 617; but not that it is merely voidable, *Com. v. O'Cull*, 7 J. J. Marsh. (Ky.) 149; not that the consideration of the judgment has failed, *Arnold v. Com.*, 8 B. Mon. (Ky.) 109.

2. *McCall v. McRae*, 10 Ala. 313; *Com. v. Magee*, 8 Pa. St. 240; 44 Am. Dec. 509; *Cason v. Mulling*, 50 Ga. 598; *State v. Gilreath*, 16 S. Car. 100; *Wetherby v. Foster*, 5 Vt. 136. Where he neglected to advertise for six months and then an injunction was obtained restraining him, he was held liable. *Weal v. Price*, 11 Ga. 29; but in *Hunter v. Phillips*, 56 Ga. 634, where the plaintiff asked the sheriff for a levy for June sales and the sheriff levied for July sales, and before that time the sheriff was enjoined, it was held that he was not liable unless the injunction was dismissed. After execution perpetually enjoined motion could not be made against the sheriff, although the execution had been several years in his hands before the order was made. *McCall v. McRae*, 10 Ala. 313.

Defendant, a sheriff, levied an execution on chattels in favor of the plaintiff and delivered them to A, taking her receipt and advertising them for sale. A subsequently claimed them as her property, and brought replevin against the officer, who then made return of the above facts. A lost the replevin suit because she already had possession, the question of ownership not being considered. *Held*, that the officer, after the judgment in replevin, should have withdrawn the execution and sold the chattels, and was liable for his failure to do so. *Cox v. Currier*, 62 Iowa 551; but it is no defense that the defendant gave notice of an intention to file a bill in equity, and the sheriff supposed that an injunction would be granted. *Dawson v. Merchants' Bank*, 30 Ga. 664. Where an affidavit of illegality was a

protection for a failure, yet it was held not to be, where the affidavit was based on the sheriff's or his deputy's wrongdoing. *Wheeler v. Thomas*, 57 Ga. 161.

3. *Crosby v. Hungerford*, 59 Iowa 712; *Wadsworth v. Walliker*, 45 Iowa 395; 24 Am. Rep. 788; *French v. Stanley*, 21 Me. 512; *Cilley v. Jenness*, 2 N. H. 87; *State v. Ogle*, 2 Houst. (Del.) 371; *Dobbs v. Justice*, 17 Ga. 624; *Cowart v. Dunbar*, 56 Ga. 417; *Canada v. Southwick*, 16 Pick. (Mass.) 556; *Boyn-ton v. Willard*, 10 Pick. (Mass.) 166; *State v. Swigart*, 22 Ark. 528; but if he refuses on this ground and indemnity is offered, he must prove, to avoid liability, that the property did not belong to the debtor. *Dalson v. Saxton*, 11 Hun (N. Y.) 565; *Com. v. Vandyke*, 57 Pa. St. 34; *Bagley v. Bates*, 8 Johns. (N. Y.) 185.

"Possession of property being *prima facie* evidence of ownership, whenever it is shown that the sheriff had knowledge that the defendant in the execution was possessed of personal property and he fails to levy upon it, the burden of proof rests upon him to show that the property was not subject to execution." *Taylor v. Wimer*, 30 Mo. 129; *Bowman v. Cornell*, 39 Barb. (N. Y.) 69.

4. *Striker v. Merseles*, 24 N. J. L. 542; *State v. Cave*, 49 Mo. 129; *Crouse v. Bailey*, 10 N. Y. 273; *Chase v. Plymouth*, 20 Vt. 469; 50 Am. Dec. 52; *Holcomb v. Dupree*, 50 Ga. 335; *State v. Gemmill*, 1 Houst. (Del.) 9; *State v. Emmons*, 88 Ind. 279; but he is liable for the damage suffered where the creditor takes back the execution so as to prevent him from completing the levy, where there has been neglect, and delivers it to another officer who makes a partial levy. *Wetherby v. Foster*, 5 Vt. 136. An agreement between creditor and debtor to suspend levy does not justify the officer in a failure to serve execution. *Derby Bank v. Landon*, 2 Conn. 417. Nor is he justified by an agreement between creditor and debtor that the amount due on the execution should be charged against the debtor on the creditor's books and be adjusted, where it was not in fact adjusted. *Nye v.*

It is a defense that a levy would have been useless.¹ It is the sheriff's duty to have a sufficient number of deputies to execute process within the proper time.²

The statutes of some States require an officer who has an execution against two persons, one of whom is a surety, to levy first on the property of the principal, if the surety brings himself within the statute.³

f. RECEIPTORS.⁴—In some States it is the practice for the sheriff to deliver over to a third person the goods attached, taking from him a promise to redeliver them.⁵ It is at the officer's option, however.⁶ He is still responsible to the plaintiff unless the goods are delivered to the receptor with the plaintiff's consent and by his direction.⁷

Kellam, 19 Vt. 548. Nor is he released where he levies execution against two defendants by the fact that, previous to the delivery of the execution to him, one of the defendants was released by the plaintiff. *Mason v. Watts*, 7 Ala. 703. He is not liable where the writ comes to him so late that he cannot execute it. *Hanmer v. Griffith*, 1 Grant Cas. (Pa.) 193; *Lyendecker v. Martin*, 38 Tex. 289; *O'Bannon v. Saunders*, 24 Gratt. (Va.) 138.

1. Where the proceeds of levy and sale would not pay expenses of sale, *In re Mowry*, 12 Wis. 52, and he is liable only for nominal damages for failing to levy against a partner's interest in partnership property on an execution against him individually, where the debts of firm equaled the assets. *State v. Emmons*, 99 Ind. 452. Where he holds several executions against the same defendant, he is liable for failure to levy one where injury results to one of the plaintiffs, although a claim has been interposed to property levied on by him under one of the other executions. *Brown v. McCrary*, 30 Ga. 878; and he is liable for failure to execute a *ca. sa.*, although he has already executed another *ca. sa.* against the defendant, in which case he gave bonds to take the benefit of the poor debtor's act and notified the plaintiff in second *ca. sa.* of such intention. *Porter v. Pierce*, 19 Ga. 268.

2. *Hallett v. Lee*, 3 Ala. 28. Sickness of officer is no defense. He should have a sufficient number of deputies or give the writ to another officer. *Trendenstein v. McNier*, 81 Ill. 208.

3. He is not liable if the surety does not make a required affidavit. *Gregg v. Crawford*, 4 Ala. 180; 37 Am. Dec. 739; nor where the execution did not

distinguish which was principal and which was surety. *Shufford v. Cline*, 13 Ired. (N. Car.) 463; nor where the statute required an order to be obtained and this was not done, though he knew of the suretyship. *Bliss v. Douch*, 110 Ind. 296.

4 See also FORTHCOMING BONDS, vol. 8, p. 565.

5. *New England States and New York.*

—The form of the receipt varies. It may be quite informal. *Hunter v. Peaks*, 74 Me. 363. If it is in the alternative, to deliver goods or pay judgment, the sheriff can still take the goods. *Sibley v. Story*, 8 Vt. 15. *Contra*, he can only recover the money. *Waterman v. Treat*, 49 Me. 309; 77 Am. Dec. 261.

It is not necessary that the goods should be specifically described. *Bruce v. Pettengill*, 12 N. H. 341; but they should be so described generally or specifically in the receipt that they can be easily identified. *Anthony v. Comstock*, 1 R. I. 454.

6. *Davis v. Miller*, 1 Vt. 9; *Moulton v. Chadborne*, 31 Me. 152; *Batchelder v. Frank*, 49 Vt. 90; *Runlett v. Bell*, 5 N. H. 433. The plaintiff has no control over this arrangement. *Phillips v. Bridge*, 11 Mass. 242.

7. *Moulton v. Chadborne*, 31 Me. 152; *Torrey v. Otis*, 67 Me. 573; *Davis v. Maloney*, 79 Me. 110.

If the bailee is nominated by the plaintiff the officer is not responsible to the plaintiff for the acts of such bailee. *Donham v. Wild*, 19 Pick. (Mass.) 520; 31 Am. Dec. 161.

In *Blake v. Kimball*, 106 Mass. 116, the court, by Ames, J., said: "Upon the attachment of personal property on mesne process the duty of the attaching officer to the plaintiff in the suit, is to keep

The plaintiff must take out execution within the life of the attachment and deliver it to the attaching officer so that the execution may be levied,¹ or he may deliver it to another officer, but in the latter event such officer should make demand on the attaching officer² for the property, even though it could not have been produced.

The bailee or receiptor is the agent or servant of the officer.³ He is accountable on his receipt for refusal and neglect to deliver, so long as the officer is accountable to any one, and no longer.⁴ He is bound to take reasonable care of the

the property attached safely so that it may be forthcoming in order to be taken within thirty days after the final termination of the suit in a judgment in favor of such plaintiff. . . . During the pendency of the suit the officer may make such arrangements upon his own responsibility in regard to the custody of the property as he may think proper. To these arrangements the attaching creditor is not a party unless he should choose to make himself so by participation or express consent. The removal of the attached property beyond the officer's reach would have no effect on the rights and liabilities of the parties in relation to each other. The attached goods remain constructively in the officer's possession and his liability to the creditor and the creditor's rights against him are exactly the same as if the possession, instead of being constructive, was actual and literal."

1. *Donham v. Wild*, 19 Pick. (Mass.) 520; *Brown v. Cook*, 9 Johns. (N. Y.) 361; *Humphreys v. Cobb*, 22 Me. 380. Mere delivery of execution to attaching officer is sufficient notice that the plaintiff claims to have the goods attached applied to the execution, and if made by a deputy and the execution is placed in the hands of the sheriff the rule is the same. *Ayer v. Jameson*, 9 Vt. 363.

2. *Howard v. Smith*, 12 Pick. (Mass.) 202; *Collins v. Smith*, 16 Vt. 9; *Pearsons v. Tinckner*, 36 Me. 384; *Wetherell v. Hughes*, 45 Me. 61; *Stackpole v. Hilton*, 121 Mass. 449; *Shepherd v. Hall*, 77 Me. 569; but where the attaching officer delivered the receipt to the attaching creditor who took out execution and delivered it and the receipt to another officer who made a demand on receiptor, it was held that this was sufficient and no demand on attaching officer was necessary. *Moore v. Fargo*, 112 Mass. 254. In this case the court, by Colt, J., said: "The creditor had chosen to take the receipt as a substi-

tute for the property and was entitled as equitable assignee to the security which it afforded, with the" (attaching officer's) "name." A demand on the attaching officer made by the creditor or officer holding the execution would have been of no avail, nor was it necessary that the execution should have been placed in the attaching officer's hands for service, or that he should make the demand. "The receipt having been delivered to the officer having the execution by one having the entire equitable interest in it there was implied authority given with it to make the demand or do any other act necessary to hold the receiptor."

In *Moore v. Fargo*, 112 Mass. 254, the officer was discharged from liability to the plaintiff for the goods, but where the plaintiff did not ask for the receipt and when it was delivered to him made no agreement to receive it as a substitute, the sheriff was not discharged from liability. *Humphreys v. Cobb*, 22 Me. 380.

3. *Meshe v. Gould*, 30 La. Ann. 163; *Barker v. Miller*, 6 Johns. (N. Y.) 195; *Roberts v. Carpenter*, 53 Vt. 678; *Brownell v. Manchester*, 1 Pick. (Mass.) 232; *Eastman v. Avery*, 23 Me. 218; *Dillenback v. Jerome*, 7 Cow. (N. Y.) 294; *Farris v. State*, 33 Ark. 70. If the receiptor delivers the goods to the defendant the officer may retake them. *Bond v. Padelford*, 13 Mass. 393; *Merrill v. Curtis*, 18 Me. 272.

In *Massachusetts* he is a mere naked bailee and has no property in the goods and is unable to maintain an action for them if taken from him. *Ludden v. Leavitt*, 9 Mass. 104; 6 Am. Dec. 45; *Brownell v. Manchester*, 1 Pick. (Mass.) 232; *contra*, *Miller v. Adsit*, 16 Wend. (N. Y.) 335; *Thayer v. Hutchinson*, 13 Vt. 504; 37 Am. Dec. 607; *Burrows v. Stoddard*, 3 Conn. 160.

4. *Pond v. Cummins*, 50 Conn. 372; *Perry v. Williams*, 39 Wis. 339;

goods,¹ cannot sell them,² and must redeliver the same, and not similar goods³ on demand.⁴

Any officer holding the receipt may make demand⁵ on the receiptor. The attaching officer may make it while his responsibility for the goods continues.⁶

The receiptor is discharged from liability if the property is destroyed without his fault,⁷ if the goods were exempt from the attachment and he has delivered them to the defendant,⁸ or if so delivered and the attachment has been dissolved,⁹ if the

Wright v. Dawson, 147 Mass. 384; Halbert v. Soule, 57 Vt. 358; Holt v. Burbank, 47 N. H. 164. In trover or replevin, Bissell v. Huntington, 2 N. H. 142; Cargill v. Webb, 10 N. H. 199; Pettes v. Marsh, 15 Vt. 454; 40 Am. Dec. 689; Dezell v. Odell, 3 Hill (N. Y.) 215; 38 Am. Dec. 628; and he would be accountable for goods where the sheriff levied a second attachment on them while in the bailee's hands, though the first attachment was dissolved. Whittier v. Smith, 11 Mass. 211; but, in such a case, if the receiptor had delivered goods to the debtor before the levy of the second attachment he would not be liable to the sheriff. Whitney v. Farwell, 10 N. H. 9.

1. Cross v. Brown, 41 N. H. 283.

2. Sibley v. Story, 8 Vt. 15. If he sells or delivers to an adverse claimant, it is *prima facie* a conversion, Baker v. Fuller, 21 Pick. (Mass.) 318; but if sold or delivered with the assent of the sheriff, it discharges the receiptor's liability on his receipt. Stevens v. Eames, 22 N. H. 568. If sold with the assent of the debtor, the attachment would not be dissolved. Clark v. Morse, 10 N. H. 236; but if without the debtor's assent by the direction of the plaintiff, the attachment would be dissolved. Eldridge v. Lancy, 17 Pick. (Mass.) 352.

3. Anthony v. Comstock, 1 R. I. 454; Scott v. Whittemore, 27 N. H. 309; Gilmore v. McNeil, 46 Me. 532.

4. The receiptor cannot discharge himself from his contract to keep and return the property by offering to return and deliver the property before demand, unless the contract contains provisions to that effect. Rowland v. Cooper, 16 Gray (Mass.) 53; Scott v. Whittemore, 27 N. H. 309.

5. Davis v. Maloney, 79 Me. 110; Gilmore v. McNeil, 46 Me. 532; Hinckley v. Bridgman, 46 Me. 450;

Davis v. Miller, 1 Vt. 9; Cross v. Brown, 41 N. H. 283. If the officer holding the execution is not the attaching officer and does not hold the receipt he should make demand for the goods on the attaching officer. Shepherd v. Hall, 77 Me. 569.

6. Webster v. Coffin, 14 Mass. 196; Colwell v. Richards, 9 Gray (Mass.) 374. In Vermont, demand on a receiptor must be made within the life of the execution. Allen v. Carty, 19 Vt. 65; Carpenter v. Snell, 37 Vt. 255. If the demand is made by any one other than the attaching officer, the receiptor may require the demandant to show authority for making such demand. Phelps v. Gilchrist, 28 N. H. 266; Cross v. Brown, 41 N. H. 283; Moore v. Fargo, 112 Mass. 254.

7. Shaw v. Laghton, 20 Me. 266; but if he lets the defendant sell the goods and they are then destroyed, he is liable. Thayer v. Hunt, 2 Allen (Mass.) 449.

8. Thayer v. Hunt, 2 Allen (Mass.) 449; Stone v. Sleeper, 59 N. H. 205; he would be liable to the sheriff if the goods were not delivered to the defendant, Smith v. Cudworth, 24 Pick. (Mass.) 196; and if the receipt is in the alternative to deliver goods or pay money it cannot be set as a defense to a suit for money that the goods were exempt from attachment. Bacon v. Daniels, 116 Mass. 474; Stevens v. Stevens, 39 Conn. 474.

9. Sprague v. Wheatland, 3 Met. (Mass.) 416; Butterfield v. Converse, 10 Cush. (Mass.) 317; Shumway v. Carpenter, 13 Allen (Mass.) 68; Mitchell v. Gooch, 60 Me. 110. Where the receiptor delivers property to the defendant and the sheriff is not liable to the plaintiff, the receiptor is discharged. Shepherd v. Hall, 77 Me. 869; Frost v. Kellogg, 23 Vt. 308; Mason v. Aldrich, 36 Minn. 283.

goods were not the property of the defendant and have been delivered to true owner,¹ or if they have been taken by the attaching officer.²

He cannot, as against the officer, claim them as his own,³ or deny that goods were seized⁴ or delivered to him.⁵

He cannot go behind the judgment in the attachment suit,⁶ or show irregularities in the attachment proceedings,⁷ if the judgment is valid, or rely on an agreement between the debtor and creditor not to enforce the receipt.⁸

1. *Denny v. Willard*, 11 Pick. (Mass.) 519; 22 Am. Dec. 389; *Burt v. Perkins*, 9 Gray (Mass.) 317; *Fisher v. Bartlett*, 8 Me. 122; 22 Am. Dec. 225; *Scott v. Whittemore*, 27 N. H. 309; *Mason v. Aldrich*, 36 Minn. 283; but he may give the receipt in such form as will estop him from denying his title, *Penobscot Boom. Corp. v. Wilkins*, 27 Me. 345; if the attachment is discharged by bankruptcy or insolvency, and the property delivered to the assignee or debtor, if he should be entitled to it, then the receptor is discharged. *Lewis v. Webber*, 116 Mass. 450; *Butterfield v. Converse*, 10 Cush. (Mass.) 317; *Andrews v. Southwick*, 13 Met. (Mass.) 535; *Shumway v. Carpenter*, 13 Allen (Mass.) 68; *Wright v. Dawson*, 147 Mass. 384; but if the attachment is not dissolved by insolvency proceedings, it would not be discharged as to the officer. *Parker v. Warren*, 2 Allen (Mass.) 187; *Smith v. Brown*, 14 N. H. 167; *Lamprey v. Leavitt*, 20 N. H. 544.

2. *Rood v. Scott*, 5 Vt. 263; but not if taken by another officer. *Rider v. Sheldon*, 56 Vt. 459.

3. *Dewey v. Field*, 4 Met. (Mass.) 381; *Sawyer v. Mason*, 19 Me. 49; *Barron v. Cobleigh*, 11 N. H. 557; 35 Am. Dec. 505; *Dillenback v. Jerome*, 7 Cow. (N. Y.) 294; until he has delivered them according to his receipt. *Johns v. Church*, 12 Pick. (Mass.) 557; 23 Am. Dec. 651; *Lathrop v. Cook*, 14 Me. 414; 31 Am. Dec. 62; and in an action by the officer for non-delivery, if the receptor has made known his claim when he gave the receipt or if he has not, and the creditor is not thereby deprived of opportunities of reaching other property, the officer can recover nominal damages only. *Bursley v. Hamilton*, 15 Pick. (Mass.) 40; 25 Am. Dec. 423; *Edmunds v. Hill*, 133 Mass. 445; *Eleven v. Frier*, 10 Cal. 172. In *Vermont*, the above circumstances would constitute a total bar. *Halbert v. Soule*, 57 Vt. 358. In *Perry*

v. Williams, 37 Wis. 339, it was held that where the receptor did not admit that the debtor was owner and the receipt asserted ownership in himself, he could claim the goods as against the officer. Where partnership property was levied on as against one member of the firm and was receipted for to the officer by the firm, the firm was not permitted to show that after giving the receipt the property was applied to the uses of the firm. *Burrall v. Acker*, 23 Wend. (N. Y.) 606.

4. He would be estopped by his receipt. *Enscoe v. Dunn*, 44 Conn. 93; 26 Am. Rep. 430; *People v. Reeder*, 25 N. Y. 302; *Jewett v. Torrey*, 11 Mass. 219; *Morrison v. Blodgett*, 8 N. H. 238; 29 Am. Dec. 653; *Bowley v. Angire*, 49 Vt. 41; *Phillips v. Hall*, 8 Wend. (N. Y.) 610; 24 Am. Dec. 108.

5. *Allen v. Butler*, 9 Vt. 122.

6. *Brown v. Atwell*, 31 Me. 351; *Burk v. Webb*, 32 Mich. 173; *Halcomb v. Nelson Lumber Co.*, 39 Minn. 342.

7. *Drew v. Livermore*, 40 Me. 266; *Bean v. Ayers*, 70 Me. 421; *Stevens v. Bailey*, 58 N. H. 564; but may take advantage of irregularities in the execution, so far as creditor's rights are concerned. *Jameson v. Paddock*, 14 Vt. 491. Slight amendments in the attachment suit that would not dissolve the attachment, would not discharge his liability to the plaintiff's claim. *Smith v. Brown*, 14 N. H. 67; *Miller v. Clark*, 8 Pick. (Mass.) 412; *Laighton v. Lord*, 29 N. H. 237; otherwise, if they materially changed the cause of action. *Moulton v. Chapin*, 28 Me. 505.

8. *Jones v. Hamlin*, 5 Cush. (Mass.) 434; nor can he show that the creditor, after judgment, received the proceeds of a sale of the goods made by the receptor without the knowledge of the defendant or officer. *Torrey v. Otis*, 67 Me. 573; nor that the receptor has a larger execution against the debtor than the attaching creditor has. *Jenney v. Rodman*, 16 Mass. 464.

A demand on the receptor is generally necessary¹ even though he is unable to deliver the goods.²

The right to sue the receptor matures on demand.³ Damages depend on the officer's liability;⁴ if the officer is liable for the goods, the measure of damages against the receptor is their full value.⁵ If the value is stated on the receipt, that binds.⁶

7. **The Return.**—See SERVICE OF PROCESS.

8. **Duty to Guard Property Attached.**—The sheriff is bound to the exercise of due care and diligence in keeping possession, so as to preserve the lien.⁷ He leaves the property at his peril in the

1. And if he is dead, on his personal representatives. *Carpenter v. Snell*, 37 Vt. 255. He has reasonable time to produce the goods. *Jameson v. Ware*, 6 Vt. 610. No demand is necessary if the contract is to deliver at a certain place "if no demand is made." *Wentworth v. Leonard*, 4 Cush. (Mass.) 415; *Hodskin v. Cox*, 7 Cush. (Mass.) 471; *Shaw v. Lighton*, 20 Me. 266; nor if the receptor has permitted the property to be taken out of the State. *Webster v. Coffin*, 14 Mass. 196; in *Mason v. Briggs*, 16 Mass. 452, demand at the receptor's dwelling house during his absence from the State held good. "If it were necessary in a case like this to make a personal demand it would always be in the power of the party to elude a demand, and thus to avoid responsibility. One who makes a contract to deliver specific articles on demand should always be ready at his dwelling house or place of business. A demand made upon him personally for goods which he could not carry about with him would be liable to more reasonable objection than that in the case before us. Absence from the commonwealth, if such a demand as was made by the plaintiff would not otherwise be proper, fully justifies him in the course he took." In *Phelps v. Gilchrist*, 28 N. H. 266, the court held that the demand must be such that a receptor, having left property in a reasonable place, shall have opportunity at such place at a reasonable time to deliver it to the bailor.

2. *Bicknell v. Hill*, 33 Me. 297; but in this event demand may be made on him anywhere. *Gilmore v. McNeil*, 46 Me. 532. It is not necessary where he has delivered the goods to the debtor. *Webster v. Coffin*, 14 Mass. 196. If there are joint receptors, demand on any one is sufficient. *Griswold v. Plumb*, 13 Mass. 298. If the bailee receipts for property attached on several

writs, demand in one case, duly made, fixes him in all. *Hinckley v. Bridgham*, 46 Me. 450; and if he delivers property on demand in one case, it discharges his receipt in the others. *Haynes v. Tenney*, 45 N. H. 183.

3. *Page v. Thrall*, 11 Vt. 230; *Scott v. Whittemore*, 27 N. H. 309. Acknowledgment of demand is evidence of refusal to deliver. *Cargill v. Webb*, 10 N. H. 199. If bailed by the deputy he may sue, *Spencer v. Williams*, 2 Vt. 209; 19 Am. Dec. 74; *Hutchinson v. Parkhurst*, 1 Aik. (Vt.) 258; *Maxfield v. Scott*, 17 Vt. 634; even if he is out of office. *Bradbury v. Taylor*, 8 Me. 130; on the sheriff may sue. *Davis v. Miller*, 1 Vt. 9; *Baker v. Fuller*, 21 Pick. (Mass.) 318; *Smith v. Wadleigh*, 18 Me. 95. It is no defense that, after refusing to deliver, he offered to permit the officer to take the goods. *Hill v. Wiggin*, 31 N. H. 292; *Thayer v. Hunt*, 2 Allen (Mass.) 449.

4. *Moulton v. Chapin*, 28 Me. 505.

5. *Whitney v. Farwell*, 10 N. H. 9; *Sawyer v. Mason*, 19 Me. 49; *Clement v. Little*, 42 N. H. 564, but if the goods have been delivered only the amount of the judgment, if the value of the goods equal or exceed that amount. *Clement v. Little*, 42 N. H. 664. If the value of the goods is less than the judgment the liability is only for their value. *Hunter v. Peaks*, 74 Me. 363.

6. *Stevens v. Stevens*, 39 Conn. 474; *Remick v. Atkinson*, 3 N. H. 299; *Smith v. Mitchell*, 31 Me. 287; *Parsons v. Strong*, 13 Vt. 235; *Wakefield v. Stedman*, 12 Pick. (Mass.) 562.

7. *Farris v. State*, 33 Ark. 70; *Brown v. Richmond*, 27 Vt. 583; *Cooper v. Mowry*, 16 Mass. 5; *Lovejoy v. Hutchins*, 23 Me. 272; *McKay v. Harrower*, 27 Barb. (N. Y.) 463; *Dick v. Bailey*, 2 La. Ann. 974; 46 Am. Dec. 561. If he delivers the property to a third person as his agent to hold it, the sheriff is bound for its value, though

debtor's possession.¹ He is bound to take ordinary care of property levied on,² to prevent deterioration or destruction, and, if he neglects so to do, is liable for the resulting injury. He should use due care in moving goods and in selecting a place for their deposit.³ He should feed live stock.⁴ If the attached property perishes without his fault he is not liable.⁵ He is

the third person becomes insolvent. *Gibert v. Crandall*, 34 Vt. 188. *Contra*, *Runlett v. Bell*, 5 N. H. 433; *Howard v. Whittemore*, 9 N. H. 134. If taken from the officer without want of ordinary care on his part he is not liable. *Bridges v. Perry*, 14 Vt. 262; but it is his duty to retake it by summoning the posse, or by replevin, if no other way exists. *Wood v. Bodine*, 32 Hun (N. Y.) 354. If the plaintiff assented to what the sheriff did, the latter is discharged from liability.

Where the attachment subsists as a valid lien only for a certain length of time after judgment, execution must be delivered to him, or demand made on him by an officer holding the execution, within that time, to render the sheriff liable for not keeping possession of goods attached. *Jameson v. Mason*, 12 Vt. 599.

If goods attached are taken from the officer, he may maintain trover against the wrongdoer. *Badlam v. Tucker*, 1 Pick. (Mass.) 389; 11 Am. Dec. 202; *Lowry v. Walker*, 5 Vt. 181; *Lathrop v. Blake*, 23 N. H. 46; trespass, *Strout v. Bradbury*, 5 Me. 313; *Whitney v. Ladd*, 10 Vt. 165; or replevin, *Gordon v. Jenney*, 16 Mass. 465.

1. *Byrne v. Anderson*, 8 La. Ann. 139; *Gale v. Ward*, 14 Mass. 352; 7 Am. Dec. 223; *Knox v. Summers*, 4 Yeates (Pa.) 477; *Rowe v. Williams*, 7 B. Mon. (Ky.) 202.

2. *Burns v. Lane*, 138 Mass. 350; *Cresswell v. Burt*, 61 Iowa 590. A sheriff having under his control a valuable plantation with a growing crop was held to the same degree of accountability as any other agent, and to the exercise of the same degree of care that a prudent owner would use over his own. *Lambeth v. Jobbrin*, 41 La. Ann. 749; *McRay v. Scott*, 39 La. Ann. 1116. Having seized a cargo of coal on replevin he was held bound "to take such steps as a careful and prudent man of sense and judgment, well acquainted with the condition and location of the vessel, and having the power of the sheriff in the matter, might reasonably be expected to take

had the coal belonged to himself." *Moore v. Westervelt*, 27 N. Y. 234.

For articles contained in a boat, but forming a part of it at the time of the attachment, his responsibility was held to be that of a bailee without hire. *Briggs v. Dearborn*, 99 Mass. 50.

3. *Sullivan v. Bellocq*, 20 La. Ann. 305; *Jenner v. Joliffe*, 9 Johns. (N. Y.) 38; *Conover v. Gatewood*, 2 A. K. Marsh. (Ky.) 568; *Tudor v. Lewis*, 3 Metc. (Ky.) 378.

If he attaches hay in a barn and removes it in an improper season and it is thereby injured he is liable. *Barrett v. White*, 3 N. H. 210.

The sheriff's agent left cows attached in a field properly fenced and the owner took down the fence and drove the cows away. Held, that the sheriff had taken due care of them and was not liable. *Bridges v. Berry*, 14 Vt. 262.

Where he left a carriage attached in an open field all winter, for which no excuse was offered but the difficulty of finding a place under cover, he was held liable for the damage to the carriage. *Briggs v. Taylor*, 28 Vt. 180.

If it is necessary that grain attached be threshed he should thresh it. *Briggs v. Taylor*, 35 Vt. 57.

4. *Sewall v. Mattoon*, 9 Mass. 535; *Tyler v. Ulmer*, 12 Mass. 162.

5. He is not liable as an insurer. *Kendall v. Morse*, 43 N. H. 553; *Browning v. Harford*, 5 Hill (N. Y.) 588; *Price v. Stone*, 49 Ala. 543; *Shaw v. Laughton*, 20 Me. 266; *Falls v. Weissinger*, 11 Ala. 801; *Cross v. Brown*, 41 N. H. 283.

If he is taking due care of the property he is not liable for its loss by theft, *Buck v. Ashley*, 37 Vt. 475; *Dorman v. Kane*, 5 Allen (Mass.) 38; nor for its destruction by fire, *Kendall v. Morse*, 43 N. H. 553; *Price v. Stone*, 49 Ala. 543; nor for its deterioration. *Robinson v. Barrows*, 48 Me. 186; where he kept money collected on an execution in a trunk under his bed and the money was stolen, he was held liable, *Gilmore v. Moore*, 30 Ga. 628;

liable for losses resulting from his neglect of instructions which the plaintiff had a right to give.¹

9. Deficient Securities.—Where it is the sheriff's official duty to take a bond he is liable for taking securities deficient at the time of the taking, but not where they were good at the time of the taking, or approved in accordance with a statute, but subsequently became worthless.²

10. Money Received.—A sheriff is bound to pay over to the plaintiff, without any demand or request,³ money made on the

where the parties restrain him by orders or agreements and in consequence loss results, he is not liable, *Pepin v. Dunham*, 20 La. Ann. 88; where the attachment is wrongful the sheriff is liable to the owner, though the loss was not due to sheriff's negligence, *Teal v. Lyons*, 30 La. Ann. 1140; *contra*, *Morris v. McKenna*, 29 Tex. 757.

1. *Patton v. Hamner*, 28 Ala. 618; *Poston v. Southern*, 7 B. Mon. (Ky.) 289; *Walworth v. Readeboro*, 24 Vt. 252; *Shyrock v. Jones*, 22 Pa. St. 303; *Isler v. Cosgrove*, 75 N. Car. 334; *State v. Pilsbury*, 35 La. Ann. 408; *Root v. Wagner*, 30 N. Y. 9; 86 Am. Dec. 348; *Godfrey v. Gibbons*, 22 Wend. (N. Y.) 569; *Morgan v. People*, 59 Ill. 60. Instructions may be such that they will justify him in failing to return the execution. *Humphrey v. Hathorn*, 24 Barb. (N. Y.) 278.

He is liable for refusing to act according to instructions where he is tendered a bond of indemnity, though the grounds of the instructions are not communicated to him. *Peirce v. Partridge*, 3 Met. (Mass.) 44.

Where the plaintiff authorized the sheriff to settle for a negotiable note and he took an unnegotiable note, and the execution expired uncollected, the sheriff was held liable for the debt, *Mason v. Ide*, 30 Vt. 697; and also when he set off a judgment contrary to instructions whereby plaintiff lost his debt, *Coggeshall v. Varnum*, 19 Pick. (Mass.) 422.

After the sheriff has notice of the assignment of the judgment or claim he should not take instructions from the plaintiff's attorney but should obey his precept except as the assignee instructs him. *Robinson v. Brennan*, 90 N. Y. 208.

2. *McKenney v. Craig*, 4 Sneed (Tenn.) 577; *Com. v. Thompson*, 3 Dana (Ky.) 301; *Choate v. Stark*, 18 N. H. 131; *Kesler v. Haynes*, 6 Wend. (N. Y.) 547; *Noble v. Desmond*, 72 Cal. 330; *Dearborn v. Kelley*, 3 Allen (Mass.) 426; *Newbert v. Cunningham*,

50 Me. 231; *Bank of Middlebury v. Rutland*, 33 Vt. 414; and is liable, if at all, for the damage caused by the failure. *Robinson v. People*, 8 Ill. App. 279. In *Pearce v. Humphreys*, 14 S. & R. (Pa.) 23, he was held responsible for their sufficiency at the end of the suit, and not merely at the time of taking.

If he does not have the sureties approved by the creditor or in the way pointed out by the statute, he is responsible for their subsequent insufficiency. *Miner v. Coburn*, 4 Allen (Mass.) 136.

To prove the insufficiency of the bond it is competent for the plaintiff to show that he brought suit on it and had not realized anything from it, and that the officer could find no property of principal or sureties as tending to show original insufficiency. *Carter v. Duggan*, 144 Mass. 32. The sheriff is not an insurer of the sufficiency of sureties in a replevin bond. It is sufficient if he takes security believed by him to be, and understood by well-informed men to be responsible. *People v. Robinson*, 89 Ill. 159.

An officer who serves a replevin writ on behalf of a defendant, to recover the possession of property attached, is bound to take sureties on the replevin bond who are at the time actually responsible for its amount. It is not enough that they are at the time the bond is taken in good credit and apparently responsible; but, on the other hand, he is not liable if, being actually responsible when taken, they cease to be so before the bond is put in suit. *Bank of Middlebury v. Rutland*, 33 Vt. 414.

It is no part of the duty of the sheriff from whom goods are replevied to see that sureties in a replevin bond are sufficient. *Chase v. Stevens*, 11 Me. 128. *Contra*, *Ford v. Perkerson*, 59 Ga. 359.

3. *Brewster v. Van Ness*, 18 Johns. (N. Y.) 133; *Canterbury v. Com.*, 1 Dana (Ky.) 415; *Janvier v. Vandever*, 3 Harr. (Del.) 29; *Dygert v. Crane*, 1 Wend. (N. Y.) 534; *contra*, not liable until demand. *Weston v. Ames*, 10

execution,¹ and the excess, after satisfying process in his hands, to the defendant.² He can only receive legal currency in satisfaction of an execution,³ and he cannot show that he received anything else.⁴ He may pay to the plaintiff's attorney⁵ of record, or to an assignee,⁶ or in accordance with an order of court.⁷

Met. (Mass.) 244; *Church v. Clark*, 1 Root (Conn.) 303; *Moody v. Mahurin*, 4 N. H. 296; *Nash v. Muldoon*, 16 Nev. 404; *McBroom v. Governor*, 6 Port. (Ala.) 32; but demand is not necessary where the sheriff asserts a right in opposition to the plaintiff's claim. *Sims v. Anderson*, 1 Hill (S. Car.) 394; *Taylor v. Easterling*, 1 Rich. (S. Car.) 310; nor where the sheriff collected the money for public purposes, *State v. McIntosh*, 9 Ired. (N. Car.) 307; nor in a case where the statute requires payment in a limited time; after that time has expired no demand is necessary, *Mentzenholster v. State*, 37 Ind. 457. He is accountable for interest from the time of demand, *Slingerland v. Swart*, 13 Johns. (N. Y.) 255; *Farley v. Monroe*, 21 N. H. 146.

1. Even though he deposited it in a bank that fails. *Phillips v. Lamar*, 27 Ga. 228; 73 Am. Dec. 731; and where he loaned it and received back confederate notes, he was liable. *Lindsey v. Cock*, 40 Ga. 7. If he sells on mesne process and deposits the money in the bank, he is liable to the creditor for interest received. *Jackson v. Smith*, 52 N. H. 11. He cannot resist recovery on the ground that the plaintiff had received satisfaction of the defendant on an execution in another action for the same cause. *Hill v. Fitzpatrick*, 6 Ala. 314.

A sheriff received a writ of attachment with orders from the plaintiff to levy on the contents of the debtor's warehouse, including goods, on which the latter had liens for storage and advances and to release the property so stored upon payment by the owners of the charges thereon due the defendant; the sheriff having done so, but having then paid out the money so collected on the defendant's order, was held liable to the attaching creditor for the money so collected, whether the goods were attachable or not, since he should have attached the money. *Hanchett v. First Nat. Bank*, 126 Ill. 499.

2. *Dickinson v. Palmer*, 2 Rich. (S. Car.) Eq. 407; *Seaver v. Pierce*, 42 Vt. 325.

3. *Griffin v. Thompson*, 2 How. (U. S.) 244; *Planters' Bank v. Scott*, 5 How.

(Miss.) 246; *Mitchell v. Hackett*, 14 Cal. 661; *Deaher v. State*, 1 Head (Tenn.) 262; *Harker v. Fox*, 7 W. & S. (Pa.) 142; but where, during the war, the only money in circulation was confederate currency and he took this, it was held that he was not liable. *Hutchins v. Hullman*, 34 Ga. 346.

4. *Tiffany v. Johnson*, 27 Miss. 227; *Armstrong v. Garrow*, 6 Cow. (N. Y.) 465; or that he received nothing, *Appleton v. Bancroft*, 10 Met. (Mass.) 231; *Payne v. Cowan*, 1 J. J. Marsh. (Ky.) 12; *Kumler v. Brandenburg*, 39 Minn. 59; *Ferguson v. Tutt*, 8 Kan. 370.

If he sells without receiving price, he is liable to defendant for the balance, after deducting execution and costs as though he had received money, *Kumler v. Brandenburg*, 39 Minn. 59; but where goods were sold on mesne process on credit and judgment is for defendant, the sheriff is not liable to the defendant for the price, unless he receives it. *Seaver v. Peirce*, 42 Vt. 325.

5. Unless he knows the authority is revoked, *Butler v. Jones*, 7 How. (Miss.) 587; *Custer v. Agnew*, 83 Ill. 194; or ought to have known it, *Parker v. Downing*, 13 Mass. 466.

6. An assignee of an execution may sue the sheriff for money collected thereon, *Alexander v. Hancock*, 2 Rich. (S. Car.) 100; but such assignment does not pass a right to sue for neglects before such assignment. *Com. v. Fuqua*, 3 Litt. (Ky.) 41. Sheriff bound only to pay to assignee after notice of assignment, *Riley v. Faber*, 9 Gray (Mass.) 372; *Gregory v. Waters*, 19 Ga. 71; *McClane v. Rogers*, 42 Tex. 214.

A mortgagor assigned his equity of redemption after attachment, and the sheriff, without notice of the assignment, sold the equity, satisfied the execution, and applied the surplus to satisfy another execution. *Held*, officer not liable to assignee for said surplus. *Bacon v. Leonard*, 4 Pick. (Mass.) 277.

In *California*, he is not obliged to decide upon the validity of an assignment under risk of being ruled. *Wilson v. Broder*, 10 Cal. 486.

7. In some States conflicting claims

Many States provide statutory penalties for his failure to pay over money collected.¹

11. Proceedings Against Him.—The proceedings against a sheriff for his defaults or misdoings take various forms.² He is liable to respond in an action brought by the person injured for actual damage and for any statutory penalty provided, unless the method of obtaining this latter is limited or pointed out. A remedy is now generally provided by statute, by summary proceedings³

to the money justify him in not paying it over. *Conway v. Campbell*, 11 Mo. 71; and he may bring it into court, *Com. v. Walter*, 86 Pa. St. 15; *McDowell v. Jefferson*, 3 Harr. (Del.) 25; and the court will order an issue made up to determine who is entitled to the money, *Starns v. Prince*, 6 Rich. (S. Car.) 319; *Crawford v. Williams*, 76 Ga. 792; and if he pays it over in accordance with an order of the court it will discharge him, *American Hosiery Co. v. Riley*, 12 Abb. N. C. (N. Y.) 329, if court has authority to so order. *Summers v. Caldwell*, 2 Nott & M. (S. Car.) 341; *State v. Boles*, 13 S. Car. 283.

1. These apply generally to willful neglect and not to cases of mistake. *Nash v. Muldoon*, 16 Nev. 404; *Griffin v. Smith*, 2 Nev. 374; *Coykendall v. Way*, 29 Minn. 162; nor where there are conflicting claims to the money, *Johnson v. Gorham*, 6 Cal. 195; 65 Am. Dec. 501; and after special demand, *Pope v. Hays*, 1 Mo. 450; *Bulfinch v. Balch*, 8 Me. 133. The proceedings to obtain the penalty must be promptly instituted. *Donley v. Wiggins*, 52 Tex. 301; *Scogins v. Perry*, 46 Tex. 113.

An injunction on part would be no defense for not paying over the remainder. *Phillips v. Behn*, 19 Ga. 298.

It is a defense that the money was made on property not belonging to the debtor. *Peaselee v. Stainford*, 1 D. Chip. (Vt.) 170; *Frankel v. Elias*, 60 How. Pr. (N. Y.) 74; or that the money has been used in paying prior liens. *Hammen v. Munick*, 37 Gratt. (Va.) 249.

2. At common law, for certain defaults, the court issued attachments against him as for a contempt of court, and, unless the contempt was purged, imprisoned or amerced him. These contempts were such as not obeying an order of the writ to bring in the defendant, or making a return on its face insufficient. *Rolle Abr. M. 1*;

Sewall on Sheriffs, 304. And it was necessary for the plaintiff to proceed within a reasonable time. *Rex v. Sheriff of London*, 1 Taunt. 111; *Rex v. Per-ring*, 3 B. & P. 151.

If the court did not set the attachment aside the sheriff was liable to the plaintiff for the amount due on the writ. *Rex v. Sheriff*, 9 East 316; *Hep-pel v. King*, 7 T. R. 370. This method was applied in this county but the party injured could also proceed by action. *Burk v. Campbell*, 15 Johns. (N. Y.) 456; *State v. Sheriff*, 1 Mill (S. Car.) 151; *Ronald v. Bentley*, 4 Hen. & M. (Va.) 461; *Phillips v. Cunningham*, 5 Yerg. (Tenn.) 416. The attachment was allowed only for a willful default acting by virtue of some order and within a reasonable time. *Mongie v. Cheney*, 1 Hill (S. Car.) 145; *Lawson v. Johnson*, 5 Ark. 168. This method was not universally adopted. *Clark v. Foxcroft*, 6 Me. 296; 20 Am. Dec. 309. In some, he was coerced by fine or imprisonment. *State v. Tipton*, 1 Blackf. (Ind.) 166; in others by imprisonment. *Lawson v. Johnson*, 5 Ark. 168. But if he acted in good faith and the loss did not result from his act he was relieved. *Pitman v. Clarke*, 1 McMull. (S. Car.) 316; *McLean v. Du Bose*, 1 Bailey (S. Car.) 646; *Daniel v. Capers*, 4 McCord (S. Car.) 237.

When both of these remedies exist he cannot follow them simultaneously. *Wood v. Hunt*, 23 Ga. 379; *Pugsley v. Drew*, 52 Ga. 339.

3. Without a jury. *Wells v. Caldwell*, 1 A. K. Marsh. (Ky.) 441; *Hensley v. Baker*, 10 Mo. 157. And this is not a violation of a constitutional guarantee of trial by jury. *Lewis v. Fellows*, 6 How. (Miss.) 261; *Lewis v. Garrett*, 5 How. (Miss.) 434.

For non-return see *Halcombe v. Rowland*, 8 Ired. (N. Car.) 240; *State v. Latham*, 6 Jones (N. Car.) 233; *Wakefield v. Moore*, 65 Ga. 268; *Hyatte v. Allison*, 3 Jones (N. Car.)

in the action¹ in which his default occurred, and he is made to respond for actual damages suffered, and for the penalty² as well.

533. For failing to pay over money, see *Moore v. Disney*, 2 Ohio 490; *Stone v. Ruffin*, 2 Ohio 503. But this means a willful neglect to pay and not cases where liability is questioned. *Custer v. Agnew*, 83 Ill. 194—or for failure to pay an assignee where he has no knowledge of the assignment. *State v. Judges*, 10 N. J. L. 319. Mere non-return is not enough in *New Jersey*. *Tood v. Hoagland*, 36 N. J. L. 352. The motion, and not notice that it will be made, is the commencement of the suit. *Hill v. Hinton*, 2 Head (Tenn.) 124. *Contra*, the notice is the commencement. *Scott v. Dow*, 14 N. J. L. 350. Notice generally must be served on the sheriff. *Stryker v. Merseles*, 24 N. J. L. 542; *Davis v. Irwin*, 8 Ga. 153. Appearance will cure want of notice and errors therein. *Watkins v. Barnes*, 1 Sneed (Tenn.) 201; *Gore v. Hedges*, 7 T. B. Mon. (Ky.) 520. Slight informalities in the notice do not harm it. *Fergus v. Ball*, 1 Litt. (Ky.) 197. In some no pleadings are necessary. *Wadsworth v. Parsons*, 6 Ohio 452. In others, they are. *Nagle v. Lumpkin*, 48 Ga. 521.

Generally a rule for contempt in not executing process will be discharged on motion where the sheriff has acted in good faith under advice of counsel. *Harrell v. Feagin*, 59 Ga. 821. Or, if caused by the plaintiff's act. *Simms v. Quinn*, 58 Miss. 221. The rule should specify the term at which the motion is made and the court in which the judgment was had on which execution issued. *Welch v. Fourier*, 6 Ala. 516; *Bethune v. Bonner*, 2 Ga. 169. Should not allege more than one ground for the motion. *Morgan v. Billings*, 3 Ala. 172. And motion should be made at the time appointed and some proceedings had to keep alive notice or it will lose its force. *Armstrong v. Robertson*, 2 Ala. 164. It does not lie in favor of an assignee. *Beaver v. Batte*, 19 Tex. 111. In his own name. *May v. Johnson*, 2 Bibb (Ky.) 229. Must be made within a reasonable time. *Overseers v. Tucker*, 2 Leigh (Va.) 580; *Mitchell v. Fullbright*, 32 Mo. 551; *Van Tassel v. Van Tassel*, 31 Barb. (N. Y.) 439. It may be served by permitting him to read it. *Stephens v. Hume*, 1 Litt. (Ky.) 6. Should be served by copy. *People v. McHatton*, 3 Ill. 566.

In *Kansas*, proceedings are a lien on real estate from the day the petition is filed. *Knox v. Merrill*, 22 Kan. 572.

1. In court from which the process issued. *Tapp v. Bonds*, 57 Miss. 281; and *Fisher v. Franklin*, 38 Kan. 251; *Kennedy v. Coleman*, 2 Litt. (Ky.) 6.

2. Where the statute provides for fixing on the sheriff satisfaction by way of penalty, it is immaterial that the defendant was insolvent so that the plaintiff suffered no actual damage. *Cox v. Ross*, 56 Miss. 481.

Chalmers, J., said: "The penalty denounced against an officer for failing to return final process by the code is strictly in the nature of a penalty to be inflicted on him for neglect of duty, and while it inures to the benefit of the plaintiff, it is in no manner dependent upon any actual damage sustained, as is well settled by former adjudications of this court. *Steen v. Briggs*, 3 Smed. & M. (Miss.) 326; *Morehead v. Holliday*, 1 Smed. & M. (Miss.) 625; *Beall v. Shattuck*, 53 Miss. 358. On bond the rule would be different. *Dailey v. State*, 56 Miss. 475."

But if not given as a penalty but as a substitute for an action at law, see *Hustick v. Allen*, 1 N. J. L. 168. Whatever would be a defense to an action would be to a motion. *Billingsly v. Rankin*, 2 Swan (Tenn.) 82. That it does not appear that the property on which he failed to levy was subject to levy under this rule would be a defense. *Smothers v. Field*, 62 Tex. 435; *Robinson v. Schmidt*, 48 Tex. 13; *Young v. Donaldson*, 2 Heisk. (Tenn.) 52.

Such a fine, though its object is to pay the claim of the plaintiff in the writ is not a debt within the meaning of the constitutional prohibition against imprisonment for debt. *Ex parte Robertson*, 27 Tex. App. 628. And a judgment against an officer on summary process is in no sense assets of the original defendant, and is for the benefit only of the creditor in whose favor the rule was made. *Ford v. Perkerson*, 59 Ga. 359.

A personal remedy is only allowable where expressly provided for. *Bushnell v. Eaton*, *Wright* (Ohio) 720; *Duncan v. Drakely*, 10 Ohio 45.

It will not be extended by implication against his sureties. *Soule v.*

12. **The Bond.**¹—A sheriff and the sureties on his bond are liable for his breaches of duty arising out of the performance of his ministerial duties.² These acts include those which the laws authorize him to perform and which are considered among the duties of his office.³

The distinction originally was between acts done *virtute officii*, defined as those within the limits of his authority, but which he performed improperly, and for which his sureties were liable, and acts done *colore officii*, defined as acts of such a character that his office gave him no authority to perform them, for which his sureties were not liable.⁴

Worshan, 22 La. Ann. 78; Hernandez v. Hugh, 22 La. Ann. 245.

The statute must be strictly followed. Robinson v. Schmidt, 48 Tex. 13; and strictly construed. Connell v. Lewis, 1 Walk. (Miss.) 251; Conkling v. Parker, 10 Ohio St. 28.

The execution to sustain such a proceeding must conform strictly to the judgment rendered. Fisher v. Franklin, 38 Kan. 251.

Not more than one fine can be imposed on a sheriff for failing to return one execution. Tomkins v. Dounman, 6 Munf. (Va.) 557.

Where a sheriff receives a writ and goes out of office before returning it, he is not liable to amercement for the non-return. State v. Woodside, 7 Ired. (N. Car.) 296. *Contra*, Armstrong v. Grant, 7 Kan. 285; Bell v. Thorpe, 44 Ga. 509. See also Stansbury v. Patent Cloth Mfg. Co., 5 N. J. L. 433.

In some States a sheriff cannot on motion be amerced for a false return, but resort must be had to an action. Bank of Gallipolis v. Domigan, 12 Ohio 221.

1. See generally, BONDS, vol. 2, p. 448.

2. But he is not liable for failing to keep the peace, whereby the plaintiff is injured by a mob. South v. Maryland, 18 How. (U. S.) 396.

3. People v. Dikeman, 4 Keyes (N. Y.) 93; for acts as a special commissioner, Hubbard v. Elden, 43 Ohio St. 380; as distributee of funds under a partition, State v. Jones, 26 Mo. App. 190; as trustee under an appointment of court, State v. Griffith, 63 Mo. 545; State v. Taylor, 6 Mo. App. 277; State v. Davis, 88 Mo. 585; for his defaults as tax collector, where this is a part of his official duty, sureties on his bond as sheriff may be held liable, State v. Powell, 44 Mo. 436; State v. Hill, 17 W. Va. 452; State v. Matthews, 57

Miss. 1; Hewlett v. Schenck, 82 N. Car. 234; although another bond was exacted from him besides his bond as sheriff, New Orleans v. Gauthreaux, 36 La. Ann. 109 (*contra*, People v. Burkhardt, 76 Cal. 606); but not where he has no right to collect the taxes, Anderson v. Thompson, 10 Bush (Ky.) 132; Greenwell v. Com., 78 Ky. 320; his sureties are not liable for his acts as an administrator, this being considered outside the duties of his office, Robinson v. State, 47 Miss. 423.

In *Prairie v. Worth*, 78 N. Car. 169, it is said that the sheriff takes office subject to the power of the legislature to control his duties as the public good may require, and every officer gives bond affected with notice of this right of sovereignty; and that it enters into and becomes an express part of his contract with the State, and is as binding on the bondsmen as an express condition.

The sureties are not liable to printers for their fees in advertising notices of sale and other official notices, although the sheriff is required by law to make such advertisements and they would have been liable if he had failed to do so. Brown v. Phipps, 14 Miss. 51; Com. v. Swope, 45 Pa. St. 535.

In a State where the sheriff is also tax collector, and a statute authorized the county court, where there was a vacancy in the office of sheriff, from any other cause than the incumbent's death, to appoint a person to collect the taxes, and the sheriff was removed, but no person was thus appointed to collect the taxes, it was held that the sheriff must proceed to collect them notwithstanding his removal, and the sureties on his official bond were liable for his failure to do so. Ballard v. Thomas, 19 Gratt. (Va.) 14.

4. The distinction is still recognized but the general rule puts a larger

His sureties are liable for an escape,¹ for a failure to levy,² to return process,³ to deliver goods to the defendant on discontinuance of the action,⁴ for non-payment of money collected as sheriff,⁵ for loss of attachment by his negligence or voluntary act,⁶ for damage to property seized caused by his negli-

liability on his sureties. In *Gerber v. Ackley*, 37 Wis. 43, the officer took goods, claiming to act by virtue of a writ of replevin, when in fact he had no writ, and the court by Cole, J., said: "The surety is only liable for his official acts done or omitted, in other words for those done *virtute officii*. A distinction is taken by the authorities between an act done *colore officii* and one done *virtute officii*. See *Coupey v. Henley*, 2 Esp. 540; *Seeley v. Birdsell*, 15 Johns. (N. Y.) 267; *Morris v. Van Voast*, 19 Wend. (N. Y.) 283. "Acts done *virtute officii* are where they are within the authority of the officer, but in doing them he exercises that authority improperly, or abuses the confidence the law reposes in him, whilst acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them." *Pratt, J.*, in *People v. Schuyler*, 4 N. Y. 137. "In order to show that the marshal violated some duty resting upon him as marshal, it must appear that he was acting under process and not merely claiming to act in the execution of process. If the marshal had a legal writ issued by a justice which commanded him to seize this identical property, that would afford him full protection unless he acted wrongfully in executing it. *Griffith v. Smith*, 22 Wis. 646; *Bates v. Hamlin*, 22 Wis. 669. If he had no such writ he cannot be said to be acting *virtute officii* and in the discharge of an official duty."

1. *People v. Dikeman*, 3 Abb. App. Dec. (N. Y.) 520. See, on the subject of escape, *ESCAPE*, vol. 6, p. 644.

2. *Com. v. Fry*, 4 W. Va. 721.

3. *McNee v. Sewell*, 14 Neb. 532; *Governor v. Pleasants*, 4 Ark. 193.

4. *Dennie v. Smith*, 129 Mass. 143; *Levy v. McDowell*, 45 Tex. 220.

5. *De la Garza v. Carolan*, 31 Tex. 387, but not for money which the sheriff had no legal authority, by virtue of process, to receive. *Barton v. Lockhart*, 2 Stew. & P. (Ala.) 109; *Gov. v. Wise*, 1 Cranch (U. S.) 142; *Thomas v. Browder*, 33 Tex. 783; *Turner v. Collier*, 4 Heisk. (Tenn.) 89; *Bacas v. Hernandez*, 31 La. Ann. 85; *Heidenheimer v. Brent*, 59 Tex. 533.

Where, holding a replevin writ, he took a deposit of money instead of bond, and embezzled the money, his sureties were held not liable, because the act was extra official. *People v. Hilton*, 36 Fed. Rep. 172.

For his failure to pay over funds when demanded the sureties were held liable, although they became sureties after he had come into possession of the money which he was ordered to hold subject to the order of the court. *Wentz v. Ledoux*, 24 La. Ann. 131; but where he had made a levy and afterwards collected and lost the money, the sureties on his bond at the time of levy were held liable, though before collection and loss he gave a new bond. *Wooddell v. Bruffey*, 25 W. Va. 465.

For any surplus in the sheriff's hands the sureties are liable to the defendant. *State v. Clymer*, 3 Houst. (Del.) 20.

Money paid to a sheriff in satisfaction of an execution, but after the return day, charges the sureties. *Beale v. Commonwealth*, 7 Watts (Pa.) 183; *contra*, on ground that the officer had no authority to receive the money. *Forward v. Marsh*, 18 Ala. 645; *Thomas v. Browder*, 33 Tex. 783.

The sureties are not liable for money paid to the sheriff by a judgment debtor to apply upon the judgment, where no process has been issued thereon. *State v. Allen*, 7 Jones (N. Car.) 564; nor are they liable for money deposited with the sheriff in lieu of bail by a defendant arrested on a *capias*, *State v. Long*, 8 Ired. (N. Car.) 415; so where he sells personal property which he has attached, but the sale is made by agreement of the parties and not as prescribed by law, his sureties are not liable for the money. *Governor v. Perrine*, 23 Ala. 807; *Webb v. Anspach*, 3 Ohio St. 522; *Schloss v. White*, 16 Cal. 65; but they are liable for money collected by him on an execution, though there was no judgment. *State v. Hicks*, 2 Blackf. (Ind.) 336.

6. *Sandridge v. Jones*, 2 La. Ann. 993; *Com. v. Contner*, 18 Pa. St. 439; *Cotton v. Atkinson*, 53 Ark. 98; to

gence,¹ for overpayments exacted by him on process;² to a third person, a stranger to the writ, whose property he levies on,³ for omitting statutory requirements at a sale,⁴ or for levying on exempt property.⁵

His sureties are not liable for acts of the sheriff which are not a part of his official duties,⁶ nor for breaches caused by the plaintiff's acts,⁷ nor for penalties.⁸

If sureties have limited their liability they are not liable beyond that amount.⁹ In some States they are not liable for acts done by the sheriff after his term expires.¹⁰

judgment creditor for release of a valid levy. *State v. Rayburn*, 22 Mo. App. 303.

1. *Witkowski v. Hern*, 82 Cal. 604.

2. *Snell v. State*, 43 Ind. 359. *Contra*, where made by mistake. *State v. Ireland*, 68 N. Car. 300.

3. *Lammon v. Fensier*, 111 U. S. 17, 22; *U. S. v. Hine*, 3 McArthur (D. C.) 27; *Cumming v. Brown*, 43 N. Y. 514; *Carmack v. Com.*, 5 Binn. (Pa.) 184; *Brunott v. McKee*, 6 W. & S. (Pa.) 513; *Archer v. Noble*, 3 Me. 418; *Greenfield v. Wilson*, 13 Gray (Mass.) 384; *State v. Jennings*, 4 Ohio St. 418; *Sangster v. Com.*, 17 Gratt. (Va.) 124; *Van Peet v. Littler*, 14 Cal. 194; *Com. v. Stockton*, 5 T. B. Mon. (Ky.) 192; *Jewell v. Mills*, 3 Bush (Ky.) 62; *State v. Fitzpatrick*, 64 Mo. 185; *Charles v. Haskins*, 11 Iowa 329; 77 Am. Dec. 148; *Turner v. Killian*, 12 Neb. 580; *Holliman v. Carrol*, 27 Tex. 23; 80 Am. Dec. 606; *Turner v. Sisson*, 137 Mass. 191; *Albright v. Mills*, 86 Ala. 324; *People v. Mersereau*, 74 Mich. 687. *Contra*, *State v. Conover*, 28 N. J. L. 224; 78 Am. Dec. 54; *State v. Brown*, 11 Ired. (N. Car.) 141; *Gerber v. Ackley*, 32 Wis. 233; 19 Am. Dec. 751; *State v. Brown*, 54 Md. 318.

4. Where the statute entitled a purchaser of mortgaged chattels to possession on his compliance with the terms of the mortgage, a liability is incurred by the delivery by the officer before such compliance. *Stifer v. State*, 114 Ind. 291.

So, if an officer sells mortgaged property under a second lien, and delivers possession to the purchaser without requiring his compliance with the conditions of a prior mortgage, the officer and his sureties are liable. *Kackley v. State*, 91 Ind. 437.

5. *Casper v. People*, 6 Ill. App. 28; *Mace v. Gaddis*, 3 Wash. 125; *Cole v. Crawford*, 69 Tex. 124; *State v. Carrol*, 9 Mo. App. 275.

6. *Walsh v. People*, 6 Ill. App. 204. But they are liable for the sheriff's act in falsely certifying as true, bills rendered against the county, this not being a part of his duty. *People v. Foster*, 133 Ill. 496.

Where, holding a warrant for the arrest of a person, he goes into another State and falsely represents that he has extradition papers and arrests the person, his sureties are not liable for such acts, but are liable for acts done after he returns to his State. *Kendall v. Aleshire*, 28 Neb. 707.

7. *Skinner v. Wilson*, 61 Miss. 90; *Robertson v. Coker*, 11 Ala. 466; *Kennedy v. Smith*, 7 Yerg. (Tenn.) 472; *Robinson v. Harrison*, 7 Humph. (Tenn.) 189; *Granberry v. Crosby*, 7 Heisk. (Tenn.) 579; or, if caused by instructions of plaintiff's attorney. *State v. Boyd*, 63 Ind. 428; *State v. Rose*, 3 Lea (Tenn.) 531; *State v. McCallum*, 11 Heisk. (Tenn.) 101.

8. *State v. Nichols*, 39 Miss. 318; only for actual damages. *Glascok v. Ashman*, 52 Cal. 493.

9. *Marcy v. Praegar*, 34 La. Ann. 54. The judgment on the bond is generally for the penal sum. *Mayor, etc., of N. Y. v. Ryan*, 9 Daly (N. Y.) 316; *Turner v. Sisson*, 137 Mass. 191; but after recoveries to the amount of the bond they are no longer liable. *Bothwell v. Sheffield*, 8 Ga. 569.

10. *Sherrell v. Goodrum*, 3 Humph. (Tenn.) 419. Where it was the duty of the outgoing sheriff to deliver unexecuted process to his successor and he did not, but collected the money, his sureties were held not liable. *State v. Morgan*, 59 Miss. 349; *Lynch v. Leckie*, 9 La. Ann. 506; *People v. Dunphy*, 2 Mich. N. P. 197; *Bennett v. State*, 58 Miss. 556.

Where a sheriff sold property under an order of court, but did not receive the money until after his term had expired, but then held the office under

An unsatisfied judgment against the sheriff is no bar to a suit on the bond;¹ and such judgment is evidence against the sureties.²

In some States, judgment against the sureties may be had on motion.³

a new election, and had given a new bond, and failed to pay over the money, it was held that the time of the defalcation determined the liability, and that the second bondsmen were liable. *State v. McCormack*, 50 Mo. 568.

Where the sheriff collected on an execution regular on its face and paid over the proceeds, and after his death the judgment was reversed, it was held that his sureties were not liable for the money collected. *Clark v. Lamb*, 76 Ala. 406.

In some States the sureties are liable for certain acts done after the expiration of his term. *Baker v. Baldwin*, 48 Conn. 131.

In those States where it is the duty of the sheriff to complete a levy which he has begun, even though this requires him to act after the expiration of his term, the liability of the sureties on his bond is extended accordingly, and if he has again been chosen and has given another bond the sureties in the first bond are, and the sureties in the second bond are not, liable for his defaults relating to such levy. *Elkin v. People*, 4 Ill. 207; *State v. Roberts*, 12 N. J. L. 114; *Governor v. Cobb*, 2 Sneed (Tenn.) 18; *Tyrel v. Wilson*, 9 Gratt. (Va.) 59.

If he has not levied, the sureties in the second bond are liable for his not returning an execution. *Sherrell v. Goodrum*, 3 Humph. (Tenn.) 419; *State v. Morgan*, 59 Miss. 349.

Where money was received by a sheriff upon a sale under an attachment during his term of office, the sureties on his bond were held liable for his failure to pay over the money, although it was not due or demanded until after the expiration of his term. *King v. Nichols*, 16 Ohio St. 80; *Brobst v. Killen*, 16 Ohio St. 382.

Where he sold real property in partition during his first term, and received the money during the second term, it was held that the sureties for the second term were liable for the money. *Ingram v. Coombs*, 17 Mo. 558. See also *supra*, this title, *Election; Appointment; Termination*.

Successive Bonds.—A sheriff, having collected part of the taxes, was required before the day of payment to give a new bond; and the sureties in that bond were held liable for money previously received by him. *Miller v. Moore*, 3 Humph. (Tenn.) 189.

Additional Sureties.—Persons who in September added their names as sureties to a sheriff's bond filed in the preceding February were held liable as if they had executed it when filed. *Com. v. Adams*, 3 Bush (Ky.) 41.

Omitted Signature.—Where the record of court stated that a sheriff elect and his sureties came into court and executed an official bond; and one of those named as surety who was present did not sign the bond, it was held that neither of the sureties was liable. *Fletcher v. Light*, 4 Bush (Ky.) 303.

1. *Bennett v. State*, 58 Miss. 556; *State v. Cason*, 11 S. Car. 392; a suit on this bond will lie without first bringing a suit against the sheriff individually. *Governor v. Perkins*, 2 Bibb (Ky.) 395; *Jefferson v. Hartley*, 81 Ga. 716; or obtaining an order of court. *State v. Cason*, 11 S. Car. 392; unless a statute requires it. *Litchfield v. McDonald*, 35 Minn. 167.

2. Some cases hold that it is merely *prima facie* evidence against them as to the default of the sheriff and the damages. *People v. Mersereau*, 74 Mich. 687; *State v. Cason*, 11 S. Car. 392; *Carr v. Meade*, 77 Va. 142; *State v. Woodside*, 7 Ired. (N. Car.) 296; some, that it is conclusive. *Dennie v. Smith*, 129 Mass. 143; *Tracy v. Goodwin*, 5 Allen (Mass.) 409; *Masser v. Strickland*, 17 S. & R. (Pa.) 354; 17 Am. Dec. 668. In *State v. Colerich*, 3 Ohio 487, it was held conclusive if the sureties had notice of the suit, otherwise only *prima facie*.

In other States, it is said to be not even *prima facie* evidence against the sureties. *People v. Russell*, 25 Hun (N. Y.) 524; *Lucas v. Governor*, 6 Ala. 826.

3. *State v. Howell*, 65 N. Car. 61; *Shepherd v. Brown*, 30 W. Va. 13.

Wherever particular and peculiar

The bond, though not in the form prescribed by statute, may be good as a common-law bond.¹

The sheriff only has a cause of action on the deputy's bond to him where the deputy commits a breach which subjects the sheriff to liability.²

remedies of enforcing a bond are pointed out by the laws of a State, enforcing these particular and peculiar matters is the exclusive province of tribunals of that State. *Pickering v. Fisk*, 6 Vt. 102.

1. *Cox v. Ross*, 56 Miss. 481; *Burnett v. Nesmith*, 62 Ala. 261; so held where it ran to the "county" instead of to the "people," as the statute required, *Bay Co. v. Brock*, 44 Mich. 45; and so where it was not executed within a given time after the sheriff's election, as required by statute, *Stephens v. Crawford*, 1 Ga. 574; 44 Am. Dec. 680; and so held when it ran to the State contrary to the statute, *State v. Horn*, 94 Mo. 162; *Huffman v. Koppelkom*, 8 Neb. 344; and the sureties are as firmly bound as though the bond fulfilled all the requirements of the statute, *Crawford v. Howard*, 9 Ga. 314; *Treasurers v. Taylor*, 2 Bailey (S. Car.) 524; where a sheriff's bond was conditioned for the years 1872 and 1873 and action was brought thereupon for his default in the collection of taxes for the year 1874, it was held that the sureties were not liable, notwithstanding a statute which saved bonds varying from the provisions prescribed by law. The court said: "The object" [of the statute] "was to enforce the substance of the obligation without regard to formal defects or variances. But it certainly never was the purpose of the act, to make men do that which they never undertook to do in form or substance, nor especially to do precisely the contrary of their undertaking." *Prince v. McNeill*, 77 N. Car. 398.

2. **Deputy's Bond.**—*Rowe v. Richardson*, 5 Barb. (N.Y.) 385; *Tuttle v. Cook*, 15 Wend. (N. Y.) 274; *Cook v. Palmer*, 6 B. & C. 739. A deputy sheriff's bond to his principal is not a mere bond of indemnity against actual loss, however. *Badgett v. Martin*, 12 Ark. 730; *Chace v. Hinman*, 8 Wend. (N. Y.) 452; 24 Am. Dec. 39.

Deputy.—The sheriff is liable civilly for the acts of his deputies. *Watson v. Todd*, 5 Mass. 271; *Jentry v. Hunt*, 2 McCord (S. Car.) 410; *Hazard v.*

Israel, 1 Binn. (Pa.) 240; *Moore v. Dawney*, 3 Hen. & M. (Va.) 127; *Prosser v. Coots*, 50 Mich. 262; *Estes v. Williams, Cooke* (Tenn.) 413; *Murrell v. Smith*, 3 Dana (Ky.) 462; where the deputy assumes to act under color of his office, *Harrington v. Fuller*, 18 Me. 277; *State v. Moore*, 19 Mo. 369. He is liable for the default of a deputy who, being duly authorized by the plaintiff on receipt of the writ, to settle the suit by receiving an order on a particular person, receives the amount of the claim in money from the defendant and does not pay it to the plaintiff or serve the writ. *Hammond v. Root*, 15 Gray (Mass.) 416; for the act of his deputy, in taking more fees than allowed by law, *M'Intyre v. Trumbull*, 7 Johns. (N. Y.) 35; for the neglect of the deputy to take a sufficient bond in replevin, *Harriman v. Wilkins*, 20 Me. 93; for the act of the deputy in taking goods that do not belong to the defendant in the execution, *Wilbur v. Strickland*, 1 Rawle (Pa.) 458; *Pond v. Lemon*, 45 Barb. (N. Y.) 152; *Satterwhite v. Carson*, 3 Ired. (N. Car.) 549; for money collected by a deputy. *Hill v. Fitzpatrick*, 6 Ala. 314. An attachment is an official act of the deputy for which the sheriff is responsible. *Rider v. Chick*, 59 N. H. 50.

The sheriff is not liable for the services of a person employed by his deputy, to keep property attached by the latter, *Dooley v. Root*, 13 Gray (Mass.) 303; *Krum v. King*, 12 Cal. 412; *Kendrick v. Smith*, 31 Me. 162; *Lucier v. Pierce*, 60 N. H. 13; *Dow v. Rowe*, 58 N. H. 125; nor for the act of his deputy performed while the deputy of a former sheriff, *Wilton Mfg. Co. v. Butler*, 34 Me. 431; *Pillsbury v. Small*, 19 Me. 435; nor for the act of his deputy in accepting an order to pay over the proceeds of an execution in his hands, *Moore v. Jarret*, 10 Tex. 201; nor where there is a departure from the ordinary execution of his office by the deputy under the instructions of the plaintiff, *Gorham v. Gale*, 7 Cow. (N. Y.) 739; nor for money received by the deputy on a case in which the execution had not then been lodged in his office.

IV. FEES AND COMPENSATION.—The sheriff's fees are provided for by statute; are paid by the party for whom the services are rendered, and, if he prevails in the proceeding, are taxed as a part of his costs.¹ He may require prepayment of his fees.²

Chelsea v. Holloway, 4 McCord (S. Car.) 164.

A sheriff's liability for such default is not terminated by the expiration of his term, when the execution of process is commenced before that time but not finished until afterwards. *Hill v. Fitzpatrick*, 6 Ala. 314; *Larned v. Allen*, 13 Mass. 295; *Doliver v. Collingwood*, 15 R. I. 510.

At common law a stranger could not sue a deputy sheriff for the breach or non-performance of his official duties, but only the sheriff, *Harlan v. Lumsden*, 1 Duv. (Ky.) 86; *White v. Johnson*, 1 Wash. (Va.) 159; *Stone v. Chambers*, 1 Strobb. (S. Car.) 117. *Contra*, that he could sue either, *Draper v. Arnold*, 12 Mass. 449; *Estey v. Chandler*, 7 Mass. 464.

A joint action will not lie against a sheriff and his deputy for the acts of the deputy. *Moulton v. Norton*, 5 Barb. (N. Y.) 286; *Campbell v. Phelps*, 1 Pick. (Mass.) 62.

And see generally *DEPUTY*, vol. 5, p. 623.

Sheriff as Collecting Agent.—The sureties on a sheriff's bond are not liable for his defaults as a collecting agent, he being regarded as a mere agent of the plaintiff. *Kinnard v. Willmore*, 2 Heisk. (Tenn.) 619; *Brumble v. Brown*, 71 N. Car. 513. *Contra*, *McLean v. Buchanan*, 8 Jones (N. Car.) 444. If he receives a note for collection and fails to account for it there is a *prima facie* presumption that he either collected it or converted it to his own use. *Brumble v. Brown*, 71 N. Car. 513. If he shows judgment was recovered on note, he sufficiently accounts for it. *Miller v. Pharr*, 87 N. Car. 396. He is bound to use reasonable diligence in the collection. He must obtain judgment and execution within a reasonable time, and if debt is lost in consequence of his neglect, he is responsible. *Kinnard v. Willmore*, 2 Heisk. (Tenn.) 619.

In *Maryland* he was responsible for the amount of officer's and lawyer's fees put into his hands for collection within the time limited by law, unless he made return to the officers and lawyers within a prescribed time,

Mantz v. Collins, 4 Har. & M. (Md.) 65.

1. *Boswell v. Dingley*, 4 Mass. 413. He has a right to call on the plaintiff's attorney for them, *Adams v. Hopkins*, 5 Johns. (N. Y.) 252; *Burnham v. Savings Bank*, 5 N. H. 446; unless the attorney has informed him that he would not be responsible, *Heath v. Bates*, 49 Conn. 342; 44 Am. Rep. 234; if the sheriff recovers judgment against the attorney, he cannot then look to the plaintiff, *Ousterhout v. Day*, 9 Johns. (N. Y.) 113.

Sometimes a statute provides a summary remedy for the sheriff against the plaintiff who has discontinued an action. *Robertson v. Smith*, 37 Ga. 604.

Where the fees are not a part of the judgment and costs in the execution, and the execution is paid, the officer cannot levy for subsequent fees. *Craft v. Merrill*, 14 N. Y. 456, 463; *Jackson v. Anderson*, 4 Wend. (N. Y.) 474. *Contra*, *Howard v. Levy Court*, 1 Har. & J. (Md.) 558.

An agreement by the sheriff to accept less than the amount of his fees, if the person to whom they are charged would allow the amount thus reduced, is without consideration. *Van Nest v. Lott*, 16 Abb. Pr. (N. Y.) 130.

When the sheriff has money in his hands collected on execution, he may retain from this the amount due him from the same plaintiff on another execution. *Robertson v. Smith*, 37 Ga. 604.

An act requiring the sheriff to pay his fees into the county treasury was held unconstitutional in *Fulk v. Board of Commissioners*, 46 Ind. 150.

He cannot claim fees for serving an execution contrary to the directions of the plaintiff. *Oswitchee Co. v. Hope*, 5 Ala. 629.

Where he returned an execution satisfied, with no detailed return thereon of his doings, and without itemizing his fees, he was held liable to the defendant for the proceeds, above what was necessary to satisfy the judgment. *Harrington v. Hill*, 51 Vt. 44.

2. **Prepayment.**—*Jones v. Gupton*, 65 N. Car. 48; *Adams v. Dinkgrave*, 26

Poundage is the amount allowed a sheriff or other officer for commissions on the money made by virtue of an execution.¹ The amount varies in the different States. At common law, if the debtor paid the creditor before levy, the sheriff was not entitled to poundage, but if so paid after levy he was entitled to it.² In the *United States* the rule varies as to how far an officer must have proceeded to be entitled to poundage, when the parties among themselves have disposed of the execution.³

La. Ann. 626; Haas v. Gaddis, 1 Wash. 89; but if prepayment is not demanded he cannot refuse to make return until they are paid, Wit v. Shoonmaker, 15 How. Pr. (N. Y.) 460; and is bound to serve as though prepaid. Carlisle v. Soule, 44 Vt. 265.

Where a judgment debtor was imprisoned and the creditor refused on demand of sheriff payment of jail fees for board weekly in advance, the sheriff was justified in allowing the prisoner to go at large. Gill v. Miner, 13 Ohio St. 182.

1. **Poundage.**—Bouvier Law Dict. Originally this was a charge out of the debt, Woodgate v. Knatchbrill, 2 T. R. 148; but by Stat. 43 Geo. III it was added to the debt.

If the sale realizes only a part of the debt he is entitled to a commission only on the sum made, Bryan v. Buckmaster, 1 Ill. 408; Black v. Ely, 6 N. J. L. 232; and if the proceeds of the sale are more than the debt he has only a percentage on amount of the debt. Sumickson v. Gale, 16 N. J. L. 21. If judgment is reduced by the court, he gets commission only on the reduced amount. Campbell v. Cothran, 56 N. Y. 279; Shaw v. Brown, 41 Tex. 446. Where the goods were taken from him on legal process he was held entitled to full poundage, Baldwin v. Shaw, 35 Vt. 273.

Where he levied an execution and it was suspended by decree and he sold afterwards under *venditioni exponas*, he was given full poundage on sale but no additional poundage for the levy. Boyd v. Harper, 3 Bush (Ky.) 142; but where it was sold after levy, by another officer under decree, first officer was not given poundage. Harris v. Pettigrew, 5 Lea (Tenn.) 596.

2. Alchin v. Welles, 5 T. R. 470; Bullen v. Ansley, 6 Esp. 111.

3. That he is not entitled if execution is paid by defendant to plaintiff before levy, Barnard v. Stevens, 2 Aik. (Vt.) 429; 16 Am. Dec. 733; Hildreth v.

Ellice, 1 Cai. (N. Y.) 192; Snell v. Woodford, 9 Dana (Ky.) 128, that it must be paid to the sheriff to entitle him to poundage, Vance v. Bank of Columbus, 2 Ohio, 214; Wynne v. Mississippi, etc., R. Co., 45 Miss. 569; that he is not entitled to it unless he receives the money, Com. v. Brown, 5 Call (Va.) 569; that he is entitled to full poundage on the amount paid after levy where the parties settled among themselves, Parsons v. Bowdoin, 17 Wend. (N. Y.) 14; Bolton v. Lawrence, 9 Wend. (N. Y.) 435; Pritchard v. Bank of California, 51 Barb. (N. Y.) 184; Woodruff v. Imperial F. Ins. Co., 90 N. Y. 521; that he is entitled to no claim for commission unless the service is rendered, Barnes v. Jackson, 2 Sneed (Tenn.) 416; but where he sold property to the plaintiff and credited amount of bid on the execution without receiving any money, he was held entitled to full poundage, Arnold v. Dinsmore, 3 Coldw. (Tenn.) 235; Litchfield v. Ashford, 70 Iowa 393; contra, Coleman v. Ross, 14 Oregon 349; and where he returned execution satisfied by instruction of the plaintiff, he was held not entitled to poundage. Hernndon v. Mason, 4 J. J. Marsh. (Ky.) 575. In *New Jersey* if the parties by mutual consent after levy dispose of the case, the sheriff is entitled to his full poundage. Sturges v. Lackawanna, etc., R. Co., 27 N. J. L. 424.

In *Indiana*, he is not entitled to it, if payment be made before levy, though he would be, if the payment were made after levy, Pomroy v. Harter, 1 McLean (U. S.) 448; Miles v. Ohaver, 14 Ind. 206; Kirland v. Robinson, 24 Ind. 105; and the same rule exists in *Missouri*. Gaty v. Vogel, 40 Mo. 553; Gordon v. Maupin, 10 Mo. 352; 47 Am. Dec. 118; Irwin v. Milburn, 10 Mo. 456; Gates v. Buck, 75 Mo. 688.

Where a sheriff, by instruction from plaintiff, received one-sixth of the amount of an execution in full settle-

When he arrests a defendant on a *ca. sa.* he is entitled to full poundage.¹ He is not entitled to double compensation for the same act.² He may have a reasonable compensation for the expense of keeping and selling goods attached before applying goods to the execution,³ if the statute allows

ment, he was held only entitled to poundage on that amount. *Pierce v. Delesdernier*, 17 Me. 431. He is not entitled to it unless the money is paid before return day of writ or while he has process in his hands authorizing him to levy, *Lofland v. Jefferson*, 4 Harr. (Del.) 303; *Kincaid v. Smyth*, 13 Ired. (N. Car.) 496.

1. *Gardner v. Neal*, 9 Gratt. (Va.) 85; although the defendant is discharged on poor debtor proceedings, *Boswell v. Dingley*, 4 Mass. 410; or under insolvent laws, *Adams v. Hopkins*, 5 Johns. (N. Y.) 252; or although *ca. sa.* issued irregularly where the sheriff, notwithstanding the regularity, incurs the risk of being made liable for an escape. *Scott v. Shaw*, 13 Johns. (N. Y.) 378. If defendant dies while in the sheriff's custody, the sheriff is not entitled to poundage, *Flack v. State*, 29 Hun (N. Y.) 286.

2. Where he holds several executions and makes one seizure he cannot charge a levy fee on each writ. *Thrower v. Vaughan*, 1 Rich. (S. Car.) 18.

Where he brought three prisoners on one trip, or might have done so, he was only allowed one mileage, *Barnes v. Marion Co.*, 54 Iowa 482; *contra*, where he was held entitled to mileage for each one, *Sherman v. Santa Barbara Co.*, 59 Cal. 486; *Evans v. State*, 85 Tenn. 269.

Where he made one trip in serving seven subpoenas he was allowed mileage for one trip only. *Redfield v. Shelby Co.*, 64 Iowa 11.

On various warrants to assess damages which a statute required to be tried before the same jury, the fees of the sheriff for service, summoning jurors, and notifying the parties, were held to be the same as if one warrant, and to be apportioned among the parties. *Wilmarth v. Knight*, 14 Gray (Mass.) 112.

He is entitled to a levying fee against each of several defendants in an execution. *State v. Burton*, 4 Harr. (Del.) 457.

Where he served eighteen citations on the defendant at the same time he

was given mileage in each case. *Gull, etc., R. Co. v. Dawson*, 69 Tex. 519; and where in several suits the defendants lived close together so that only one trip was necessary he got mileage in each case. *McGee v. Dillon*, 103 Pa. St. 433.

Where he levied on separate parcels of real estate he was given fees for each levy. *Young v. Miller*, 63 Cal. 302.

In a suit against a corporation, where the sheriff attached divers parcels of real estate belonging, respectively, to individual members of the corporation who were liable in their individual capacity for debts of the corporation, he was not allowed a separate fee for each parcel attached. *Washington Bank v. Boston Glass Manufactory*, 6 Pick. (Mass.) 375.

3. *Baldwin v. Hatch*, 54 Me. 167; *McNeil v. Bean*, 32 Vt. 429; *Rowley v. Painter*, 69 Iowa 432; *Irvin v. Real Estate Bank*, 5 Ark. 30; *Schneider v. Sears*, 13 Oregon 69; *Shelly's Appeal*, 38 Pa. St. 210; *Olds v. Loomis*, 10 Ill. App. 418; even if proceeds are ordered paid to the debtor, *Connors v. Avery*, 23 La. Ann. 330; and in a lien on the goods, *Twombly v. Hunewell*, 2 Me. 221; *Pailhes v. Thelen*, 1 La. Ann. 34; *McNeil v. Bean*, 32 Vt. 429; *Steele v. Shirley*, 13 Smed. & M. (Miss.) 196. In some States, this must first be allowed by the court, *Bower v. Rankin*, 61 Cal. 108; *Geil v. Stevens*, 48 Cal. 590; *Addington v. Sexton*, 17 Wis. 327; 84 Am. Dec. 745.

He cannot charge plaintiff with expenses incurred in holding property after he is notified that the plaintiff has released his claim. *Hall v. U.S. Reflector Co.*, 34 Hun (N. Y.) 467.

He has no authority to insure and ask reimbursement for premiums paid. *Owens v. Davis*, 15 La. Ann. 22.

He may charge for storage, *Eastman v. Coös Bank*, 1 N. H. 23; and has a claim for reimbursement of money necessarily paid to preserve the property, *Hanness v. Smith*, 21 N. J. L. 495; and expenses incurred in maintaining animals attached, may be recovered of plaintiff if judgment is given

it.¹ His fees for travel are to be computed by the distance on the usual way traveled.² He is entitled to his legal fees,³ and these include a great variety of expenses,⁴ not specially provided for, but covered by some general provision of the statute. He is not entitled to extra compensation or reward for doing that which is merely his duty.⁵

for defendant, *Phelps v. Campbell*, 1 Pick. (Mass.) 59; *Gleason v. Briggs*, 28 Vt. 135. Where he delivered the goods to the defendant he was held not entitled to fees for guarding the property, but might be allowed necessary expenses, not exceeding sheriff's fees, if he had held possession, *Cape Fear Steamboat Co. v. Bartholomess*, 67 Ga. 452.

1. *Croft v. Brandt*, 58 N. Y. 106; 17 Am. Dec. 213; *German Bank v. Morris Run Coal Co.*, 74 N. Y. 58; *King v. Shepherd*, 68 Iowa 215; or agreement has been made to pay, *Mathers v. Ramsey*, 2 Disney (Ohio) 334; and is not allowed for mere care of property outside of statutory fees and salary. In *McKeon v. Harsfall*, 88 N. Y. 431, it was held that he was not entitled to keeper's fees, these depending on agreement recoverable only by action, but that he might employ an attorney if necessary. *Mayhew v. Duncan*, 31 Barb. (N. Y.) 87; and be allowed expenses incurred in regaining property taken from him without his fault, *Rhoads v. Woods*, 41 Barb. (N. Y.) 471; *Newman v. Wilson*, 1 La. Ann. 45.

2. *Pierce v. Delesdernier*, 17 Me. 431. Where a statute provided that he should receive mileage for "every mile necessarily traveled in going only in executing any warrant of arrest, etc., taking prisoner before magistrate, etc." he was held entitled both for mileage in going to make arrest and for that traveled in bringing prisoner from place of arrest to a magistrate, *Allen v. Napa Co.*, 82 Cal. 187; but the same court did not allow mileage for traveling in different directions looking for one criminal. *Broughton v. Santa Barbara Co.*, 65 Cal. 257.

He is entitled to mileage, where, through no fault of his own, he fails to serve process. *Davis v. Le Sueur Co.*, 37 Minn. 491.

3. *Hicks v. Moore*, 2 Ga. 240; *Burnham v. Savings Bank*, 5 N. H. 446; *King v. Shepherd*, 68 Iowa 215. An agreement between the sheriff and the parties in a suit to accept a certain

sum in lieu of all fees for services afterward to be performed, is void, *Gilman v. Des Moines Valley R. Co.*, 40 Iowa 200; as is an agreement for compensation in excess of that fixed by law. *Burk v. Webb*, 32 Mich. 173. Where the fees are specifically fixed by statute the court has no discretion, and can give no more, *Irvin v. Alexander*, 63 Ill. 528; *Fletcher v. Aldrich*, 81 Mich. 186; *Tennessee, etc., R. Co. v. East Alabama R. Co.*, 81 Ala. 94.

4. If the expense of recovering property was caused by his own neglect in losing it, it will not be allowed, *Gill v. Wilkinson*, 30 Ga. 760; *Martin Co. v. Pipher*, 98 Ind. 124; nor will it be allowed if it is extra work, but included in an item for which fees are fixed—e. g., extra work in carrying meals or caring for prisoners which the courts decide are included in an allowance for board, *Schneider v. Sears*, 13 Oregon 69; *Bynum v. Greene Co.*, 100 Ind. 90; *Benton Co. v. Harman*, 101 Ind. 551; *Republic Co. v. Kindt*, 16 Kan. 157; *Grubb v. Louisa Co.*, 40 Iowa 314; where he received a salary it was held this was to be regarded as full compensation for all services not otherwise specially provided for, and that he could not recover for services as jailer, *McDonald v. Woodbury Co.*, 48 Iowa 404; *Ford v. Howard Co.*, 3 Mo. 309; *Stockton v. Shustea*, 11 Cal. 113; but where, by act of the legislature, \$100 was given sheriffs for their fees in criminal cases, it was held this was not meant to be their sole compensation, because there are many services rendered by sheriffs not provided for in the fee bill, *Parker v. Robertson*, 14 La. Ann. 249.

5. *Bilke v. Havelock*, 3 Camp. 374; *Preston v. Bacon*, 4 Conn. 471; *Shattuck v. Woods*, 1 Pick. (Mass.) 175; *Bussier v. Pray*, 7 S. & R. (Pa.) 447; *Carroll v. Tyler*, 2 Harr. & G. (Md.) 54; *Hatch v. Mann*, 15 Wend. (N. Y.) 49; but if the services are extra official he may receive reward for such services. *Warner v. Grace*, 14 Minn. 487; *Hatch v. Mann*, 15 Wend. (N. Y.) 44; *Smith v. Whildin*, 10 Pa. St. 39; 49 Am. Dec.

He is liable in an action to refund excessive or illegal fees.¹

V. MARSHAL.—The general duties of the United States marshal are substantially similar to those of the sheriff.² He holds office

572; or if they are rendered out of his precinct. *Brown v. Godfrey*, 33 Vt. 120; *People v. Rainey*, 89 Ill. 34; *Blake v. Baldwin*, 54 Conn. 5.

He is not entitled to profits made in using property attached. *Price v. Cutts*, 29 Ga. 142; 74 Am. Dec. 52.

Where a prisoner who was sick, promised the jailer if the latter would attend altogether to the prisoner instead of devoting his spare time to his business as a blacksmith, to pay him therefor twice as much as he could earn by his work, it was held that the contract was valid. *Trundle v. Riley*, 12 B. Mon. (Ky.) 396.

A deputy sheriff was held not entitled to compensation offered by an individual for procuring the return from another State of a fugitive from justice from his own State where the statute fixed the compensation of a State agent empowered for such a purpose, and forbade a public officer to receive any additional compensation for such service. *Day v. Townsend*, 70 Iowa 538. *Contra*, *Morrel v. Quarels*, 35 Ala. 544.

1. *Jackson v. Smith*, 52 N. H. 10; he is liable for commissions received and retained by him on an unauthorized sale, *Shropshire v. Pullen*, 3 Bush (Ky.) 512.

The payment of illegal fees without protest is not a waiver of the right to recover a statutory penalty. *McClure v. Locke*, 61 N. H. 14. *De jure* sheriff can recover the emoluments of his office received by the *de facto* sheriff during his usurpation. *Mayfield v. Moore*, 53 Ill. 428; 5 Am. Rep. 52; *Boyter v. Dodsworth*, 6 T. R. 681; *Glascock v. Lyons*, 20 Ind. 1; 83 Am. Dec. 299; *Currey v. Wright*, 9 Lea (Tenn.) 247; *McCue v. Wappel Co.*, 56 Ga. 598; *contra*, *Stuhr v. Curran*, 44 N. J. L. 181; 43 Am. Rep. 353.

Subrogation.—The sheriff, who for a default, has become liable, and has paid to the execution creditor the sum due on an execution which he has for collection, is subrogated to the creditor's rights against the debtor, *Heilig v. Lemley*, 74 N. Car. 250; 21 Am. Rep. 489; *Grant v. Ludlow*, 8 Ohio St. 1; *Staples v. Fox*, 45 Miss. 667; *Bellows v. Allen*, 23 Vt. 169; where the sheriff left the property with the defendant who removed it from the county and the sher-

iff paid the execution, the court issued a new execution for the benefit of the sheriff to be levied on real estate of the defendant. *People v. Onondaga*, 19 Wend. (N. Y.) 79.

Where the sureties on a sheriff's bond were compelled to pay for the default of the sheriff's deputy in taking indemnity fund instead of a bond, they were held to be subrogated to the rights of the sheriff against the deputy and his sureties and also against the indemnity fund. *Blalock v. Peake*, 3 Jones (N. Car.) 323.

Where the sheriff made an illegal levy, an attachment bond having been filed, and the sheriff has paid the judgment, he is subrogated to defendant's rights for what he has paid out. *Shaw v. Holmes*, 4 Heisk. (Tenn.) 692.

He is not authorized to pay money due on a judgment and keep it open for his own benefit. *Rutland v. Pippen*, 7 Ala. 469; *Finn v. Stratton*, 5 J. J. Marsh. (Ky.) 364; *Reed v. Pruyn*, 7 Johns. (N. Y.) 426; 5 Am. Dec. 287; *Hill v. Sewell*, 27 Ark. 15.

A sheriff who pays an execution in his hands for collection, without an assignment of the judgment or debt on which it is founded, cannot be subrogated to lien rights against creditors having lien by judgment. *Clevinger v. Miller*, 27 Gratt. (Va.) 740; *Fearnster v. Withrow*, 12 W. Va. 611; see *Sanford v. McLean*, 3 Paige (N. Y.) 117.

2. He cannot bind a vessel for repairs not absolutely necessary to the preservation of the vessel while in his custody. It is his duty merely to keep the vessel as he received her. *The Sultana*, Brown's Adm. 35.

The marshal is not bound to hold an execution the sixty days it might run before making a return: the presumption that he did his duty is not overcome by the fact that he returned the process the day he received it. *Bassett v. Orr*, 7 Biss. (U. S.) 297.

Bailiffs.—In States where a sheriff may, by writing, empower any person to execute process, a marshal may do the same. *U. S. v. Fayette Co.*, 2 Abb. (U. S.) 265.

A bailiff is a special deputy of the marshal. *In re Crittenden*, 2 Flip. (U. S.) 212; *Tug E. W. Gorgas*, 10 Ben. (U. S.) 460.

for four years,¹ and in the event of his death his deputies continue to act in his name until his successor is qualified; and a default of the deputy during this time constitutes a breach of the marshal's bond.² In case of a marshal's removal, or the expiration of his term, he or his deputies may execute all process then in his hands.³

If the marshal or his deputy is a party to a suit the process must be executed by a disinterested third person appointed by the court.⁴ It is his duty to keep the peace at national elections and protect the United States supervisors.⁵

The compensation of the marshal is a fixed salary, exclusive of expenses, and a suitable compensation for his deputies.⁶

VI. CONSTABLE.—The office of constable is one of great antiquity.⁷ At common law it was elective,⁸ and the constable's principal duties were police duties.⁹ His term was for a

Escape.—The marshal being called upon by the court to bring before it any defendant arrested by him on any original writ or mesne process according to the tenor of his return and failing to do so, will on motion be amerced to the amount of the debt, damages and costs. *Winter v. Simonton*, 3 Cranch (C. C.) 585.

But where he has committed a prisoner to a county jail under a *mitimus*, he has no further control over the prisoner and is not responsible for an escape. *U. S. v. Harden*, 4 Hughes (U. S.) 455.

Return.—The court will not direct the marshal what return to make on process in his hands. He must make a return at his peril. *Wortman v. Conyngham*, Pet. (C. C.) 241.

The court will not direct him to amend his return. *Steamer v. Circassian*, 1 Ben. (U. S.) 128.

Acts After His Term.—He may do certain acts after his term has expired. *U. S. v. Strobach*, 4 Woods (U. S.) 592.

He may sue personal property on which he has levied, but not real estate. *U. S. v. Bank of Arkansas*, Hempst. (U. S.) 460; *McFarland v. Gwin*, 3 How. (U. S.) 717; *Stewart v. Hamilton*, 4 McLean (U. S.) 534.

Deputy.—A deputy marshal is an officer of court subject to summary order or attachment for contempt. *Bark Lawrens*, Abb. Adm. 508; and the sheriff is answerable for his deputy's acts done *colore officii*. *Bark Lawrens*, Abb. Adm. 508; *Bagley v. Yates*, 3 McLean (U. S.) 465; *Rogers v. Marshal*, 1 Wall. (U. S.) 644.

Failure to Sell.—For neglect to sell he is liable to the plaintiff for what the property would have produced if he had sold it. *Dunlap v. West*, 2 Hayw. (N. Car.) 346.

Security.—If he does not take sufficient security on a replevin bond he will be liable. *Bispham v. Taylor*, 2 McLean (U. S.) 355.

False Return.—He is liable in an action for a false return. *Segourney v. Ingraham*, 2 Wash. (U. S.) 336.

Care of Property.—He is bound to keep property officially in his hands with due care and diligence; but he is not authorized to insure it. *Burke v. Brig M. P. Rich*, 1 Cliff. (U. S.) 509.

1. U. S. Rev. Stat., (1875), § 779.

2. U. S. Rev. Stat., § 789.

3. U. S. Rev. Stat., § 790.

4. U. S. Rev. Stat., §§ 922, 803.

5. U. S. Rev. Stat., §§ 2022, 5521.

6. U. S. Rev. Stat., § 841.

7. Bouv. Law Dict.

8. The chief or high constable was appointed by the greater number of the justices of the peace of a division. 1 Dickinson's Justice 474. The petit constables were chosen at the court-leet, and if not so chosen were appointed by the justices of the peace. Comyn's Dig., Constable B; 1 Dickinson's Justice 475. By statute in *England* magistrates were empowered to appoint special constables when a riot was likely to occur and such appointees were compelled to act under penalties.

9. The high constable was keeper of the peace for the hundred, and the petit constable for the town. Comyn's

year.¹ He was required to be an inhabitant of the place for which he was qualified to serve,² and to be duly sworn before entering upon the duties of the office.³

After justices of the peace were created the constable was the ministerial officer of the justice and was authorized to serve all warrants and præcepts within the authority of the justice.⁴

The constable for special reason, such as sickness or absence, could appoint a deputy.⁵

In the United States the name constable is applied to a class of officers, including policemen, city marshals and other officers whose duties are more generally, and perhaps exclusively, police duties. These officers are policemen, and possess in their districts the powers of the sheriff as conservators of the peace.⁶

A constable may arrest an offender without a warrant,⁷ whose arrest is necessary to prevent an immediate breach of the peace,⁸ or where a breach of the peace is committed in his presence.⁹ He may arrest without warrant an offender guilty of a felony.¹⁰

Dig., Constable A; 1 Dickinson's Justice 479; 1 Burn's Justice of the Peace 1016.

1. 1 Dickinson's Justice 479.

2. 1 Burn's Justice of the Peace.

3. If he refused to be sworn or to serve he could be fined and indicted. 1 Dickinson's Justice 476. Certain persons were exempt from service, however, such as physicians, surgeons, apothecaries, attorneys, militia-men, foreigners, and others for special reasons. 5 Burr. 2790; 1 Dickinson's Justice 478.

4. 1 Bl. Comm. 356; 1 Dickinson's Justice 479; Bacon's Abr., Constable D.

5. Rex v. Inhabitants, Cald. 252; Rex v. Clark, 1 T. R. 682.

In *Pruit v. Lowry*, 1 Port. (Ala.) 101, it was held that a levy and sale under an execution by one constable for another, which levy and sale were recognized and returned by the latter, were valid.

In *Dows v. McGlynn*, 6 Abb. Pr. (N. Y.) 241, it was held that a constable to whom an execution was directed, had no power to delegate his authority to another constable.

Where a constable holding an execution delivers it to another constable, who collects the money, the second constable is liable to the plaintiff in the execution in an action for money had and received but his sureties are not liable in any form. *Pettijohn v. Hudson*, 4 Harr. (Del.) 178.

6. Murfree on Sheriffs, §§ 1112-1129.

7. At common law he has no au-

thority to arrest a person on an ordinary charge of misdemeanor, except such as are breaches of the peace or threaten a breach of the peace. *Rex v. Curvan*, 1 Moore C. C. 132; *Reg. v. Phelps*, C. & M. 185; 41 E. C. L. 103; *Fox v. Gaunt*, 3 B. & Ad. 798; 23 E. C. L. 187; *Matthews v. Biddulph*, 4 Scott N. R. 54; *Griffin v. Coleman*, 4 H. & N. 265.

8. *Hunt v. Gray*, 1 Root (Conn.) 66; *Reg. v. Mabel*, 9 C. & P. 474; 38 E. C. L. 189; *Quin v. Heisel*, 40 Mich. 576. He may arrest without warrant where there has been a breach of the peace, and there is reasonable ground to believe it will be renewed. *Grant v. Moser*, 5 M. & G. 123; 44 E. C. L. 74. He may arrest a person threatening a breach, *Cohen v. Huskissin*, 2 M. & W. 482; *Reg. v. Light*, 1 D. & B. 339; but if the threat seems an idle one, the arrest would not be justified, *Reg. v. Bright*, 4 C. & P. 387; 19 E. C. L. 434; *Wheeler v. Whiting*, 9 C. & P. 262; 38 E. C. L. 111; *Price v. Seeley*, 10 C. & F. 28; *Baynes v. Brewster*, 2 Q. B. 375.

9. *Quin v. Heisel*, 40 Mich. 576; *Viners' Abr.*, Constable E., and all persons called to his assistance are protected, 1 East P. C. 303. If the arrest is not made on the instant it should be made so soon after as to make it one transaction, *Howell v. Jackson*, 6 C. & P. 723; 25 E. C. L. 617; *Cook v. Nethercote*, 6 C. & P. 741; 25 E. C. L. 627.

10. He will be justified in making the

He should take the prisoner before a magistrate for a hearing as soon after arrest as possible.¹ It is generally provided by statute that an officer, in the execution of his duty, may command aid and that any person refusing such aid shall be liable to punishment.²

The constable, properly so called, besides having the powers above mentioned, as a peace officer, has other powers (within certain limits prescribed by the statutes of his State), similar to those of a sheriff, to act in civil proceedings. His duties and his liabilities, within the scope of his authority, are measured by the rules applied to sheriffs.³ He is declared by the statutes of many

arrest without a warrant, although he arrests the wrong person, if he has reasonable cause to believe the person arrested is the offender; and this would be so although no felony had been committed, if he had proceeded on reasonable grounds of information or belief. Bacon's Abr., Constable C; Viner's Abr., Constable E.; Rohan v. Sawin, 5 Cush. (Mass.) 281; Eanes v. State, 6 Humph. (Tenn.) 53; Samuel v. Payne, 1 Doug. 359; McCloughan v. Clayton, Holt N. P. 478; Davis v. Russell, 5 Bing. 354; 15 E. C. L. 463; Beckwith v. Philby, 6 B. & C. 638; 13 E. C. L. 287; Lawrence v. Hedger, 3 Taunt. 14; Hogg v. Ward, 3 H. & N. 417; Griffin v. Coleman, 3 H. & N. 265; Parton v. Williams, 3 B. & Ald. 334.

He is not bound to arrest a person on the order of a private individual. Parton v. Williams, 3 B. & Ald. 334.

1. Touhey v. King, 9 Lea (Tenn.) 422; Pratt v. Hill, 16 Barb. (N. Y.) 303; Edwards v. Ferris, 7 C. & P. 542, 32 E. C. L. 622. He may detain him for a reasonable time, if magistrate is inaccessible, until he finds the magistrate. Arnold v. Steeves, 10 Wend. (N. Y.) 515; Wiggins v. Norton, 83 Ga. 148; Braddy v. Hodges, 99 N. Car. 319; Vandever v. Matlocks, 3 Ind. 479; Johnson v. Americus, 46 Ga. 80; Wright v. Court, 4 B. & C. 596; 10 E. C. L. 412; Cochran v. Toher, 14 Minn. 385.

2. These provisions do not permit the officer to commit the performance of his duty to some other person, but give him authority to associate with him persons in such number as he considers necessary to overcome resistance. Rex v. Patience, 7 C. & P. 775; 32 E. C. L. 730; People v. Moore, 2 Doug. (Mich.) 1; People v. McLean, 68 Mich. 480.

It was held in *Comfort v. Com.*, 5 Whart. (Pa.) 437, if he be resisted in the service of a *capias* he may raise the *posse comitatus* for his assistance.

3. He is bound to execute process valid on its face and not void. Billings v. Russell, 23 Pa. St. 192. He cannot avail himself of any mere irregularities in the process, not rendering it or the judgment void, to excuse his failure to execute it. Couch v. Atkinson, 32 Ala. 633. He is protected from liability in serving process valid on its face. McDonald v. Wilkie, 13 Ill. 22; 54 Am. Dec. 423; Fortner v. Flannagan, 3 Port. (Ala.) 257. If he serves process which on its face shows that the justice who issued it has no jurisdiction, he is a trespasser. Hall v. Blaisdell, 2 Ill. 332; Sasnett v. Weathers, 21 Ala. 673; Crumpton v. Newman, 12 Ala. 199.

In *Morrell v. Cook*, 35 Me. 207, it was held that a constable could make a legal service of a writ within his jurisdiction, although it was not directed to him, as the direction, being matter of form, is not necessary to the validity of the writ.

He should make due return of his process. Robertson v. Marshall County, 5 Gilm. (Ill.) 559, in writing and signed, Fitzgerald v. Adams, 9 Ga. 401; Shaver v. Funk, 5 W. & S. (Pa.) 457; and, if the process is valid, is liable for failure to do so. Kautzler v. People, 11 Bradw. (Ill.) 610; Betts v. Baxter, 58 Miss. 329. He cannot rid himself of his duty to return the writ by transferring it to another constable to execute. Calhoun Co. Ct. v. Back, 27 Ill. 440. The return may be amended. Freeman v. Cohart, 17 Ga. 348.

If he sells the entire property in goods owned by two jointly, under an

States to be the proper ministerial officer of a justice of the peace, and unless other provision be made by statute, the one to serve his process.¹

The office of constable, in the United States, is generally a town office, corresponding to that of petit constable at common law. The constable is generally elected at periods varying from one to four years in the different States.² The liability on his official bond is measured by the rule applied to sheriffs' bonds.³

execution against one of them, he is a trespasser. *Smith v. Tankersley*, 20 Ala. 212.

If process has been superseded he is protected in serving it, unless notified of the supersedeas. *Payne v. Governor*, 18 Ala. 320. He cannot serve a writ where he is plaintiff. *Morton v. Crane*, 39 Mich. 526. He is liable for the escape of a defendant whom he has arrested on *ca. sa.* *Abbott v. Holland*, 20 Ga. 598.

Illegal Security.—A constable has no right to receive a deposit of money as security for the appearance of a defendant arrested by him upon a civil warrant, and if he does, refusing to pay it upon demand is a conversion for which an action lies. *Millard v. Canfield*, 5 Wend. (N. Y.) 61.

Void Promise.—A promise by a constable to a debtor against whom he has an execution, that if the debtor will deliver property as security he will wait thirty days before selling it, is without consideration and void. *Goodale v. Holridge*, 2 Johns. (N. Y.) 193.

1. Bacon Ab. Constable D.; Murfree on Sheriffs, § 1112.

The scope of his powers depends on the statutes of the different States. *Lowe v. Alexander*, 15 Cal. 296; *Lafontaine v. Greene*, 17 Cal. 394. He must bring himself within the provisions of the statute, and cannot serve any other process. *Conner v. Palmer*, 13 Met. (Mass.) 302; *Hart v. Huckins*, 5 Mass. 260; *Tilley v. Damon*, 11 Cush. (Mass.) 247. When acting outside of these limits he is not vested with official character. *People v. Burt*, 51 Mich. 199.

Where A was appointed a policeman with the powers of a constable at a theater, under the provisions of a statute authorizing such appointment, it was held that his power was not confined to the space within the walls of the theater, but extended to the envi-

rons so far as the special vigilance of an officer might be required to keep the peace and preserve order among persons frequenting the theater. *Com. v. Hastings*, 9 Met. (Mass.) 259.

2. If he ceases to be a resident of the town during the term for which he is chosen, he vacates the office. *Barre v. Greenwich*, 1 Pick. (Mass.) 129.

Some States provide a punishment, as at common law, for one who, being elected, refuses to serve. *Massachusetts Pub. Stat.*, ch. 27, § 112.

Sale of Office.—The sale of the office is contrary to public policy, and a note executed for the price is void. *Meredith v. Ladd*, 2 N. H. 517; *Groton v. Waldo*, 11 Me. 306; 26 Am. Dec. 530.

The vote of a town, that whoever "should make the lowest bid for collecting the taxes" would be the constable, is not the choice of such person for that office, because the electors vote for no particular person. *Crowell v. Whittier*, 39 Me. 530.

Special Constables.—There is a provision in the statutes of most States for the appointment of special constables. Where the justices of the peace had authority under the statute, "in cases of emergency," to appoint a special constable, it was held that the justices were the exclusive judges of the necessity of such appointment. *Moles v. State*, 24 Ala. 672.

3. The liability is fixed by the terms of the bond and the statutes in force at the time. *Freudenstien v. McNier*, 81 Ill. 208.

The sureties may be liable, though the bond varies from the statutory bond. *Prince v. McNeill*, 77 N. Car. 398.

In a suit on the bond the constable is not permitted to deny that he is an officer. *Shaw v. Havekluft*, 21 Ill. 127; nor can the sureties take advantage of a neglect to swear the constable, or to approve his bond. *Musselman v.*

His fees depend upon the statutory regulations of his State.¹ He may hold another office not incompatible with that of constable.²

Com., 7 Pa. St. 240; nor can they object that the security was not filed within the statutory time. *Dutton v. Kelsey*, 2 Wend. (N. Y.) 615.

The sureties are not liable for an act of the constable's prior to the time when the bond takes effect. *Bryan v. Kelly*, 85 Ala. 569. Where a demand was put in a constable's hands for collection in 1839 and he committed a breach of duty in not collecting it that year, and he was reappointed for 1840 and committed a like breach during that year, it was held the injured person had an election to resort to either bond or to both bonds and might recover his full damages in either suit. *State v. Wall*, 9 Ired. (N. Car.) 20. Where a constable receives an execution during his first term returnable after the expiration of that term, and he is chosen for a second term and gives bond for that term, the sureties on the bond for the first term are not liable for his failure to pay over the money on the return day, because the default did not occur during the term covered by the bond. *Warren v. State*, 11 Mo. 583.

Scope of Liability.—If the act is committed under color and by virtue of his office he and his sureties are liable. *Jewell v. Mills*, 3 Bush (Ky.) 62; *Lowell v. Parker*, 10 Met. (Mass.) 309; and it is immaterial so far as the sureties' liability is concerned that the act was instigated wholly by private malice and was in no way connected with his duties as constable. *Clancy v. Kenworthy*, 74 Iowa 740; 7 Am. St. Rep. 508.

His sureties are liable for his levy on exempt property, *McElhaney v. Gilleland*, 30 Ala. 183; for his act in levying on the goods of a stranger to the writ, *Brunott v. McKee*, 6 W. & S. (Pa.) 513; *Walsh v. People*, 6 Ill. App. 204; *Horan v. People*, 10 Ill. App. 2; *Archer v. Noble*, 3 Me. 418; for damages by reason of his negligence, to goods seized by him and in his hands by virtue of a writ. *Witkowski v. Herp*, 82 Cal. 604.

The sureties are not liable for money collected by the constable, except by virtue of process, when such collection is no part of his required duty, *Henckler v. Monroe Co. Ct.*, 27 Ill. 39; *White*

v. Com., 3 Dana (Ky.) 462; *Bogart v. Green*, 8 Mo. 115; *Treasurers v. Temples*, 2 Spears (S. Car.) 48; *Crittenden v. Terrill*, 2 Head (Tenn.) 588; nor are they liable for his failure to pay to the plaintiff money intrusted to him (the constable) for the purpose after the writ was served, *Boston v. Moore*, 3 Allen (Mass.) 126.

In *State v. Stephens*, 3 Ired. (N. Car.) 92; *State v. Eskridge*, 5 Ired. (N. Car.) 411, *State v. Wall*, 8 Ired. (N. Car.) 11, the sureties were held liable for the constable's failure through his default to collect notes in his hands for collection.

The sureties held not liable where the constable purchased property from the judgment debtor, and, as a part of the price, agreed to pay the judgment, which he failed to do, *Hill v. Kemble*, 9 Cal. 71; nor are they responsible for an act not done in his official capacity, *Snapp v. Corn*, 2 Pa. St. 49.

1. He cannot generally recover fees for a mere levy without a sale. *Pixley v. Butts*, 2 Cow. (N. Y.) 421. He may receive a compensation agreed on to go out of his county to serve a warrant without being liable for taking illegal fees. *People v. Rainey*, 89 Ill. 34. He cannot recover on a *quantum meruit* for services, the fees for which are fixed by statute, *Wilcoxson v. Andrew*, 66 Mich. 553; but he may if the statute does not prescribe the fees, *Waldron v. Tuttle*, 4 N. H. 149. Where a constable defended an action to protect his levy, the plaintiff in the execution having had notice of his so doing and having succeeded, paid his attorney from the proceeds of the levy, and retained the sum so paid, it was held he was justified in doing so. *Johnson v. Haynes*, 37 Hun (N. Y.) 303.

2. It has been held that he could be a justice of the peace. *Com. v. Kirby*, 2 Cush. (Mass.) 577; *contra*, *Chapman v. Shaw*, 3 Me. 372; *Pooler v. Reed*, 73 Me. 129.

It is quite generally provided by statute that he shall not make any writ, declaration, etc., in an action; under such a statute, which mentioned "sheriffs" only, it was held that constables were included. *Winchell v. Pond*, 19 Vt. 198.

SHERIFF'S SALES.—(See also APPRAISEMENT, vol. 1, p. 634; EXECUTION, vol. 7, p. 117; FORECLOSURE OF MORTGAGES, vol. 8, p. 185; INDEMNITY CONTRACTS, vol. 10, p. 402; INJUNCTIONS, vol. 10, p. 777; JUDICIAL SALES, vol. 12, p. 208; NOTICE, vol. 16, p. 787; RECEIPTOR, vol. 19, p. 1111; RECORDING ACTS, vol. 20, p. 527; REDEMPTION, vol. 20, p. 608; SHERIFFS, vol. 22, p. 525.)

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I. DEFINITION.—A sale is an exchange of a commodity for its equivalent in money.¹

In the absence of a contrary indication, the term "sheriff's sales" will herein be used in its ordinary generic sense—namely, as applying to official sales by the sheriff, deputy, constable, coroner, high bailiff, or marshal.²

A judicial sale is a sale made in pursuance of a mandate of a competent court by an officer therefor authorized.³ This, in effect, includes generically every sheriff's sale that requires confirmation by the court; and conversely.⁴

1. The command, "*feri facias*," etc., "cause to be made out of the defendant's goods the sum," etc., means "raise the cash." 3 Bl. Com. 417. No credit can be granted except by consent of the parties, special mandate of the court, or statutory exception. For collation of statutes, and decisions thereon, defining the rights and liabilities of the sheriff, the purchaser and the parties, see *infra*, this title, *Conducting the Sale—Cash or Credit; The Purchaser's Title—When a Lienholder Purchases*.

2. In some statutes, the word "sheriff" includes "constable." *Winchell v. Pond*, 19 Vt. 198; *Hume v. Norris*, 5 Oregon 478.

3. Abb. L. Dict.; Black L. Dict.; Bouv. L. Dict.; Burrill L. Dict.; Rappalje & Law. L. Dict., Art. "Judicial Sale."

4. See JUDICIAL SALES, vol. 12, p. 208, also p. 209, note, quoting *in extenso* from the opinion in *Andrews v. Scotton*, 2 Bland (Md.) 629.

Market Overt.—A leading case distinguishing a sheriff's sale from a judicial sale, is that of *Griffith v. Fowler*, 18 Vt. 390, wherein Redfield, J., observes that the rigorous English doctrine that a sale in market overt passes an absolute title to the chattel, does not apply to any sheriff's sale in *Vermont*; the purchaser acquiring only the execution debtor's interest. So also in *Massachusetts*. *Dame*

II. PRELIMINARIES—1. Sheriff's Duty as Bailee.—A sheriff in possession of personal property under a levy is bound to exercise the care usually bestowed upon such property by prudent owners.¹ If, by his undue delay, the property is depressed, or the title passes to an assignee in bankruptcy, he is liable to the execution creditor for the value, if this does not exceed the amount of the execution.²

2. Cognizance of Nullity—*a.* JUSTIFICATION UNDER PROCESS.—Although it be a rule of common law, and in some States even prescribed by statute, that the sheriff may justify seizure under an execution regular upon its face, whatever be the defects in the previous proceedings, it is his duty, before appraisal or advertisement, to heed all facts ascertainable by due vigilance, affecting his power to sell.³ He is presumed to know the pertinent

v. Baldwin, 8 Mass. 518; and in *New York. Wheelwright v. Depeyster*, 1 Johns. (N. Y.) 480; 3 Am. Dec. 345. Chancellor Kent even affirms that the law of markets overt does not exist in this country. 2 Kent's Com. 324. See also Kent's Com. (13th ed.), note 1. Where two churches agreed that a lot in dispute should be sold by the sheriff and the settlement be made the judgment of the court, it was held that such a sale was not a judicial sale. *Doyle v. African Meth. Church*, 43 Ga. 400.

1. His liability for negligence is not that of an insurer, but of an ordinary bailee for custody and sale. *Sherman and Redf. Neg.*, § 621; *Browning v. Hanford*, 5 Hill (N. Y.) 591; 40 Am. Dec. 369. Such property need not be taken into his actual possession, provided it be forthcoming to answer the exigencies of the writ. *Dorrance v. Com.*, 13 Pa. St. 160.

Statutes either specifically (like *Massachusetts Pub. Stat.*, ch. 161, §§ 90-95) prescribe for attachment, immediate appraisal, and sale of live animals and perishable property, or generally (like *Mississippi Rev. Code*, 1880, § 1758) "at such time and place and in such manner as sound discretion may warrant."

In *Arizona*, a levy may be made on animals running in a range by making a reasonable estimate in presence of two credible persons, and giving notice to the owner or his herder, and filing a copy in the county recorder's office; and the execution purchaser may pen them and select, etc. *Arizona Ex. Law* of 1889, p. 39, §§ 9, 15.

In *Missouri*, if no receiver be appointed to hold the account books, etc., the sheriff shall act, and when re-

quired, give security other than his official bond. *Missouri Rev. Stat.* 1889, § 4919. In *New York*, a sale under execution, without leave of the court, of property in a receiver's hands, is void. *French v. Pratt*, 54 Hun (N. Y.) 635.

2. See *infra*, this title, *Sheriff's Rights and Liabilities—Liability to the Plaintiff*. *Crawford v. Word*, 7 Ga. 445.

In *England*, however, the sheriff is consequently liable to the plaintiff only for the actual damage suffered by him. *Clifton v. Hooper*, 6 Q. B. 468. This has been animadverted upon as allowing the execution plaintiff to be perpetually kept out of the fruits of his judgment during the continuing solvency of the defendant, if it is impossible to show that any beyond nominal damages resulted from the failure to sell. *Freeman Ex.* (2d ed.), § 304.

The sheriff is liable to be amerced for laches, although no *vend. exp.* has been issued. See *infra*, this title, *Sheriff's Rights and Liabilities—Amercement*.

In *Jeanes v. Wilkins*, 1 Ves. 195, the court by *Ld. Ch. Hardwicke* said: "A *vend. ex.*, though a proper writ, is not of necessity, being rather to compel the sheriff, when guilty of laches, to do what he has authority to do, than to give him a new authority." But compare *Porter v. Neelan*, 4 Yeates (Pa.) 108.

3. See *infra*, this title, *Sheriff's Rights and Liabilities—Liability to the Defendant*.

He would be liable for conversion if he proceeded to sell after the execution defendant had tendered the amount of

law and any limitations of territorial jurisdiction.¹ He is bound to recognize that if either the execution or the levy is void, the order of sale thereunder is also void, also that a sale under a void² or satisfied judgment is a nullity.³ If there be any harmful irregularities whereof he has actual or constructive notice, he proceeds at his peril.⁴

b. ADVERSE CLAIMS.—In case of complications arising from intervention of adverse third claimants of personal property levied upon, it is the sheriff's duty promptly to avail himself of the appropriate statutory proceedings for protection and adjustment.⁵

the judgment, costs and fees on a sale, on the pretext that the amount was insufficient. *Tiffany v. St. John*, 5 Lans. (N. Y.) 153.

But if the defendant simply pays the amount of the judgment to the execution plaintiff before the time for sale, he is liable to the sheriff for the fees allowed in case of a levy. *Morse v. Gibbons*, 43 Cal. 377.

Where a sheriff, believing he could not postpone, conducted the sale in great haste, in absence of the owner of the greater part of the judgment, and the price was only one-twelfth of the value, the sale was set aside. *Kauffman v. Morriss*, 60 Tex. 119.

1. Under *Alabama Code*, 1886, § 2882, a *fi. fa.* is addressed "to any sheriff of the State." It seems, that if it be delivered to the sheriff of one county, and be by him acted under, it is invalid in the hands of the sheriff of any other county. *Plant v. Anderson*, 16 Fed. Rep. 914.

In *Georgia*, a whole tract of land divided by the county in which the execution defendant resides, can be levied on and sold as his property by the sheriff of that county, but not by the sheriff of the adjoining county. *Farnbrough v. Amis*, 58 Ga. 519.

In *Indiana*, a sale on three executions when the one first to be satisfied was wrongly issued, was held to be invalid, as based on a defective record. *Brown v. McKay*, 16 Ind. 484.

In *Michigan*, although it is irregular to issue two executions at once upon the same judgment to the sheriffs of different counties, yet a sale under one, without the other's return, is not necessarily void. *Atwood v. Bearss*, 45 Mich. 469.

In *North Carolina*, after a sale of land on one execution, a sale thereof on another, later issued on the same

judgment, gives no title. *Beebles v. Pate*, 90 N. Car. 348.

In *Tennessee*, a sale is valid, made under two executions, only one of which is sufficient. *Simpson v. Sparkman*, 12 Lea (Tenn.) 360.

In *New York*, the sheriff may make a valid sale upon the junior execution, whether the senior be in his own or another's hands. *Marsh v. Lawrence*, 4 Cow. (N. Y.) 461.

In *Massachusetts*, where the senior execution creditor's sale of goods was, by his direction, made on six months' credit, the sheriff keeping the goods as security, and, on the purchaser's failure, they were sold under the junior execution for cash, it was held that the first sale was invalid, and the proceeds should be applied on the junior execution. *Bayley v. French*, 2 Pick. (Mass.) 586.

2. *Jones v. Calloway*, 56 Ala. 46; *Maxwell v. King*, 3 Yerg. (Tenn.) 460; *Floyd v. Goodwin*, 8 Yerg. (Tenn.) 484; *Criswell v. Ragsdale*, 18 Tex. 403.

3. See *infra*, this title, *Void Judgment*.

4. See *infra*, this title, *Effect of Irregularities—Sheriff's Liabilities*.

In *Georgia*, it has been held to be no justification of a sheriff's suspension of the sale, that he had been notified that the defendant was adjudicated a bankrupt and that the property was exempt under the bankrupt law. *Wheeler v. Redding*, 55 Ga. 87.

5. See *infra*, this title, *Liability to Third Parties*. As to property in *custodia legis*, see *EXECUTIONS*, vol. 7, p. 129.

Where a sheriff, when requested by the execution plaintiff to sell, refused on the ground (set forth in his return) that the goods were claimed by other parties, but asked of the plaintiff no indemnity, nor took any measures to

3. Injunction or Stay.—The sheriff is liable for proceeding after being served with an injunction, notice of allowance of a writ of error or of *certiorari*, and commanded to stop; or after being officially notified of a *supersedeas* or other stay.¹

4. Waiver of Formalities.—Essential formalities can be waived only by common consent of the parties.² The rule that the

secure himself against the claim, it was held that he was liable to amercement; and that the burden of proof was on himself to show that goods whereof the defendant was found in possession were not liable to the levy. *Harris v. Kirkpatrick*, 35 N. J. L. 392.

1. As to the plaintiff's control of proceeding, see *infra*, this article. *Plaintiff's Rights and Liabilities; Sheriff's*, etc.—*Liability to the Plaintiff*, and *Liability to the Defendant*.

As to a *Michigan* rule of court for bidding "proceedings to enforce" a decree before its enrollment, not applying to execution sales, see *Taylor v. Gladwin*, 40 Mich. 232.

On being enjoined, the sheriff must return the writ, with a statement of his action, and the reason for his ceasing to act. *Bryan v. Hubbs*, 69 N. Car. 423.

Existence of an injunction sanctioned by the sheriff's own fault affords him no excuse for delay. *Neal v. Price*, 11 Ga. 297.

If the purchaser refuses to pay, the sheriff is not bound to make himself liable and sue the purchaser. He must, upon being enjoined to stay, etc., restore the chattels to the owner. *Bisbee v. Hall*, 3 Ohio 449.

An order of stay is operative from the time of service, and a sale subsequently made of part of the chattels levied on is properly declared to be naught. *Bernheim v. Daggett*, 12 Abb. N. Cas. (N. Y.) 316.

In *Minnesota*, when the sale is enjoined, the sheriff should note the fact on the execution and simply retain his levy; if the injunction is not dissolved before the return-day, he should return the facts; if it is, he should advertise again, and sell in the ordinary way, but he should not adjourn the sale. *Pettingill v. Moss*, 3 Minn. 222; 74 Am. Dec. 747.

As to when a member of a partnership, who claims as exempt the property levied on, cannot make the sheriff a party to a suit to enjoin the sale, see *Stout v. McNeill*, 98 N. Car. 1; *Mann v. Wallis*, 75 Tex. 611.

In order to make the sheriff a party to a suit to restrain the sale, he must be interested in the subject-matter, and there must be no adequate remedy at law. *Howell v. Foster*, 122 Ill. 276; *Dunn v. Baxter*, 30 W. Va. 672; *Driggs Bank v. Norwood*, 50 Ark. 42; *Swayze v. Hackettstown Nat. Bank*, 44 N. J. Eq. 9.

As to the effect of alleged insolvency of the sheriff's sureties thereon, see *Bentley v. Crenshaw*, 85 Ga. 871. As to the effect of insolvency of parties to the judgment, see *Biggerstaff v. Hoyt*, 62 Mo. 481.

In *Indiana*, the sale of A's land under an execution against B may be enjoined. *Scobey v. Walker*, 114 Ind. 254. But compare, as stating the better rule, *Baker v. Rinehard*, 11 W. Va. 238; *Searles v. Jacksonville, etc., R. Co.*, 2 Woods (U. S.) 621; *Davidson v. Seegar*, 15 Fla. 671.

In *Louisiana*, an injunction granted against the sale of one undivided half of a plantation, need not prevent the sale of the other undivided half. If the sale is to be made with benefit of appraisalment, the one-half of the estimated value of the entire property is the proper basis on which the sale should be made. Thereupon the sheriff, on refusal, could be compelled by mandamus to make formal title to the half sold, and to put the purchaser in possession thereof. *Losee v. De Lacey*, 23 La. Ann. 287.

As to injunction against sale on seizure pending a suspensive appeal, see the complicated case, *Choppin v. Blanc*, 25 La. Ann. 35.

2. In *South Carolina*, where, at a sale of slaves levied on, the execution creditor, privately and without consent of the defendant administratrix, arranged with an insolvent bidder (a distributee of the estate) temporarily to remove them without payment, and, on a resale four years later (that was forbidden by various persons), the slaves brought only a nominal sum, it was held that, as against her, the execution must be regarded as satisfied; the effect was as if the sheriff had of

formalities in forced alienations are to be strictly observed, is intended rather for the benefit of the defendant and purchaser.¹

In order to avoid hardship in dispensing justice, the provisions of merely directory statutes as to the preliminaries of the sale have sometimes been considered as waived.² But proceedings in disregard or waiver of a mandatory statute invalidate the sale.³

5. Death of a Party.—In some States, the sheriff's procedure on the death of the defendant is prescribed by statute.⁴ In some

his own head waived the formalities. *Richardson v. Inglesby*, 13 Rich. Eq. (S. Car.) 59.

The *Connecticut* requirement that all the appraisers be freeholders of the town, etc., cannot be waived by agreement of the parties. *Chapman v. Griffin*, 1 Root (Conn.) 126.

In *Louisiana*, the debtor's telling the sheriff at the sale that no appraisal was necessary, was held to be a sufficient waiver. *Desplate v. St. Martin*, 17 La. Ann. 91. Waiver by an execution debtor in failing circumstances is of no effect. *Hiligsberg's Succession*, 1 La. Ann. 340.

In *Arkansas*, the defendant's acquiescence during all the proceedings may preclude him in a collateral suit from attacking the validity of the sale. *Feild v. Dortch*, 34 Ark. 399.

1. As to waiver of appraisal, see *infra*, this title, *Preliminaries—Non-Appraisalment*. As to waiver of the notice, see *infra*, this title, *The Notice—Waiver and Estoppel*. See *infra*, this title, *Sheriff's, etc.—Liability to the Defendant*.

2. See *infra*, this title, *The Notice—Effect of Want of Notice; Statutes Mandatory or Directory*.

After a levy had been set aside, a sale on a new inquisition and *vend. exp.* was held not to be affected by the want of an *alias fi. fa.* and new levy. *Thompson v. Phillips, Baldw.* (U. S.) 246.

A discrepancy between the writ and the notice (of sale of a tan yard) as to the terms of payment was held not to be fatal. *Lewis v. Gordy*, 5 La. Ann. 570.

As to the distinction between an implied waiver and an estoppel, see *Bigelow, Estop.* (5th ed.) 660.

3. See *infra*, this title, *Vacating Sales—Grounds for Vacating*.

So held, as to sale without previous issuance of the *vend. exp.*, prescribed by the *Pennsylvania* act of 1705. *Porter v. Neelan*, 4 Yeates (Pa.) 108.

4. In *Missouri*, if the defendant dies after the levy, the sheriff must return the execution, stating the fact, and this shall be sufficient indemnity for his failure to proceed. *Missouri Rev. Stat.* 1889, § 6025.

In *Indiana*, *Oklahoma*, and a few other States, the defendant's death does not affect the proceedings, except to exempt the widow's allowance. *Oklahoma Stat.* 1890, § 4811. *Indiana Rev. Stat.* 1881, § 790. If it occurs after the levy, the sheriff may proceed to sell. *Doe v. Heath*, 7 Blackf. (Ind.) 154.

In *Colorado*, on defendant's death before the issuance, the judgment creditor's remedy shall not be suspended by non-age of defendant's heirs, but the execution must not issue within one year from the decease. *Colorado Annot. Stat.* 1891, § 2533. But after a year, it may issue against the representative without reviving the judgment. § 2570.

In *Illinois*, a sale without the statutory notice to the defendant's executor, or a *sci. fa.*, is void. *Ransom v. Williams*, 2 Wall. (U. S.) 313. Compare *Turney v. Young*, 22 Ill. 253; *Clingman v. Hopkie*, 78 Ill. 152.

In *Mississippi*, if a party dies after a stranger has interposed a claim, a *sci. fa.* issues to the executor, etc. *Mississippi Rev. Code*, 1880, § 1779.

In *Alabama*, on defendant's death before issuance of the execution, the sale would be void. *Meyer v. Hearst*, 75 Ala. 390.

In *New Jersey*, if the defendant die after the issuance, and a levy be made thereafter, the selection for the use of his family is relegated to the ordinary. *New Jersey Rev.* 1878, p. 392, § 16.

Under the *Texas* probate act of 1848, land levied on before the owner's decease, can only be sold thereafter by order of the county probate court. *Burdett v. Chandler*, 22 Tex. 14.

A sale under an execution issued after the defendant's death, on a judg-

States his death, after the levy, need not hinder the sheriff's proceeding to sell; the sale not being void, but, under certain circumstances, voidable.¹ In many States, if the only defendant has died after levy there must be a revivor.²

Upon the death of the plaintiff the judgment must be revived in the name of his personal representative.³ On death of the purchaser, his representatives are entitled to the deed.⁴

6. Reservations—*a*. DOWER.—In absence of any statutory provision therefor, a widow's right to have dower assigned cannot be seized or sold.⁵

ment rendered theretofore, is void. *Cain v. Woodward*, 74 Tex. 549.

Under the *Pennsylvania* law of 1836, an amicable *sci. fa.* can be filed *nunc pro tunc* to cure an irregular sale under such judgment. *Diese v. Fackler*, 58 Pa. St. 109.

A sale was held valid, though on revivor against the terre-tenant only. *Colborn v. Trimpey*, 36 Pa. St. 463. See *Rosengarten v. Deemer*, 1 W. N. C. (Pa.) 63. So also was held valid a sale under a judgment against an administratrix by default on *sci. fa.* to revive a judgment against her intestate, although another *sci. fa.* was pending at his death. *Middleton v. Middleton*, 106 Pa. St. 252.

In *Tennessee*, if the execution defendant dies after levy and before a valid sale, his heirs may demand a revivor against the personal representative; also exhaustion of personal assets before the lien can be enforced by sale of the land. *McKnight v. Hughes*, 4 Lea (Tenn.) 522.

1. This was the case at common law. *Tidd's Prac.* 915; *Lewis v. Coombs*, 60 Mo. 44; *Jones v. Jones*, 1 Bland (Md.) 443; 18 Am. Dec. 327; *Hughes v. Wilkinson*, 37 Miss. 481; *Aycock v. Harrison*, 65 N. Car. 8; *Wait v. Savage* (N. J. 1888), 15 Atl. Rep. 225; *Wood v. Morehouse*, 45 N. Y. 368; 1 Lans. (N. Y.) 405; *Holman v. Holman*, 66 Barb. (N. Y.) 215.

In *New York*, A's purchase under A's execution against B of B's life estate, was held to be a valid satisfaction of the judgment, although B died after the levy, and before A was entitled to enter upon the land. *Kleinhenz v. Phelps*, 6 Hun (N. Y.) 568.

In *Ohio*, if the defendant dies after a levy on real estate and before sale, his representatives need not be made parties to the judgment. *Bigelow v. Renker*, 25 Ohio St. 542.

In *Alabama*, in such case, the sale cannot be impeached, in a collateral proceeding, because it was made under a *vend. exp.* or because personal notice of the levy had not been given him. *Strange v. Graham*, 56 Ala. 614.

In *Arkansas*, a sale under an execution issued and bearing *teste* after the defendant's death without a revivor, is a nullity, and open to collateral attack. *Cunningham v. Burk*, 45 Ark. 267.

2. *Bristow v. Payton*, 2 T. B. Mon. (Ky.) 91; 15 Am. Dec. 134; *Stockard v. Pinkard*, 6 Humph. (Tenn.) 119; *Harrison v. Wood*, 1 Dev. & B. Eq. (N. Car.) 437; *Cartney v. Reed*, 5 Ohio 221; *Woodcock v. Bennet*, 1 Cow. (N. Y.) 711; 13 Am. Dec. 568.

3. In *Colorado*, thereupon the letters of administration may be recorded in the court, and execution issue in the name of the executor or administrator. *Colorado Annot. Stat.* 1891, § 2571.

In *Tennessee*, a sheriff has no power to sell and convey real estate under a *vend. exp.* issued after death of the plaintiff in the judgment of condemnation, without such revivor. *Hewgly v. Johns*, 59 Tenn. 85.

4. See *infra*, this title, *The Deed—To Whom*.

5. As to her right generally, see *DOWER*, vol. 5, p. 884; *Gooch v. Atkins*, 14 Mass. 378; *Nason v. Allen*, 5 Me. 479; *Tompkins v. Fonda*, 4 Paige (N. Y.) 448; *Pennington v. Yell*, 11 Ark. 212; 52 Am. Dec. 262. For collation of decisions, see 2 Scribner, *Dower*, p. 37, *et seq.*

As to the effect of the *Indiana* statute of 1852, substituting for dower an estate in fee simple, see *Thatcher v. Devol*, 50 Ind. 30.

The purchaser stands, as to improvements, as if the conveyance had been by deed directly from the husband. *Ayer v. Spring*, 9 Mass. 8; *McClana-*

So also as to the right of quarantine.¹

b. HOMESTEAD.—In some States, the statute providing for laying off the homestead, in proceedings on execution, is considered merely as directory, and the sheriff's failure to have it set out as not to invalidate the sale.² Otherwise where the statute is adjudged mandatory.³

han v. Porter, 10 Mo. 746; Summers v. Babb, 13 Ill. 483.

In *Georgia*, the widow's right of dower in land seized as her deceased husband's, may be reserved in the sale, though this was not done in the levy, and the deed be effective as to the reversion. Parler v. Johnson, 81 Ga. 254.

In *Pennsylvania*, statutory dower, before assignment, may be seized and sold. Thomas v. Simpson, 3 Pa. St. 60. Although a sale under an execution against a tenant in tail does not pass the heir's title, it divests the wife's title to dower. Elliot v. Pearshall, 3 Pa. L. J. 157.

As to the *New York* law and the rights of parties thereunder, see Jackson v. Aspell, 20 Johns. (N. Y.) 411.

The *Missouri* statute providing that a "creditor" of the widow, or of her husband, may have her dower assigned and thus render it amenable to execution, does not change the common-law rule. Waller v. Mardus, 29 Mo. 25.

1. Cook v. Webb, 18 Ala. 810; Wallis v. Smith, 2 Smed. & M. (Miss.) 220.

2. As to the homestead exemption generally, see HOMESTEAD, vol. 9, p. 423.

In *Georgia*, if the sheriff sells pending application for assignment of homestead, equity will enjoin eviction until the rights of the parties be adjusted. Kilgore v. Beck, 40 Ga. 293.

In *Missouri*, on failure to have it set out, the title passes subject to the homestead. Bunn v. Lindsay, 95 Mo. 250. In ejectment brought for the premises by the purchaser. Crisp v. Crisp, 86 Mo. 630.

In *Alabama*, similarly, Nelson v. McCrary, 60 Ala. 301.

In *Tennessee*, the *omnia vite* presumption upon the validity of the sheriff's deed, is not overcome by the mere fact that the land was sold without first laying off the homestead. Burnett v. Austin, 10 Lea (Tenn.) 564.

The *Iowa* statute of 1839, inhibiting sale of the homestead if there is enough other land, is merely directory, and non-compliance will not vitiate the sale, even where the plaintiff's attorney is the purchaser. Cavender v. Smith, 1 Iowa 306. Offering several tracts without obtaining bids, is "exhausting the other property," within Iowa Rev. St. § 2281. Burmeister v. Dewey, 27 Iowa 468. The owner's failure to object does not render sale of the exempt homestead valid. Visek v. Doolittle, 69 Iowa 602.

3. Kipp v. Bullard, 30 Minn. 84; Mohan v. Smith, 30 Minn. 259.

Under *Nebraska* Laws, 1877, p. 34, if the homestead had not been plotted and recorded, the sheriff's failure to do this before selling any portion of the premises, invalidates the sale. Aultman v. Howe, 10 Neb. 8. Compare Eaton v. Ryan, 5 Neb. 47.

In *North Carolina*, a sale on a judgment founded on a debt contracted before adoption of *North Carolina* Const., 1868, without first allotting a homestead, is void, unless it is apparent there can be no excess. McCannless v. Flinchum, 98 N. Car. 338. Where the sale is for a debt against which the exemption does not prevail, and the debtor's only property is worth less than \$1,000, laying off the homestead is an idle form and ommissible. Miller v. Miller, 89 N. Car. 402. If the statute be not complied with, the purchaser, whether plaintiff or stranger, acquires no title. McCracken v. Adler, 98 N. Car. 400. The sale would be absolutely void. Mebane v. Layton, 89 N. Car. 396.

In *South Carolina*, a majority of the court held that where a sheriff, at the time of a levy and sale of an estate of homestead under an execution founded on a debt contracted after adoption of *South Carolina* Const. 1868, had in his office an execution founded on a debt contracted theretofore, the sale might be referred to this execution, although his deed did not mention it, nor the

The statutory rights of parties to the execution, or of strangers holding liens as to the homestead, may be restricted or waived as to many matters by their own acts.¹

c. OTHER EXEMPTIONS.—Seizure and sale of property that is by statute exempted from levy, renders the sheriff a trespasser *ab initio*.²

7. The Appraisement—*a*. STATUTORY METHODS.—The time, place, and manner of appraisement of real estate levied on are generally prescribed by statute.³ So also appraisement of perishable personal property.⁴ Sometimes personalty in general is embraced in such statutes.⁵ In some States the appraisement must precede advertisement of sale.⁶ In some States the appraisers must all concur.⁷ Some statutes prescribe their qualifications, as to householding, vicinage, disinterestedness, etc.⁸

purchaser know of it. *Agnew v. Adams*, 17 S. Car. 364.

The execution is notice that the defendant has other property than the homestead. He is not estopped to demand that a sale thereof be set aside by his failure to object; he having presumed that the sheriff would do his duty. *Owens v. Hart*, 62 Iowa 620.

1. In *Georgia* the fact that a third person has taken a homestead on land against which a foreclosure *fi. fa.* has issued, will not excuse the sheriff for failing to sell; a rule to show cause may be made absolute against him for the value of the land, not exceeding the amount of the execution. *Blackman v. Rome R. Co.*, 45 Ga. 292.

2. See EXECUTIONS, vol. 7, p. 130; *infra*, this title, *Conducting the Sale—Grounds for Vacating; and Sheriff's Rights, etc.—Liability to the Defendant*.

It is held that a sale on execution against A of realty in adverse possession of B is invalid. *Campbell v. Point Street Iron Works*, 12 R. I. 452.

3. As to strict construction of the appraisement laws, waiver thereof, etc., see APPRAISEMENT, vol. 1, p. 635.

As to the sheriff's liability for selling in disregard of such appraisement laws, see *infra*, this title, *Sheriff's Rights and Liabilities*.

4. See *supra*, this title, *Preliminaries—Sheriff's Duty as Bailee*.

5. *McClain's Iowa Rev. Stat.*, § 4329.

6. *Kansas Gen. Stat.* 1889, § 4552; *Ohio Rev. Stat.* 1890, § 5390. In *Pennsylvania*, the sheriff's omission to give the statutory notice of the inquisition will not invalidate the sale. *Meanor v. Hamilton*, 27 Pa. St. 137.

7. *Evans v. Landon*, 6 Ill. 307. In *Massachusetts*, if but two have certified, a sufficient reason must be given why the other did not. *Moffitt v. Jaquins*, 2 Pick. (Mass.) 331.

8. The *Connecticut* requirement that they be freeholders of the town in which the land lies, cannot be waived by agreement of parties. *Chapman v. Griffin*, 1 Root (Conn.) 196.

In *Kansas*, a sale of personal property was held not to be avoided merely because the under sheriff who sold it acted as one of the appraisers. *Sullenger v. Buck*, 22 Kan. 28. An unmarried man owning a storehouse, doing business in one part and living with a family in the other part is a "householder." *Kutler v. Buckout*, 4 Kan. 101.

In *Indiana*, a sale was avoided by an appraiser's not residing in the township of the land. *Richmond v. Marston*, 15 Ind. 134. Compare *Woods v. Cochrane*, 38 Iowa, 484.

In *Maine*, the appraisers need not be residents of the county. *Woodman v. Smith*, 37 Me. 21.

In *Massachusetts*, the sale transfers no title if the sheriff's return fails to show that the appraisers were disinterested, and otherwise legally qualified. *Williams v. Amory*, 14 Mass. 20; *Wolcott v. Ely*, 2 Allen (Mass.) 338.

In *Connecticut*, so also. *Fitch v. Smith*, 9 Conn. 42; *Johnson v. Huntington*, 13 Conn. 47.

In *Vermont*, after two years' acquiescence, objection that the appraisers were appointed in part from each town, etc., was held to come too late. *Perrin v. Reed*, 35 Vt. 2. Unfriendliness to the execution debtor was there held not to disqualify, the appointing justice

b. INCUMBRANCES.—In some States, incumbrances are to be deducted, each lien to be specifically enumerated.¹ In others, the sheriff must furnish the appraisers with a schedule of the property levied on, and the incumbrances made known to him.²

c. NON-APPRAISEMENT.—In general, an execution sale without the prescribed appraisement (or "inquisition and condemnation") or waiver thereof is utterly void.³

Where the law, at the date of a contract on which judgment has been rendered, requires an appraisement before the sale, omission thereof renders the sale void; and conversely.⁴

being sole judge of the fitness. *Briggs v. Green*, 33 Vt. 565.

In *New Hampshire*, upon an extent on land of A and B, the husband of a second cousin of A's wife and the husband of a sister of B, were held to be "disinterested." *Baker v. Davis*, 19 N. H. 325.

An attorney who had conducted the suit was there held to be a "reputable freeholder." *Porter v. Bean*, 1 N. H. 362.

In *Lower Canada*, "the relative valuation being established upon the report of experts, the case is sent back to the prothonotary, to determine the order of collocation, and the distribution of the money." Rev. Stat. P. *Quebec*, 1888, § 5950.

In *England*, on *elegit* or extent, real estate is appraised and set off to the plaintiff until he is paid out of the profits. See *infra*, this title, *The Purchaser's Title—Effect of Reversal—Under Elegit*.

1. In *Nebraska*, a tax deed is not included as an incumbrance. *Sessions v. Irwin*, 8 Neb. 5.

In *Iowa*, it has been held, that as against an execution defendant seeking to have the sale set aside for not realizing the exclusive two-thirds of the appraisal value (as prescribed in *Iowa*, *Kansas*, *Ohio*, etc.), the purchaser need not prove that the appraisers estimated the incumbrances; he may rely on the public records therefor, although an incumbrance appear to be partly satisfied. *Barber v. Tryon*, 41 Iowa 349.

2. *Indiana* Rev. Stat. 1881, § 737. In *Indiana*, it is not enough that the appraisers' return state an estimate, and add, that "if there are any liens, they are to be deducted from the above value." *Stumph v. Reger*, 92 Ind. 286.

In *Massachusetts*, appraisers' deducting, as an incumbrance, the

amount of a previous attachment in a suit pending at the time of the levy, was held to avoid the levy. *Barnard v. Fisher*, 7 Mass. 71.

In *Ohio*, where a mortgage of a railroad has precedence of a judgment against the corporation as to that part of the road lying in one county, the portion that is not subject to the mortgage cannot be sold under the execution; the whole road must be appraised and sold together, and the proceeds be brought into court and distributed according to priority of liens. *Ludlow v. Clinton Line R. Co.*, 1 Flip. (U. S.) 25.

In *Connecticut*, an equity of redemption levied upon must be appraised and set off to the execution creditor. *Scripture v. Johnson*, 3 Conn. 211.

In *Ohio*, the land itself, and not the debtor's interest therein, must be appraised. *Baird v. Kirtland*, 8 Ohio 21.

3. *Gardner v. Sisk*, 54 Pa. St. 506; *Tyler v. Wilkerson*, 27 Ind. 450. So held where the sale was for less than two-thirds of the proved value. *Brown v. Butters*, 40 Iowa 544; *Capital Bank v. Huntoon*, 35 Kan. 577. So held also where the two-thirds was \$901, and the sale was for \$101, but subject to a supposed mortgage of \$800. *De Jarnette v. Verner*, 40 Kan. 224.

In *Massachusetts*, failure of the sheriff's return to state by whom the appraisers were chosen renders the levy void. *Allen v. Thayer*, 17 Mass. 299. And his return must show that he notified the debtor to choose, etc. *Shields v. Hastings*, 10 Cush. (Mass.) 247.

So also in *Maine*, must notification be shown therein. *Harrison v. Cummings*, 45 Me. 351.

4. *Rosier v. Hale*, 10 Iowa 470; 77 Am. Dec. 127; *Hutchins v. Barnett*, 19 Ind. 15; *Rawley v. Hooker*, 21 Ind. 144; *Blakeney v. McCraw*, 28 Ark. 200; *Robinson v. Perry*, 4 Tex. 273.

But compare *Patrick v. Oosterhout*,

d. ESTOPPEL.—As against an innocent purchaser, not a party to the execution, a defendant who, in absence of fraud or mistake, has taken no step to prevent confirmation of a sale made contrary to the appraisement laws, is estopped to deny its validity.¹

e. CONCLUSIVENESS.—In the absence of fraud, or mistake other than of mere judgment, the appraisement is conclusive and cannot be impeached.²

After considerable lapse of time, the maxim *omnia rite præsuntur esse acta*, applies, and the regularity of the appraisement must be presumed.³

III. THE NOTICE.—1. **In General.**—*a. ORDINARY REQUISITES.*—The purpose of the notice is to inform the parties, and especially the public, of the time, place and terms of the sale, the character of the property, and the names of the persons whose interests are to be affected; thereby procuring attendance, competition, and the full equivalent.⁴

¹ Ohio 27; *Douglas v. Meloy*, 5 Ohio 522; *Sprott v. Reid*, 3 Greene (Iowa) 489; *Gales v. Christy*, 4 La. Ann. 295; *Force v. McIntyre*, 14 La. Ann. 153.

Remedial Incidents.—Authorization to proceed under one of several plaintiffs' execution renders the sale valid as to the others. *Shirk v. Wilson*, 13 Ind. 129. So, also, is the sale made valid by a direction that a part of the judgment be collected without appraisement. *Mugge v. Helgemeier*, 81 Ind. 120. It is well settled that the appraisement may be established by evidence outside the return. *Thurston v. Barnes*, 10 Ind. 289.

In *New Hampshire*, the return is evidence that an agent was authorized to choose for the creditor. *Odiome v. Mason*, 9 N. H. 24.

In *Pennsylvania*, an irregularity as to complying with the law of 1842, is remedied by acquiescence of parties until the acknowledgment of the deed. *Crowell v. Meconkey*, 5 Pa. St. 168.

1. *Wray v. Miller*, 20 Pa. St. 111; *Allen v. Parish*, 3 Ohio 187. See, also, certain applications of the general rule (that one silent when he ought to have spoken, will not be permitted to speak when he ought to be silent) in, *Bigelow*, *Estop.* (5th ed.) 586, note 4.

In *Kansas*, disqualification of an appraiser of attached real estate was held to be no ground for setting aside the execution sale; the defendant having appeared before the judgment. *Gapen v. Stephenson*, 17 Kan. 613.

2. *Lawrence v. Edelen*, 6 Bush (Ky.) 55.

Even where the appraisers, through mistaking the tract to be sold, so undervalued the land that it brought less than two-thirds of its real value, although two-thirds of its estimated value, the sale was held valid. *Valandingham v. Worthington*, 85 Ky. 83.

If the estimate be below the value, the debtor cannot recover of the creditor the difference; his only remedy is seasonably to redeem. *Horn v. Swett*, 2 N. H. 301.

As to what ambiguity or variance is ground for setting aside the appraisement, on seasonable application, see *Ohio L. Ins. & T. Co. v. Goodin*, 10 Ohio St. 557; *Johnson v. Hovey*, 9 Kan. 61.

As to the effect of the appraisement to operate as a severance of growing grain from the realty after the defendant's election to take, as exempt, see *Hershey v. Metzgar*, 90 Pa. St. 217.

3. *Evans v. Ashby*, 22 Ind. 15; *Hale v. Talbot*, 86 Ind. 44.

In *Connecticut*, everything so annexed to the freehold as to pass by the levy, is presumed to have been considered in the estimate. *Payne v. Farmers etc., Bank*, 29 Conn. 415.

In *Massachusetts*, parol proof is not admissible to show that the third appraiser did not concur. *U. S. v. Slade*, 2 Mason (U. S.) 76.

4. As to the requisites of evidence of notice, burden of proof, etc., see *NOTICE*, vol. 16, p. 827.

b. STATUTORY CHARACTERISTICS.—The statutes of nearly all the States prescribe these objects quite specifically.¹ In a few, however, somewhat is left to inference. Thus, *California*² and *New York*³ do not prescribe notice to the parties or direct reference to the judgment.

c. NOTIFYING THE DEFENDANT.—In some States, the defendant must receive personal notice,⁴ or if this be not practicable, the nearest equivalent thereto.⁵ Some statutes require notice to the mortgagee of chattels levied on.⁶

d. WAIVER AND ESTOPPEL.—Such notice being for the defend-

1. The ordinary features of such statutes, as to sales of realty on execution, are perhaps best exemplified in *Massachusetts* Pub. Stat., 1882, ch. 172, § 29. "The officer shall give notice in writing of the time and place of sale to the debtor, if found within his precinct, and shall also cause notification thereof to be posted up in some public place in the city or town where the land lies, and also in two adjoining cities or towns, if there are so many in the county; all which notices shall be given thirty days at least before the sale. The officer shall cause an advertisement of the time and place of sale to be published three weeks successively before the sale in some newspaper printed in the county where the land lies, if any such paper is there printed."

It has been held that a return that the sale was made "after giving public notice of the time and place of sale agreeably to the law," etc., was not curable by subsequent extrinsic proof of the necessary facts. *Wellington v. Gale*, 13 Mass. 488.

A change of statute as to the length of notice is held not to contravene the constitutional inhibition of enactments impairing the obligation of contracts. *James v. Stull*, 9 Barb. (N. Y.) 482.

2. Simply written notice of the time and place of sale. *California* Code Civ. Proc., § 692, 1. See contrast thereof with the mandatory statute of *Tennessee*, in *Blood v. Light*, 38 Cal. 649; 99 Am. Dec. 441.

3. The notice prescribed by 2 *New York* Stat. 366, § 21, on sale of chattels need not describe the execution, nor give the name of the debtor. *Chapman v. Morrill*, 19 Hun (N. Y.) 318.

4. *E. g.*, in *Delaware*, "One such advertisement shall, at least ten days before the day of sale, be delivered to the defendant or be left at his usual place of abode; if he does not reside in the county, notice shall be served on his

tenant, or, if there be no tenant, shall be left at the mansion house." *Delaware* Rev. Stat. 1874, 111, § 23. It has been held that leaving a copy in the hands of the tenant's wife is insufficient. *Lewis v. Woodall*, 4 Houst. (Del.) 543. This statute is mandatory. *Burton v. Wolf*, 4 Harr. (Del.) 221.

Tennessee Code, 1884, § 3755, requires that if the defendant is in actual possession and occupation of the land levied on, the officer shall within twenty days serve him with written notice. It was held in *Lafferty v. Conn*, 3 Sneed (Tenn.) 221, that the notice could not be served on the tenant or other resident; and in *Christian v. Mynatt*, 11 Lea (Tenn.) 615, that the notice need not be given to a defendant not in actual occupation of the land.

In *California*, after considerable lapse of time, it will be presumed that the defendant was duly notified, and given opportunity to designate the property. *Frink v. Roe*, 70 Cal. 206.

5. In *Illinois*, if the debtor is out of the county, the officer need not notify him to claim his exemption. *Foot v. People*, 12 Ill. App. 94.

In *Missouri*, if the land lies in the county where the judgment was rendered, the notice prescribed by *Missouri* Rev. Stat., 1889, § 4943, to be given to a defendant living in another county is not required. *Lohmann v. Stocke*, 94 Mo. 672.

In *Alabama*, want of personal notice of the levy, etc., does not invalidate the sale. *White v. Farley*, 81 Ala. 563.

In *Massachusetts*, notice of an execution sale of an equity of redemption, served upon an administrator, but not upon the heirs, was held to be sufficient. *Atkins v. Sawyer*, 1 Pick. (Mass.) 351; 11 Am. Dec. 188.

6. *Washington Territory* Code, § 1990, is mandatory, but does not affect the validity of the sale. *Byrd v. Forbes*, 3 Wash. T. 318.

ant's own benefit, may, by express word or by tantamount acts, be waived by him.¹ But a sale made under a waiver savoring of fraud upon creditors will not be upheld.²

Ordinarily, it is not the sheriff's duty specially to notify the execution plaintiff of the time of the sale.³ The latter may also become estopped from denying the sufficiency of the regular notice.⁴

c. EFFECT OF WANT OF NOTICE.—By the preponderance of judicial decisions, statutes requiring notice are more directory than mandatory, and consequently, default thereof will not avoid the sale against a purchaser, not himself in fault.⁵

1. *Burroughs v. Wright*, 16 Vt. 619. So held where the sheriff advertised to sell "Saturday," Jan. 5, 1827, and sold on Friday, Jan. 5, and the defendant, though knowing of the mistake, pointed out the boundaries to the intending purchaser. *McClure v. McCormick*, 5 Blackf. (Ind.) 129.

In *Tennessee*, it has, however, been held that the defendant's presence at the sale without objecting, did not amount to a waiver. *Carney v. Carney*, 10 Yerg. (Tenn.) 491; 31 Am. Dec. 590. And the court, by Cooper, J., in *Prater v. McDonough*, 7 Lea (Tenn.) 670, held that the defect could not be remedied by adequacy of notice of a previously advertised sale which did not take place; and further that the sufficiency of the notice was a question for the court and not for the jury.

An execution debtor, by pointing out property, waives his right to special notice of the sale. *Hewitt v. Stephens*, 5 La. Ann. 640. His acceptance of the surplus of the proceeds is a waiver of a defect of the notice. *Huffman v. Gaines*, 47 Ark. 226. And conversely his knowledge of the sale imports notice of the levy and return. *Cowles v. Hardin*, 101 N. Car. 388.

2. *Gibbs v. Neely*, 7 Watts (Pa.) 305.

In *Louisiana*, spouses' waiver of notice of an executive sale of dotal property was held not to render a sale, made without the prescribed advertisement, effectual to divest the wife's title. *Esneault v. Cooley*, 16 La. Ann. 165. The waiver cannot there be proved by parol. *Lockhart v. Harrell*, 6 La. Ann. 531.

In absence of any showing of fraud, notice will be deemed waived if the defendant did not object within a reasonable time. *Morris v. Hastings*, 70 Tex. 26.

3. In *Kansas*, the fact that the sheriff failed to fulfill his promise to notify the plaintiff has been held to be no ground for the court to refuse to confirm the sale. *Keene Five Cent Sav. Bank v. Marsh*, 31 Kan. 771.

In *Missouri*, the sheriff's omission to give the statutory notice to a non-resident debtor, does not, *ipso facto* invalidate the sale. *Hobein v. Murphy*, 20 Miss. 447.

4. Especially as against an innocent purchaser. *Hollcraft v. Douglass*, 115 Ind. 139.

His appointment of an appraiser imports a waiver of error in the advertisement. *Lewis v. Gordy*, 5 La. Ann. 570.

Persons under disability may be estopped therefrom through a husband's or a guardian's acquiescence in the sale. *Meanor v. Hamilton*, 27 Pa. St. 137.

5. *Jackson v. Spink*, 59 Ill. 404; *Frink v. Roe*, 70 Cal. 302; *Rounsaville v. Hazen*, 33 Kan. 71; *Wade v. Saunders*, 70 N. Car. 270; *Mitchell v. Nodaway Co.*, 80 Mo. 257; *White v. Cronkhite*, 35 Ind. 483; *Wallace v. Trustees*, 52 Ga. 164; *Thulemeyer v. Jones*, 37 Tex. 560; *Lee v. Howes*, 3 U. C. Q. B. 292.

Some decisions hold to this rule even where the purchaser knew of the deficiency. *Harvey v. Fisk*, 9 Cal. 93; *Johnson v. Reese*, 28 Ga. 353; 73 Am. Dec. 757.

Even where the plaintiff was the purchaser, absence of notice has been held not to defeat the sale. *Wood v. Morehouse*, 45 N. Y. 368. But see *dicta* to the contrary in *Dula v. Seagle*, 98 N. Car. 458; *Collins v. Smith*, 57 Wis. 284.

In *New Jersey*, it has been held that absence of notice invalidates the sale. *Henderson v. Hays*, 41 N. J. L. 387. Compare *dictum* in *Hughes v. Watt*, 26 Ark. 228.

f. REMEDIAL INCIDENTS.—The sale will not be set aside for insufficiency of notice alone, where statutes provide ample remedy by amercement of the sheriff.¹ Nor for clerical error involving no obviously serious damage.²

g. CHANCERY PRACTICE.—In absence of statutory regulation, notice of a sheriff's sale in lien or equity proceedings is entirely within the discretion of the court granting the decree.³ In the English chancery practice, the complainant's solicitor prepares the advertisement, and obtains from the master an order for its publication; a subsequent or "peremptory" advertisement fixes the time, and is published in the Gazette.⁴

2. Describing the Property.—The property should be sufficiently designated to notify the public of its location, extent, character and value. A description calculated to do this, will not cause the sale to be set aside for any blunders not misleading.⁵ And

As to how far the confirmation precludes inquiry into the regularity of the notice, see *infra*, this title, *Confirmation—Effect*.

1. See *infra*, this title, *Sheriff's Rights, etc.—Amercement*.

So held under *California* Code Civ. Proc., § 693, *Smith v. Randall*, 6 Cal. 47; 65 Am. Dec. 475; *Shores v. Scott River Water Co.*, 17 Cal. 626. In *Illinois*, the filing of the certificate of sale is constructive notice to everybody. *McClure v. Englehardt*, 17 Ill. 47.

2. Thus under *Rhode Island* Pub. Stat., ch. 223, § 11, requiring that "all persons concerned" be notified, it was held that a notification was not vitiated by describing the execution plaintiff, Richard Bassett, as "Richard Bartlett;" nor by omission, after a stay of the execution had been vacated, to post the notifications *de novo*. *Horton v. Bassett*, 16 R. I. 419.

But after an injunction on the sale has been dissolved, and considerable time elapsed, the notice must be given *de novo*. *Patten v. Stewart*, 26 Ind. 395.

In *Tennessee*, issuance of an *alias* execution does not necessitate new advertisement. *Luther v. McMichael*, 6 Humph. (Tenn.) 298; *Arnold v. Dinsmore*, 3 Coldw. (Tenn.) 235.

Otherwise in *New York*. *Mascraft v. Van Antwerp*, 3 Cow. (N. Y.) 334.

In *Delaware*, the sheriff is bound to prove notice of sales of land strictly, the statute being mandatory. *Burton v. Wolfe*, 4 Harr. (Del.) 221.

In *Illinois*, it was held that where the execution was valid, and the plaintiff, the purchaser, the burden of prov-

ing a want of notice was on the party attacking the regularity of the sale; the court, by Lacey, P. J., observing that it is the policy of the law to uphold judicial sales, and citing *Rorer*, Jud. Sales, § 1306.

In *Georgia*, too, this policy has been recognized, and an advertisement sustained where in the execution defendant, "Jeffries," was described as "Jeffers;" the names being *idem sonans*. *Jeffries v. Bartlett*, 75 Ga. 230.

In *Pennsylvania*, omission to notify a holder of land of an extent of execution thereon, was held to be cured by the acknowledgment of the sheriff's deed. *Critchlow v. Critchlow* (Pa. 1887), 11 Atl. Rep. 235.

3. *Gould v. Garrison*, 48 Ill. 258.

4. *Daniel's Ch. Pr. & Pl.* (5th Am. ed.), § 1270.

5. Immaterial Defects.—The following illustrative instances may be adduced in addition to those presented in JUDICIAL SALES, vol. 12, p. 211, note 1.

Where standing corn on the southeast quarter of the northwest quarter of a township section was misdescribed as on the southeast quarter of the northeast quarter, the mistake was held to be immaterial, there being such surrounding circumstances that all persons "would be apprised with sufficient certainty." *Pollard v. King*, 63 Ill. 36. So, also, was held immaterial a clerical error putting "township" for town. *Herrick v. Morrill*, 37 Minn. 250. So, also, was an omission in the notice to give the numbers to lots or to buildings, in absence of evidence that the property was not well known in the

conversely.¹ Some States provide specifically against fraudulent misdescription of the property in the advertisement and return.²

Some statutes provide that the defendant may deliver to the officer a plan of the land, and that he must sell according thereto.³ Ordinarily a defect in the description is not curable by the deed.⁴

A misdescription in the advertisement, carried into the deed, is relievable in equity;⁵ otherwise, however, in case of laches, or of intervention of the bar of the Statute of Limitations.⁶

community. *Collier v. Vason*, 12 Ga. 440; *Allen v. Cole*, 9 N. J. Eq. 286. So, also, where the name of the county was omitted. *Duncan v. Matney*, 29 Mo. 368; 77 Am. Dec. 575. So, also, where the name of the town was omitted from a notice published in the town. *Dickerson v. Small*, 64 Md. 395. See, also, as to identifying the town or township. *Reeside v. Peter*, 33 Md. 120; *Frazier v. Steenrod*, 7 Iowa, 344; 71 Am. Dec. 447. So, also, as to the surplus addition of "or arpents" in stating the quantity of acres. *Thompson v. Barrow*, 7 La. Ann. 670.

In *Pennsylvania*, it has been held that the notice need not state a prior incumbrance. *Association v. O'Neill*, 6 W. N. C. (Pa.) 501.

1. Where land in "the southeast quarter of a township section" was described and sold as in "the southwest (S. E. $\frac{1}{4}$) quarter," etc., it was held that the court was justified in refusing to confirm the sale. *Helmer v. Rehm*, 14 Neb. 219. So, also, where the section was not fractional was a description, "the fractional east half," etc., held insufficient. *Peck v. Sims*, 120 Ind. 345.

In *Minnesota*, a description, "lot 5, block 39," without naming the city or village, was held fatally defective. *Herrick v. Ammerman*, 32 Minn. 544.

In *New Jersey*, a clause "together with all his other real estate in the county of Atlantic, of which a more particular description will be given on the day of sale," was held insufficient to authorize a sale of any lands except those specified above it. *Merwin v. Smith*, 2 N. J. Eq. 182. Where the tract advertised was four acres more than the tract (contained therein) to be sold, the advertisement was held fatally defective; persons desiring only the latter's quantity might not attend the sale. *Fenner v. Tucker*, 6 R. I.

555. Where the sheriff levied upon part of a tract, but the schedule, return, and advertisement failed to show what part, it was held that the defect was not cured by a recital in his deed that he had levied on the whole tract. *Langley v. Jones*, 33 Md. 171. Compare *Wooters v. Arledge*, 54 Tex. 395.

In *Delaware*, omission to mention "a good large barn" was held to be ground for setting aside the sale. *Oldham v. Hossinger*, 5 Del. 434.

In *Pennsylvania* it has been held that buildings must be mentioned, wherever they would enhance the bidding. *In re Wallace's Estate*, 2 Pittsb. (Pa.) 145. An alleyway appurtenant must be mentioned. *Ulrich v. McCann*, 1 T. & H. Pr. (Pa.) 998.

In *Indiana*, a description of section 36 as "section 26" was held fatal. *Goss v. Meadors*, 78 Ind. 528.

For collation of *Tennessee* decisions upon the description, see *Doe v. Plunkett*, 1 Flip. (U. S.) 434.

2. *E. g.*, *Massachusetts*: forfeiture of five times the amount of the actual damage. *Massachusetts* Pub. Stat. 1881, ch. 171, § 41.

For amercements in other States, see *infra*, this title, *Sheriff's Rights*, etc.—*Amercement*.

3. In *Iowa*, this applies to sales under special as well as under general executions. *Taylor v. Trulock*, 59 Iowa 558.

4. *Pfeiffer v. Lindsay*, 66 Tex. 123. See *infra*, this title, *The Deed—Recitals*. Otherwise held, as to a failure to state the numbers of certain lots of land. *Lawrence v. Grambling*, 13 S. Car. 120.

5. *Steward v. Pettigrew*, 28 Ark. 372.

6. *Walling v. Morefield*, 33 La. Ann. 1174. As to when the deed will be reformed, see *infra*, this title, *The Deed—Reforming*.

In a notice of a sale of a right in equity, a general description of the land is sufficient.¹

In advertising mortgage sales, it is generally sufficient to follow the mortgage description, and refer by book and page to the registry, or to some authoritative plan.²

3. Designating the Time.³—The notice ought to name the hour when the sale will begin, in order that persons inclined to attend will not be deterred by a prospect of being kept waiting in business time. But notices are sustained which declare that the sale will be made between two certain business hours.⁴ If a statute designates the hours between which a sale may be made the advertisement need not mention them.⁵ And in absence of any showing of consequent damage, such advertisement will be sustained where the statute only prescribes notice of the time and place.⁶ And *vice versa*.⁷

So also, indefiniteness as to the day of the week is not fatal if it does not tend to mislead.⁸

The consequence to the advertisement of its fixing the day on Sunday, would depend somewhat on the existence or absence of statutory provisions thereon. Only judicial proceedings on Sunday are prohibited at common law.⁹

1. So held, where the description was: "The right in equity of redeeming the messuage and farm situate in Brighton, in the county of Middlesex, on which Jonathan Winship now lives," without designating any parcels, or stating the nature of the incumbrance. *Pomeroy v. Winship*, 12 Mass. 514; 7 Am. Dec. 91.

2. *Jones, Mort.* (4th ed.), § 1840. So held, even where the street number of the building has been changed after the making of the mortgage; the number appearing only on a plan referred to in the mortgage, and the mortgagee not knowing of the change. *Model Lodging House Assoc. v. Boston*, 114 Mass. 133. So held, even where the description in the mortgage was very imperfect. *Robinson v. Amateur Assoc.*, 14 S. Car. 148. So, also, where there was a defective exception of lands already sold. *Loveland v. Clark*, 11 Colo. 271.

3. As to computation, see NOTICE, vol. 16, p. 817.

As to length of time, see JUDICIAL SALES, vol. 12, p. 212, note 3.

4. As to the hour, see JUDICIAL SALES, vol. 12, p. 211, note 4.

5. *Evans v. Robberson*, 92 Mo. 192.

6. *Thorwarth v. Armstrong*, 20 Minn. 464.

7. Thus a mere specification that the

sale could be made, "on the 2d day of January next" was held insufficient. *Trustees of Schools, etc. v. Swell*, 19 Ill. 156. Whether a designation, between the hours of nine o'clock A.M. and the setting of the sun, is sufficient depends on the circumstances of the case. *McCormick v. Wheeler*, 36 Ill. 114, 85 Am. Dec. 388. This designation was held sufficient where twelve years had elapsed without attack. *Menard v. Crowe*, 20 Minn. 448.

8. **The Day.**—An error in appointing a postponed sale on "Thursday, Dec. 19, 1873," corrected on Thursday, December 18 by substituting "Friday," was held not to invalidate the sale. *Chandler v. Cook*, 2 MacArthur (D. C.) 176. But it was held otherwise as to a converse correction of "Friday, the 17th," made on Friday the 16th, the day of sale. *Wellman v. Lawrence*, 15 Mass. 326. And a notice appointing a sale on Saturday, June 24, 1855 (Saturday being the 23d), was held insufficient. *Thayer v. Roberts*, 44 Me. 247. So, also, as to appointing one on Wednesday, Feb. 19, 1874, the 19th being Thursday. *Thacker v. Tracy*, 8 Mo. App. 315.

9. These would not include a foreclosure sale. *Sayles v. Smith*, 12 Wend. (N. Y.) 57; 27 Am. Dec. 117. But such advertisement could certainly be rem-

So also may a mistake in designating the month¹ or the year² be too obvious to vitiate the advertisement.

4. Specifying the Place.—The notice should indicate the place of sale with such certainty that any person interested would have no difficulty in finding the spot. In determining this the prominence of a building or town in the country, or the uncertainty from extent of a city, are to be considered.³ The statutes generally require simply "notice of the time and place," etc.⁴

5. Posting.—The statutes of some States require that the notice be posted in some "public place." This is a relative term.⁵ The statutes provide against the defacing or tearing down of the notice.⁶

6. Publication.—In order to a sale of realty, the statutes usually

edied by a postponement, even without personal service of notice on the defendant. *Westgate v. Handlin*, 7 How. Pr. (N.Y.) 372.

1. The Month.—So held where an advertisement was directed to be made twenty days before the sale and one dated December seventh stated that the sale would take place "on the 28th day of December next;" this word would be understood to mean "instant." *Gray v. Shaw*, 14 Mo. 341.

2. The Year.—So held upon a designation of the year as "1761," instead of 1861, in *Jensen v. Weinlander*, 25 Wis. 477; and as "1858" instead of 1868, in *Mowry v. Sanborn*, 68 N. Y. 153. But a notice dated in January, 1858, appointing a sale in 1859, although published in a paper issued in 1859, was held to be fatally ambiguous. *Fenner v. Tucker*, 6 R. I. 551.

3. See JUDICIAL SALES, vol. 12, p. 212, note 1. A designation "at the court-house door in the town of Hillsboro" (without naming the county) was held sufficient in *Powers v. Kueckhoff*, 41 Mo. 425; 97 Am. Dec. 281.

4. The naming of an impossible place is tantamount to naming no place. *Bottineau v. Aetna L. Ins. Co.*, 31 Minn. 125.

5. See PUBLIC PLACE, vol. 19, p. 563. In *Cummins v. Little*, 16 N. J. Eq. 48, it was said that was a public place for notice of sale which is likely to inform persons who may probably become bidders. A blacksmith's shop, or a tree at an intersection of public roads, would be a public place in the country if in the vicinity of the land; but not if many miles distant therefrom. And in *Austin v. Soule*, 36 Vt. 648, where the

notice had been posted inside an open shed, the court, by Kellogg, J., said that a public place is any place where the posted advertisement attracts such general attention that its contents may reasonably be expected to become a matter of notoriety in the vicinity. A barn, dwelling-house, shed, or even a rock or tree may answer this condition. In *Cahoon v. Coe*, 57 N. H. 556, it was held that a dwelling-house, if near the land, is a public place. So, also, is the side of a public square. *Carter v. Abshire*, 48 Mo. 300. So, also, is a hotel or coffee-house. *Fox v. Tio*, 1 La. Ann. 334. So, also, the inside of a postoffice, though closed on Sunday. *Graham v. Fitts*, 53 Miss. 307.

On the question of publicity or obscurity, the fact that before the sale, the ink had so faded as to render the advertisement nearly illegible, was held no ground for setting the sale aside. *Holly v. Bass*, 68 Ala. 206.

The *Maine* statute, requiring a posting of two notices, is held to be mandatory, and an omission of one to be fatal to the purchaser's title. *Grosvenor v. Little*, 7 Me. 376.

Otherwise, an omission of one of the five required by the *Mississippi* statute. *Natchez v. Minor*, 10 Smed. & M. (Miss.) 246.

The *Kentucky* statute of 1790 requiring one to be posted at the meeting-house door, is directory only; and, in absence of fraud, non-compliance is not fatal. *Lawrence v. Speed*, 2 Bibb (Ky.) 401.

6. In *New York*, an execution defendant was punished for picking up and carrying off an advertisement blown down in a grocery. *Murphy v. Tripp*, 44 Barb. (N. Y.) 189.

require that the sheriff not only post advertisements but publish notice thereof a stated period in some newspaper.¹ Statutes in derogation of the common law are to be construed strictly.² The preponderance of judicial decision is, that a statute prescribing publication of the notice for three successive weeks requires at least twenty-one days to intervene between the first publication and the day of the sale.³

The statutes of some States expressly require the computation to exclude the first day of publication and to include the day on which the event is to happen.⁴

The proviso in some statutes, "if there be a paper published in the county," imports an available paper.⁵

1. A sheet gratuitously distributed weekly at expense of advertisers has been held not to be a "newspaper." *Tyler v. Bowen*, 1 Pittsb. (Pa.) 225.

In *Lower Canada*, "the sheriff is bound to advertise in the Quebec Official Gazette, in the French and English languages." Rev. Stat. P. Quebec, 1888, § 5933.

2. For collated examples, see NOTICE, vol. 16, p. 817, note 5.

3. *Early v. Doe*, 16 How. (U. S.) 610; *Smith v. Rowles*, 85 Ind. 264; *Bacon v. Kennedy*, 56 Mich. 329.

The *Kansas* statute prescribing publication "for at least thirty days before the day of sale," it is held to require that the notice be first published at least thirty days before the day of sale, and be continued in successive issues of the paper up to the day of sale. *Whitaker v. Beach*, 12 Kan. 492.

In *Illinois*, a requirement of publication for three weeks successively is held to be sufficiently complied with by three publications, between the first of which and the day of sale nineteen days intervened. *Garrett v. Moss*, 20 Ill. 554.

The *New York* statute is held to be sufficiently complied with by publication once in each week for the six weeks before the sale, although six full weeks did not elapse between the date of the first publication and the date of sale. *Wood v. Morehouse*, 45 N. Y. 368.

In *South Carolina* it has been held that the first day of the publication and the day of the sale may both be included to make twenty-one days. *Manning v. Dove*, 10 Rich. (S. Car.) 395; *Maddox v. Sullivan*, 2 Rich. Eq. (S. Car.) 4; 44 Am. Dec. 234.

In *Wisconsin*, an execution plaintiff purchasing at a sale upon insufficient

notice, is chargeable with knowledge thereof, and has not the rights of a bona fide purchaser. *Collins v. Smith*, 57 Wis. 284.

4. *E. g.*, *Minnesota* and *Ohio*. In a daily paper, the first publication may be thirty days before the day of sale. *Hagerman v. Ohio Bldg., etc., Assoc.*, 25 Ohio St. 186.

Under the *Pennsylvania* act of 1836, the first notice must be at least twenty-one days before the day of sale. *Erie Sav. Fund, etc., Assoc. v. Thompson*, 13 Phila. (Pa.) 511.

5. By *Missouri* Rev. Stat., 1889, § 4941, it is the sheriff's duty to give "twenty days' notice of the time and place of sale, . . . by advertisement in some newspaper printed in the county, which may be designated by the plaintiff or his attorney of record, if there be one regularly published weekly or daily, and if not by at least six printed or written handbills, put up," etc. Where the defendant, owning the only newspaper in the county, refused to permit the notice to be published therein, it was held that notice by hand bills was a sufficient compliance with the statute. *Walton v. Harris*, 73 Mo. 489.

Omission to advertise "in the public gazette," as required by the *South Carolina* act of 1797, was held not to invalidate the sale. *Turner v. M'Crea*, 1 Nott & M. (S. Car.) 11.

Under *Kansas* Civil Code, § 460, authorizing the officer to refuse to publish the notice until the execution plaintiff advances money sufficient to pay therefor, it has been held that the sheriff cannot be compelled by mandamus to publish the notice in a newspaper selected by the plaintiff, though it has been paid in advance therefor. *Winton v. Wilson*, 44 Kan. 146.

IV. THE TIME OF SALE—1. In General—*a.* **STATUTES DIRECTORY OR MANDATORY.**—Under a statute merely directory as to notice, a sale made without notification of the time is not absolutely void;¹ otherwise, under a mandatory statute.² In some States, the sale must be at a date during the statutory period of the lien.³ In others, a specific limit is prescribed.⁴

1. *Supra*, this title, *Notice—Statutory Characteristics*.

2. So, in *California*. *Bagley v. Ward*, 37 Cal. 133; 99 Am. Dec. 256; *Eldridge v. Wright*, 55 Cal. 531.

In *Isaac v. Swift*, 10 Cal. 81, the court by Burnett, J., distinguished the *California* statute, that the lien, shall continue for two years; from the *Arkansas* and *Texas* statutes, that the lien shall cease, etc.; in *Arkansas* in three years, and in *Texas* in one year.

A sale made contrary to the *North Carolina* statute prescribing certain sale days, was held to be void; the court, by Smith, C. J., *distinguishing* prior decisions turning on statutes directory or on waiver. *Mayers v. Carter*, 87 N. Car. 146. Compare decisions of the same court in *Lowdermilk v. Corpening*, 101 N. Car. 649, and *Wortham v. Basket*, 99 N. Car. 70. But a sale made not on the day prescribed by a *Texas* statute was upheld after its confirmation. *Brown v. Christie*, 27 Tex. 73; 84 Am. Dec. 607.

In *Tennessee*, a sale for taxes, made on a day other than prescribed by the statute, is void. *Conrad v. Darden*, 4 Yerg. (Tenn.) 307.

In *New York*, the ten years begin to run at the original docketing, and the lien is not saved by revivor on *sci. fa.* *Tufts v. Tufts*, 18 Wend. (N. Y.) 621. But there, an execution issued more than a year and a day after the judgment and without revivor, is voidable merely, and the sale will confer a valid title. *Woodcock v. Bennett*, 1 Cow. (N. Y.) 711; 13 Am. Dec. 568.

Similarly in *Tennessee*. *Overton v. Perkins*, Mart. & Y. (Tenn.) 367.

3. The lien of the judgment does not depend on the levv. *Thompson v. Phillips*, Bald. (U. S.) 246. "The lien is neither *jus in re* nor *jus in rem*. Though the judgment creditor release all right to the land, he may afterwards extend it by execution." *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; *Whiting v. Butler*, 29 Mich. 122; 4

Kent. Com. (13th ed.) 437. And see *EXECUTIONS*, vol. 7, p. 144; and *JUDGMENTS*, vol. 12, p. 105.

In *California*, where an execution was returned without sale, and after the judgment lien had expired, another was issued and levied, it was held, that the sale made hereunder took effect by relation at the time when the second (not the first) execution was levied. *Bagley v. Ward*, 37 Cal. 121; 99 Am. Dec. 256.

4. In *Missouri*, "if there be sufficient time, the officer shall appoint the day of sale at least fifteen days before the return day of the execution." *Missouri Rev. Stat.* 1889, § 4939.

Where, through non-attendance of the judge, there is a statutory adjournment of the court from day to day for three days, a sale meanwhile made should be set aside. *Sarpy v. Detchemendy*, 31 Mo. 196. But where a term was postponed by an act of the legislature, it was held that the lien of the judgment was preserved beyond the regular time, until the writ was executed, and that the sale conferred a good title. *Bank of Missouri v. Wells*, 12 Mo. 361; 51 Am. Dec. 163.

Under the *Missouri* statute extending the lien until a sale day at a future term of court, a new levy by the sheriff's successor was held not to be necessary. *Tierney v. Spiva*, 97 Mo. 98.

In *Maine*, after levy on personal property, if the sheriff does not advertise and sell within the time prescribed by statute, his claim to the property is extinguished. *Plaisted v. Hoar*, 45 Me. 380. Compare *Mason v. Ham*, 36 Me. 573.

In *Massachusetts* also, a sale made after the period therefor designated by statute, is a nullity. *Macy v. Raymond*, 9 Pick. (Mass.) 285. And even in absence of any expressed statutory limit of operation of license to sell, a sale will be treated as void if made after lapse of many years. *Wellman v. Lawrence*, 15 Mass. 326.

In *Florida*, the legal day of sale is the first Monday in every month. *Florida Dig. Laws*, 1881, p. 525, § 25.

b. IF AFTER RETURN DAY.—In absence of a contrary statutory prohibition, the sheriff may sell before or after the return day. His power to sell grows out of his levy; it does not depend on the then *status* of the execution.¹

Under appropriate statutory provision for proceeding upon the creditor's affidavit that delay will endanger collection, a sale, after due notice, of goods covered by a mortgage, is not void, though the execution be issued immediately after the judgment, as authorized in such case.²

1. Besides the cases cited at JUDICIAL SALES, vol. 12, p. 218, see *Smith v. Mundy*, 18 Ala. 182; 52 Am. Dec. 221; *Johnson v. Bemis*, 7 Neb. 224; *Lowry v. Reed*, 89 Ind. 442; *Rose v. Ingram*, 98 Ind. 276; *Savings Inst. v. Chinn*, 7 Bush (Ky.) 539; *Mooney v. Maas*, 22 Iowa 380; *Bryant v. Dana*, 8 Ill. 343; *Wheaton v. Sexton*, 4 Wheat. (U. S.) 503.

In *Pennsylvania*, the sale must be made on or before the return day or within six days thereafter. B. P. Dig. *Pennsylvania Laws*, 1885, p. 758, § 89. Otherwise it is void. *Dale v. Medcalf*, 9 Pa. St. 108. But compare *McCormick v. Meason*, 1 S. & R. (Pa.) 192.

But if the levy also be after the return day, the sale is void. *Young v. Smith*, 23 Tex. 598; 76 Am. Dec. 81; *Doe v. M'Kinnie*, 4 Hawks (N. Car.) 279; *Bank of Missouri v. Bray*, 37 Mo. 194; *Jefferson v. Curry*, 71 Mo. 85.

In *Illinois*, it has been held that if the sheriff improperly returns the execution, he may sell without either an *alias* or a *vend. exp.* *Willoughby v. Dewey*, 63 Ill. 246.

In *Mississippi*, a sale made six weeks after the return day was held void. *Williamson v. Williamson*, 3 Smed. & M. (Miss.) 725; 41 Am. Dec. 636.

In *Michigan*, even when there had been a delay of five years, it being in good faith, the sale was held valid, as against an intervening levy and sale. *Ward v. Citizens' Bank*, 46 Mich. 332.

In *South Carolina*, in 1826, a sale made four years after a levy of the sheriff's predecessor was held valid. *Leger v. Doyle*, 11 Rich. (S. Car.) 109; 70 Am. Dec. 240.

In *Pennsylvania*, where, after entry of judgment, five years elapsed before sale, but not before issuance of the *vend. exp.*, it was held that the sale passed the defendant's title; but the lapse let in a subsequent judgment

creditor to priority in the distribution of the proceeds. *McCahan v. Elliott*, 103 Pa. St. 637.

In *Arkansas*, a sale under *vend. exp.* three years after date of the judgment, was held void. *Pettit v. Johnson*, 15 Ark. 55.

In *Texas*, a sale after the return day is a nullity. *Cain v. Woodward*, 74 Tex. 549. And the deed conveys no title. *Mitchell v. Ireland*, 54 Tex. 301.

In *North Carolina*, a sale of land under an execution issued over ten years after the docketing of the judgment is invalid. *Lyon v. Russ*, 84 N. Car. 588.

In *Illinois*, a delay of nine years between levy and advertisement was held fatal. *Conwell v. Watkins*, 71 Ill. 488.

In *Indiana*, a sale of land under an execution issued on a justice's transcript filed more than ten years after judgment was rendered, is not void for want of revival and leave of court, but voidable only in a direct proceeding instituted before the sale. *Martin v. Prather*, 82 Ind. 535.

In *Kentucky*, the sheriff may sell after the return day while the original execution is in his hands, provided the levy was made before the return. *Kentucky Gen. Stat.*, 1887, p. 554, § 3. But see *dictum* in *Colyer v. Higgins*, 1 Duv. (Ky.) 7; 85 Am. Dec. 601.

2. *Conrad v. Wilson*, 66 Ind. 437. Otherwise, a sale made on two days' notice, without the knowledge of one of the three execution creditors, the attorney of the two others becoming the purchaser. *Skinner v. Warren*, 81 N. Car. 373.

A notification on the day set for sale, that the defendant had been adjudicated a bankrupt and that the property was exempt under the bankrupt law, has been held to be no justification for the sheriff's suspending the sale. *Wheeler v. Redding*, 55 Ga. 87.

An officer discovering that he has sold on a day other than the one prescribed in the notice, cannot be compelled by mandamus to accept payment and convey.¹

After the confirmation of the sale, the maxim *omnia præsumuntur rite esse acta* is applied in his favor.²

Some statutes protect the purchaser's title against such irregularity on the part of the sheriff.³

c. THE HOUR.—In some States the statute regulates the hour at which the sheriff's sale is to take place.⁴ Where the hour is fixed by the notice of sale, either under such a statute, or in the absence of it, the sale may be made at any time before the expiration of the hour; that is, if the time is fixed at eleven o'clock, the sale may be made at any time between eleven and twelve.⁵

2. Dies Non.—a. SUNDAY.—At common law, Sunday was *dies*

1. *Collins v. Byrd*, 42 Ga. 629. Such sale would, in legal effect, be one without notice, and if made should be set aside. *Wheatley v. Terry*, 6 Kan. 427. Especially when fraudulent. *McConnell v. Gibson*, 12 Ill. 128. The defendant's presence thereat, without objection, would not be a waiver of his right to have the sale vacated. *Humphreys v. Browne*, 19 La. Ann. 158.

2. Under the Iowa restriction as to "four o'clock P. M.," where the sheriff's notice appointed a sale between two and five o'clock P. M., it was held that the sale must be presumed not to have been held after four o'clock. *Cole v. Porter*, 4 Greene (Iowa) 510.

Similarly was it held in *Missouri*, on recital in the deed that the sale was made between the "lawful hours." *Evans v. Robberson*, 92 Mo. 192.

The purchaser may rest his title on the judgment and execution; "the seal of the court is enough." *Barkley v. Screven*, 1 Nott & M. (S. Car.) 408. So held, on a collateral attack made after lapse of nearly half a century, where the advertisement had appointed the sale for April 11, but the deed recited it was made April 9. *Houck v. Cross*, 67 Mo. 151.

3. The *Illinois* statute expressly provides that the officer be amerced for non-compliance therewith as to the time of sale, and that the irregularity shall not affect the title of a purchaser who buys without notice thereof. Thus, a sale to such purchaser was upheld, though averred by the certificate to have been made at four o'clock in the morning. *Rigney v. Small*, 60 Ill.

416. But otherwise, one made, two days before the date notified, to a party with notice. *King v. Cushman*, 41 Ill. 31; 89 Am. Dec. 366. Also one made after nine o'clock at night of shares of stock of a building association. *McNaughton v. McLean*, 73 Mich. 250.

4. *California* Code Civ. Proc. 1885, § 694; *Dakota* Comp. Laws, 1887, § 5144; *Montana* Comp. Stat. 1887, p. 150, § 334.

5. *McGovern v. Union Mut. L. Ins. Co.*, 109 Ill. 151.

But a sale made a few minutes before the hour advertised, and at a grossly inadequate price, may be set aside on the defendant's motion. *Pickett v. Pickett*, 31 Kan. 727.

The fact that a constable's sale of corn advertised for the forenoon took place in the afternoon, and for a sum below value, was held not to raise any presumption of fraud to sustain a collateral attack in trespass *quare clausum fregit* for entering and carrying it away. *Russell v. Stoeckel*, 5 Del. 464.

Under *Texas* Rev. Stat. 1879, § 2303, prescribing "between the hours of ten o'clock A. M. and four o'clock P. M." a sale made after four o'clock P. M. is void; and the non-compliance may be proved by parol. *Grace v. Garnett*, 38 Tex. 156.

Where a statute, like that of *New York* (2 Rev. Stat. New York, 3d ed. 466), requires that every sale which may be made by virtue of execution shall be between the hours of nine A. M. and the setting of the sun, a sale made after sunset is void. *Carrick v. Myers*, 14 Barb. (N. Y.) 9.

non juridicus.¹ England and several States have statutes declaratory thereof, and inhibiting unnecessary business or labor thereon.² Accordingly a sale made by a sheriff on Sunday is invalid.³ So, also, is a sale made by him under an advertisement in a Sunday newspaper.⁴

b. HOLIDAYS.—Some States have statutes making certain days non-judicial.⁵ But a sheriff's sale is not a judicial act, and, in absence of special statutory inhibition, if made on a legal holiday in good faith and discretion, would be sustained.⁶ So, also, would the sale be valid if made on an election day.⁷

3. Adjournments.⁸—At common law, a party requesting the sheriff to sell at auction must pay the expenses.⁹ He need not consider the debtor's interest in having a sale postponed. Not finding a buyer for enough of the goods to satisfy the debt, it was his duty to return the fact, and, if a *vend. exp.* issued, he might make the same return to that.¹⁰ Otherwise, if he sold at auction. If the bid was inconsiderable, he was to keep the goods, return that he did so, for want of buyers, and await a *vend. exp.*, which was construed to mean: "Sell for the best price you can."¹¹

1. *Swann v. Broome*, 3 Bur. 1595.

2. Sedgwick's Stat. & Const. Law (2d ed.), p. 14, note, and p. 512, note; Stat. 29 Car. II., ch. 7; 45 & 46 Vict., ch. 50, § 230. Compare *Shaw v. Dodge*, 5 N. H. 462; *Hoghtaling v. Osborn*, 15 Johns. (N. Y.) 119; *Baxter v. People*, 8 Ill. 468; *Thomasson v. State*, 15 Ind. 454.

In *Upper Canada*, all sales "made on the Lord's Day shall be utterly null and void." *Ontario Rev. Stat.* 1887, p. 2255, § 8.

In *Lower Canada*, simply a penalty is imposed for selling goods on Sunday, except at church doors for church benefit. *Rev. Stat. P. Quebec*, 1888, § 3498.

3. See *supra*, this title, *The Notice—Designating the Time*. Under the *Pennsylvania* act of 1705, forbidding the sheriff to keep his office open on Sunday, he could not then receive an order from an execution plaintiff to make the sale. *Stern's Appeal*, 64 Pa. St. 447.

Similarly in *New York*, he cannot, after midnight of Saturday, receive a verdict in an inquisition of damages. *Butler v. Kelsey*, 15 Johns. (N. Y.) 177.

4. So held, under *Indiana* Rev. Stat., 1881, § 2000, inhibiting disturbance of the peace or good order of society by engaging in one's "usual avocation" on Sunday. *Shaw v. Williams*, 87

Ind. 158. Compare, under a similar *Illinois* statute, *Scammon v. Chicago*, 40 Ill. 146.

5. *E. g.*, "Courts shall not be opened on Sunday, Thanksgiving, Fast, or Christmas, the twenty-second day of February, the thirtieth day of May, the fourth day of July, or the following day when either of the three days last mentioned occurs on Saturday, unless for the purpose of entering or continuing cases, instructing or discharging a jury, receiving a verdict on adjourning." *Massachusetts* Pub. Stat. 1882, ch. 160, § 4.

6. The *Texas* inhibition of service of process on a legal holiday does not apply to a sheriff's sale. *Crabtree v. Whiteselle*, 65 Tex. 111.

7. The *New York* inhibition of transaction of court business on election day is held not to apply to a sheriff's sale; this never compelling absence from the polls. *King v. Platt*, 37 N. Y. 155.

Declaring a day a legal holiday does not import a suspension even of judicial business. *Dunlap v. State*, 9 Tex. App. 179; 35 Am. Rep. 736; *Houston, etc., R. Co. v. Harding*, 63 Tex. 262.

8. See JUDICIAL SALES, vol. 12, p. 217.

9. *Woodgate v. Knatchbull*, 2 T. R. 148.

10. *Leader v. Danvers*, 1 B. & P. 359.

11. *Keightley v. Birch*, 3 Campb. 521.

The statutes of many States also provide for such adjournments.¹ In other States, without express statutory provision therefor, the sheriff may, to avoid a sacrifice, change both the time and place.² He is, by common law of all the States, invested with a large discretion according to the circumstances and exigencies that may demand a postponement,³ but he is responsible for its abuse.⁴ If a sale cannot be completed at sunset, it should be adjourned; if until next day, by proclamation; but if longer, by formal notices.⁵

1. *E. g.*, "If at the time appointed for the sale the officer deem it expedient and for the interest of all persons concerned, that the sale should be postponed either for want of purchasers or for other sufficient cause, he may adjourn the sale for any time not exceeding seven days, and so for like good cause until it is completed, giving notice of every such adjournment by a public proclamation thereof, at the time and place previously appointed for the sale." *Massachusetts* Pub. Stat. 1882, ch. 172, § 30. Such return need only state that he deemed the postponement expedient for want of purchasers. *Sanborn v. Chamberlin*, 101 Mass. 409.

The *Rhode Island* statute specifies "accidents or extraordinary storms" as grounds for postponement; but the sheriff's power to adjourn is held not to be limited thereto. *Aldrich v. Grimes*, 14 R. I. 219.

The *Iowa* limit is three days. *McClain's Iowa* Rev. Stat. 1888, § 4312.

In *Missouri*, under the act of 1863, if, without the officer's fault, the sale is rendered impossible at the first term after issuance, the lien is continued from term to term, and a sale without vend. *exp.* confers a good title. *Wood v. Messerley*, 46 Mo. 255. See other *Missouri* decisions, *supra*, this title, *Statutes Directory*, etc.

2. Thus in *Vermont*, he may properly change the place of a sale of hay from a tavern to the barn where it had been levied on. *Jewett v. Guyer*, 38 Vt. 216; compare *Fairbanks v. Benjamin*, 50 Vt. 99; *Russell v. Richards*, 11 Me. 371; 26 Am. Dec. 532; *Tinkom v. Purdy*, 5 Johns. (N. Y.) 345.

In *Connecticut*, when the officer "is of the opinion that the property can be more advantageously sold at some other time or place," he may adjourn the sale not more than ten days, and

then again adjourn in like manner. *Connecticut* Gen. Stat. 1888, § 1162.

In *Maryland* a foreclosure sale has been confirmed, though made on adjournment to a place other than that named in the decree. *Farmers' Bank v. Clarke*, 28 Md. 145.

3. See JUDICIAL SALES, vol. 12, p. 217, note 5.

4. *Todd v. Hoagland*, 36 N. J. L. 352.

His contract for unlawful compensation for making postponement is void. *Perkins v. Proud*, 62 Barb. (N. Y.) 420.

5. *Crocker on Sher.* (3d ed.), § 482. Two adjournments to enable mistakes in the newspaper advertisement to be corrected were held to be "good cause" within the *Rhode Island* statute. *Reynolds v. Hoxsie*, 6 R. I. 463.

An adjournment for one day, long acquiesced in, was held not to be a ground for setting aside the sale. *Jackson v. Spink*, 59 Ill. 404.

The adjournment should not be beyond the return day. *Lantz v. Worthington*, 4 Pa. St. 153; 45 Am. Dec. 682.

If the original notice was for too short a time, it cannot be remedied by an adjournment. *Smith v. Morse*, 2 Cal. 524; *Sessions v. Peay*, 19 Ark. 267.

A bid made before the adjournment is to be treated as withdrawn. *Donaldson v. Kerr*, 6 Pa. St. 486.

The sheriff cannot delegate to the plaintiff's attorney the power to adjourn the sale. *Wolf v. Van Metre*, 27 Iowa 348.

Where the sheriff accepted a sole bid that was the amount of the senior judgment, but much below the value of the land, it was held that his refusal to adjourn the sale was no ground for setting it aside, the owner having an adequate remedy by redemption. *Equitable Trust Co. v. Shrope*, 73 Iowa 297.

Several short adjournments of a foreclosure sale may be made to enable the mortgagor to pay the debt, and, on full payment, the sale may be discontinued altogether.¹

V. THE PLACE FOR SELLING—1. In General.—The statutes ordinarily provide that the sale must be at the place advertised.²

2. Personalty.—The sale of personal property must take place where the bidders can inspect it.³ The preponderance of decisions is that a sheriff's sale, in absence of the chattel, and without the defendant's waiver of the irregularity, is absolutely void.⁴ But there are many decisions that such sale is merely voidable.⁵

1. So held even where there had been a bid of \$250,000, and the marshal made four adjournments. *Blossom v. Milwaukee R. Co.*, 3 Wall. (U. S.) 106.

2. In *Vermont* (where by Rev. Laws, 1880, §§ 1549, 1550, the notification is to fix the sale at a public place, and only such chattels as hay, machinery, etc., can be sold elsewhere) a constable selling cattle and farm utensils elsewhere than as advertised, was held liable in trespass for the full value, although he applied the proceeds on the execution. *Evarts v. Burgess*, 48 Vt. 205. Such application could only properly be made on a legal sale. *Hall v. Ray*, 40 Vt. 576; 94 Am. Dec. 440.

In *Indiana*, an execution sale of brick elsewhere than as advertised was held void, although the defendant had consented to a levy and sale; the consent must be presumed to be only to a legal sale. *Murphy v. Hill*, 77 Ind. 129.

In *Louisiana*, sales have been set aside where a sacrifice resulted from a waiver as to the proper place. *Lawrence v. Young*, 1 La. Ann. 297; *Hilligsberg's Succession*, 1 La. Ann. 340.

In *Delaware*, so held, although the sheriff had a discretion as to the place of sale. *Cowgill v. Cahoon*, 3 Harr. (Del.) 23.

3. See JUDICIAL SALES, vol. 12, p. 213.

"No personal property shall be exposed for sale, on execution, unless the same be present and within the view of those attending such sale; and it shall be offered for sale in such lots or parcels as shall be calculated to bring the highest price." *Michigan Stat.* 1888, § 7691. Hereunder a sale of a crop of corn three-fourths of a mile distant was set aside. *Winfield v. Adams*, 34 Mich. 437.

In *California*, *Dakota*, and *Montana*, "property capable of manual

delivery" must be within view of the bidders. *California Code Civil Proc.*, 1885, § 694; *Dakota Comp. Laws*, 1887, § 5144; *Montana, Comp. Stat.*, 1887, p. 150, § 334.

4. So held, as to a sale of flax machinery six miles distant. *Cresson v. Stout*, 17 Johns. (N. Y.) 116; 8 Am. Dec. 373. And a sale of wheat two miles off. *Tibbetts v. Jageman*, 58 Ill. 43.

And a sale of cattle running on a range a mile away, *Rowan v. Refeld*, 31 Ark. 648; and a sale of an interest in slaves absent in another county, *Blanton v. Morrow*, 7 Ired. Eq. (N. Car.) 47; 33 Am. Dec. 391; and a sale of a slave in adverse possession, *Brown v. Lipscomb*, 9 Port. (Ala.) 472; and a sale of goods locked in a room upstairs, *Ainsworth v. Greenlee*, 3 Murph. (N. Car.) 470; 9 Am. Dec. 615; and a sale of a hog in a pen a hundred rods off, *Gaskill v. Aldrich*, 41 Ind. 338; and advertisement and sale in one town in Kansas, under a justice's execution issued in another, *Paulson v. Hall*, 39 Kan. 365.

5. Thus, a sale of a chattel saw and grist mill, at a courthouse door and not within view, was sustained; the court, by Hough, J., saying that cases may be imagined where the more vigorous rule "would be productive of inconvenience and positive detriment to the parties interested." *Eads v. Stephens*, 63 Mo. 90.

It would be folly to tear up all the furniture of a large summer hotel, and pile it on the lawn, or allow the crowd to go through the rooms at the sale to inspect it. *National Bank v. Sprague*, 20 N. J. Eq. 159.

A sale of stereotype plates absent in vault was upheld, impressions therefrom being exhibited; the principal value not being their material. *Bruce v. Westervelt*, 2 E. D. Smith (N. Y.) 440.

Where, without the sheriff's conclu-

3. Realty.—In the absence of waiver by the defendant, a sale of real estate must be at the place fixed by statute or decree. This is usually at the door of the courthouse of its county.¹ A sale at a point approximately near is a substantial compliance, especially if the courthouse is destroyed.² The sale must be in the county where the land lies, and by the sheriff thereof.³

A sale made at an improper place is sometimes treated as valid until set aside.⁴

VI. BY WHOM—**1. Deputies.**—The sale must be made by the sheriff of the county,⁵ in person, or under his immediate direc-

sion in the absence of the chattel a few moments, a slave worth \$1,000 was sold for \$625, the sale was upheld. *Hamilton v. Shrewsbury*, 4 Rand. (Va.) 427; 15 Am. Dec. 779. So, also, the sale of a small barn a mile away, in a sparsely settled country. *Phillips v. Brown*, 74 Me. 549. But compare *Foster v. Mabe*, 4 Ala. 402; 37 Am. Dec. 749.

A sale of two horses, one of which was absent, was held valid as to the one present. *Linnendoll v. Doe*, 14 Johns. (N. Y.) 222. But a constable's sale of fourteen sheep out of a flock of twenty-one present, without more specification than that he meant "the fattest," was set aside. *Warring v. Loomis*, 4 Barb. (N. Y.) 484. So, also, was an indiscriminate sale of goods, although a few articles were pointed out. *Sheldon v. Soper*, 14 Johns. (N. Y.) 352. So, also, a sale of horse railroad chattels *en masse* and mostly out of view. *Boylan v. Kelly*, 36 N. J. Eq. 331.

1. See JUDICIAL SALES, vol. 12, pp. 213, 214, notes.

Sometimes the term "courthouse door" is defined specifically; *e. g.*, in *Texas Rev. Stat.*, 1879, art. 2310.

2. *Wilhelm v. Schmidt*, 84 Ill. 183. So held, as to a sale a hundred yards distant, but in view of the courthouse site. *Longworthy v. Featherston*, 65 Ga. 165. A sale at the courthouse door was held valid, notwithstanding a private local law prescribing sale on the premises. *Biggs v. Brickell*, 68 N. Car. 239.

The former *Mississippi* statute thereon (Code of 1857, art. 277) was mandatory, and a sale elsewhere was void. *Koch v. Dridges*, 45 Miss. 247.

In *Texas*, a sale by a U. S. marshal, before the door of a U. S. courthouse instead of at the door of the county courthouse where the land lies, is void. *Moody v. Moeller*, 72 Tex. 635.

In *Missouri*, a sale at the circuit courthouse door of the county seat under a judgment obtained in a common pleas court in another town, was held valid. *Mers v. Bell*, 45 Mo. 333.

In *Rhode Island*, in absence of statutory provision to the contrary, a sale was held valid though made at the sheriff's office in Newport, twenty miles from the tract. *Howland v. Pettey*, 15 R. I. 603.

3. *Terry v. O'Neal*, 71 Tex. 592; *Finley v. South Car. Canal, etc., Co.*, 2 Rich. (S. Car.) 567.

As to the case of a new county formed, see *Ulshafer v. Stewart*, 71 Pa. St. 170.

The rule that the sale must be in the county was applied even to a foreclosure sale in Jackson county of two tracts separated only by the Muscatatuk river, the boundary between their counties and the sale of the Scott county tract was held invalid. *Holmes v. Taylor*, 48 Ind. 169.

In *Lower Canada*, immovables held in free and common "socage, or otherwise than *en roture* or *en franc alleu roturier*, when they are not situated in a parish civilly erected, can only be offered for final bidding and adjudication at the registry office for the division in which they are situate." *Rev. Stat. P. Quebec*, 1888, § 5937.

4. A sale at the courthouse door under a trust deed prescribing sale on the premises, was sustained upon collateral attack. *Nixon v. Cobleigh*, 52 Ill. 387.

5. See SHERIFF. Where a judgment was recovered in Knox county, but an execution, directed to the sheriff thereof was delivered to the sheriff of Fulton county, who, in 1840, levied on land therein and sold it, it was held that the defect was not cured by an amendment, made three years later by the Knox circuit

tion.¹ If the writ be not directed to the sheriff personally, it may be executed by a regularly appointed deputy.²

2. Coroner.—Neither the sheriff nor his deputies can execute a writ under a judgment to which he is a party in name or in interest.³ In such case the writ must be directed to another officer; usually to the coroner.⁴

3. Representatives.—Expiration of the sheriff's term of office does not confer upon his successor power to make the sale, if the *vend. ex.* should be directed to himself.⁵ He acquires by the levy a special property continuing after his removal from office, or even after his death. Accordingly, his executor or administrator can execute the *vend. ex.*⁶

court, substituting "Fulton." *Bybee v. Ashby*, 7 Ill. 151. But compare *Walden v. Davison*, 15 Wend. (N. Y.) 575.

After the sheriff has levied he has power to make the sale, although meanwhile the land has become included in a new county. *Lofland v. Ewing*, 5 Litt. (Ky.) 42; 15 Am. Dec. 41.

A constable of one township selling personal property under a writ directed to a constable of another township is a mere trespasser. *Gordon v. Camp*, 3 Pa. St. 349; 45 Am. Dec. 647.

1. See in Crocker on Sher. (3d ed.) § 481, collations of citations of State statutes hereon.

2. *Levett v. Farrar*, Cro. Eliz. 294; *Wroe v. Harris*, 2 Wash. (Va.) 126. Ever since *Gordon's Case*, tried in 1789, and reported in *East's Pleas of the Crown*, p. 315, acts of a mere *de facto* deputy are sustainable on collateral attack. *Potter v. Luther*, 3 Johns. (N. Y.) 431.

Under the *New York* statute requiring all sales under a decree to be made by a master, it was held that he could not specially deputize a seller. *Heyer v. Deaves*, 2 Johns. Ch. (N. Y.) 154.

A sale by a bailiff appointed by the sheriff *pro hac vice*, by parol, would be set aside on petition to the chancellor, in course of the same proceeding. *Meyer v. Patterson*, 28 N. J. Eq. 239.

A sale made by another than the sheriff upon an agreement with the defendant's attorney, was held void. *Kronschnable v. Knoblauch*, 21 Minn. 56.

In *South Carolina*, the court may specially appoint another than the sheriff to carry into effect an order of sale. *Adams v. Kleckly*, 1 S. Car. 142.

3. *Bowen v. Jones*, 13 Ired. (N. Car.)

25; *May v. Walters*, 2 McCord (S. Car.) 470; *Chambers v. Thomas*, 3 A. K. Marsh. (Ky.) 536; *Riner v. Stacy*, 8 Humph. (Tenn.) 288.

4. "Where the sheriff, to whom an execution is delivered, dies, is removed from office, or becomes otherwise disqualified to act before the execution is returned, his undersheriff must proceed upon the execution as the sheriff might have done. If there is no undersheriff, the court from which the execution issued, may designate a person to proceed thereupon, who . . . must give such security as the court directs." *New York Rev. Stat.* 1889, p. 1068, § 27.

In *Vermont*, the high bailiff so acts. *Vermont Rev. Laws*, 1880, § 2396; *Fletcher v. Bradley*, 12 Vt. 22; 36 Am. Dec. 324.

5. And this, notwithstanding statutory direction to deliver over the books and papers of his office. *Ryan v. Couch*, 66 Ala. 244.

In *England*, his successor could compel him to proceed with the sale. *Clerk v. Withers*, 6 Mod. 290.

The *Missouri* statute has been construed to authorize a sale by either the levying officer or his successor. *Kane v. McCown*, 55 Mo. 197.

In *California*, on levy upon real estate, the court may issue the *vend. ex.*, to the successor of the levying officer; otherwise as to personalty. *Clark v. Sawyer*, 48 Cal. 133.

6. *Obiter*, of Mansfield, C. J., in *Cooper v. Chitty*, 1 W. Bl. 69. The official successor assuming to execute it, could recover no commissions. *Sanderson v. Rogers*, 3 Dev. (N. Car.) 38; *Read v. Stevens*, 1 N. J. L. 264.

In *Mississippi*, if, after levy and before sale, the sheriff dies, a *vend. ex.* issues to the proper county officer to re-

To Whom.

SHERIFF'S SALES. Not to Sheriff or Deputy.

4. Auctioneers.—The sheriff may employ an auctioneer to call off the property, but must himself be present and approve of its being struck off.¹ In *England*, if neither party had requested an auction, the sheriff must himself pay the expense out of his commissions.² Otherwise in *New York*, etc.³ The auctioneer is merely the sheriff's agent.⁴

5. In Chancery.—Statutory provision for chancery sales to be made by a certain class of officers, does not import want of power to decree a sale by a special master.⁵ The decree usually indicates the mode in which the authority to sell is to be exercised.⁶

VII. To Whom.—**1. Not to Sheriff or Deputy.**—It is a rule in every code of jurisprudence that a purchase by a trustee or agent of the particular property of which he has the sale, whether he has an interest in it or not, *per interpositum personam*, carries fraud on the face of it.⁷ This prohibits the sheriff, constable, marshal, master, executor, or other trustee officiating,⁸ from being

ceive the property from his representatives and sell. *Mississippi Rev. Code*, 1880, § 1771.

In *Michigan*, if after levy and before sale, the sheriff dies or becomes incapable of proceeding, the sale may be completed by any other officer who might by law have executed the writ, if originally delivered to him. *Michigan Annot. Stat.* 1882, § 7695.

1. *Williamson v. Berry*, 8 How. (U. S.) 495; *Galbraith v. Drought*, 24 Kan. 592.

2. *Sewall on Sher.* 253; *Woodgate v. Knachtbull*, 2 T. R. 157.

3. See *Crocker on Sher.*, § 481; and *infra*, this title, *Sheriff's Rights—Fees*, etc.

A *New York* statute of 1869 provides that on decretal sale of lands in New York county the auctioneer's fees are to be paid by the purchaser in addition to the amount of his bid. But compare *Lord v. Richmond*, 38 How. Pr. (N. Y.) 173.

4. Where the execution plaintiff bought the goods and paid the auctioneer, who delivered the money to the constable, but the constable thereupon disclosed another execution, levied on the goods and carried them away, it was held that he disaffirmed the sale and was bound to return the purchase money. *Thurley v. O'Connell*, 48 Mo. 27.

5. *Mayer v. Wick*, 15 Ohio St. 548. Failure of such officer to file security was held not to be a ground for setting aside the sale after a long lapse of time. *Nicholl v. Nicholl*, 8 Paige

(N. Y.) 349. But compare *Brown v. Frost*, 10 Paige (N. Y.) 243.

6. *Blossom v. Milwaukee, etc., R. Co.*, 3 Wall. (U. S.) 205.

7. In *Michoud v. Girod*, 4 How. (U. S.) 555, the court, by Wayne, J., said: "The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity."

This rule is declared to be well settled in the U. S. Supreme Court. *Wormley v. Wormley*, 8 Wheat. (U. S.) 421.

8. The *Utah* statute inhibits any officer or deputy who is conducting the sale from becoming "interested in any purchase at such sale." *Utah Comp. Laws*, 1888, § 3436.

The *Wisconsin* statute forbids the officer from being interested "directly or indirectly." *Wisconsin Annot. Stat.* 1889, § 2999.

So also that of *Wyoming*. *Wyoming Comp. Laws*, 1876, p. 415, § 105.

In *Kansas*, the sale "shall be considered fraudulent and void" if made either directly or indirectly to the officer selling or to an appraiser. *Kansas Gen. Stat.* 1889, § 4560. Nor can the auctioneer buy. *Galbraith v. Drought*, 24 Kan. 592. Nor can a tax sale be made to a firm of which the county treasurer selling is a member. *Spicer v. Rowland*, 39 Kan. 740.

As a sheriff could only bid as agent, if at all, the fact that he failed to obey an instruction of the plaintiff to bid for him, was held to be no ground

himself, either directly or indirectly, the purchaser.¹ Otherwise, the sheriff, in fixing the time and place, could maneuver to lessen the price, "and no human tribunal could detect the fraud."²

Strictly applied, the rule which inhibits an officer from uniting the two opposing characters of seller and buyer would not allow him to act as agent of an absentee desirous of being a *bona fide* bidder, wherever the bid would require an exercise of the officer's discretion.³ It seems he might by letter or otherwise receive a specific offer, fairly announce it, and, if the highest bid, accept it.⁴ But this delicate dual condition of private agent and public officer would, in almost every case, involve embarrassing complications.⁵

A deputy, however, may purchase under an execution in his own favor if the sale is conducted by his principal.⁶ An assistant jailer is not a deputy within the *New York* inhibition.⁷ The crier of the sale, if not a deputy, can be the purchaser.⁸

2. Not to Appraiser.—In an *Ohio* statute declaring that a sale to the officer or to one of the appraisers "shall be considered fraudulent and void," this word has been construed to mean "voidable" only.⁹ Under the statutes of other States a sale to the sheriff or appraiser is usually adjudged void.¹⁰

for setting aside the sale. *Moore v. Pye*, 10 Kan. 246.

1. JUDICIAL SALES, vol. 12, p. 222.

In *Massachusetts*, an officer, after attaching a partnership stock of goods, may, subject to the attachment lien, purchase a partner's interest therein on a private debt due the officer. *Arnold v. Brown*, 24 Pick. (Mass.) 89; 35 Am. Dec. 296.

2. *Perkins v. Thompson*, 3 N. H. 146.

In *Massachusetts*, on sale by a trustee, the *cestui* has option, if seasonably exercised, to confirm the sale and retain the property, or to confirm the sale and receive the consideration. *Litchfield v. Cudworth*, 15 Pick. (Mass.) 31.

3. Thus the officer cannot bid as agent of the plaintiff. *Knight v. Herring*, 48 Me. 533. Compare the Tax-sale Case of *Pierce v. Benjamin*, 14 Pick. (Mass.) 356; 25 Am. Dec. 396.

4. *Dickerman v. Burgess*, 20 Ill. 266.

5. An officer, on his way to sell six acres of wheat worth over \$100, received a written bid of ten dollars. No person attended the sale. He cried the bid, accepted it, and made return accordingly. The sale was adjudged void on the ground that he could not properly accept the bid. *Sparling v. Todd*, 27 Ohio St. 521.

By a *Tennessee* act of 1805, an officer

bidding at his own sale, either for himself or for another, is indictable. *Chambers v. State*, 3 Humph. (Tenn.) 237.

6. *Jackson v. Collins*, 3 Cow. (N. Y.) 89; *Cowles v. Hardin*, 101 N. Car. 388.

In *Kentucky*, where a statute of 1792, prohibited one deputy from purchasing real estate at another's execution sale, the court, by Marshall, J., in the case of a sale of a slave, declined to declare absolute incapacity of a deputy to buy a chattel at a sale by his co-deputy. *Worland v. Kimberlin*, 6 B. Mon. (Ky.) 610; 44 Am. Dec. 785.

7. *Jackson v. Anderson*, 4 Wend. (N. Y.) 481.

8. *Crook v. Williams*, 20 Pa. St. 342.

9. Sustaining a fair sale to an appraiser, the court, by Brinkerhoff, J., stated that the word "considered" therein, does not import a legislative fiat. *Terrill v. Auchauer*, 14 Ohio St. 85.

Upon the same words in the *Nebraska* statute, the court, by Maxwell, C. J., stated that the fraudulent sale is a conclusion of law from the conduct, etc.; and a sale of land worth over \$800 to an appraiser for \$156, was accordingly set aside. *McKeighan v. Hopkins*, 19 Neb. 40.

10. See JUDICIAL SALES, vol. 12, p. 222, note 5.

3. Other Disqualifying Relations.—A purchase by an attorney in charge of the sale will not be upheld if he fails to show that he exercised due care to make the sale advantageous to his client.¹ An administrator's attorney cannot purchase at the sale;² nor can the judge of probate.³ The right of the defendant to purchase has been questioned in one dissenting opinion; "by-standers, on seeing him bid, may, from commendable sympathy, refuse to compete."⁴

The plaintiff, or any person interested in the judgment, may become the purchaser.⁵ In the *English* chancery practice, any of the parties to the cause may become a purchaser upon procuring an order therefor.⁶ In absence of fraud one co-tenant may, at sheriff's sale, purchase a moiety of any of the others' interest.⁷ So, also, in absence of any suspicious circumstances, may a partner purchase his co-partner's interest.⁸ An execution debtor

In *Mills v. Goodsell*, 5 Conn. 475; 13 Am. Dec. 90, the court, by Brainard, J., said: "The law cuts up, 'root and branch,' the power to purchase and the temptation to defraud. It will not permit an inquiry into the fairness or unfairness of the transaction." But the defendant may, by acquiescence, be estopped from denying the validity of the sale. *Farnum v. Perry*, 43 Vt. 473.

In *Pennsylvania*, a sheriff, selling under a *vend. exp.*, is not estopped from selling the land as trustee of the execution debtor. *Robins v. Bellas*, 2 Watts (Pa.) 359.

1. *Burke v. Daly*, 14 Mo. App. 542.

In a case where the attorney purchased 7,000 acres of land for \$35, the court, by Robertson, C. J., considered such purchases "*per se*, as in the twilight between legal fraud and fairness, and to be deemed fraudulent or in trust for the debtor, upon slight additional facts." *Howell v. McCreary*, 7 Dana (Ky.) 390.

Where a farm worth \$2,000 was, on a stormy day, sold to the attorney for ten dollars, the court, by Kent, Ch., adjudged the purchase to be in trust for the respective interests of the parties. *Howell v. Barker*, 4 Johns. Ch. (N. Y.) 118.

If there be two plaintiffs in the execution, the attorney cannot purchase for benefit of one, without consent of the other for a less sum than the whole amount of the claim. If thereon he receives the sheriff's deed, there is a resulting trust for both plaintiffs.

Leisenring v. Black, 5 Watts (Pa.) 303; 30 Am. Dec. 322.

2. *West v. Waddill*, 33 Ark. 575.

3. *Livingston v. Cochran*, 33 Ark. 294.

But the defendant's attorney may purchase with money advanced by the plaintiff, and the deed be made to the plaintiff as if a mortgage, cutting off subsequent liens. *Saunders v. Gould*, 134 Pa. St. 445.

In *Howell v. Barker*, 4 Johns. Ch. (N. Y.) 120, Chancellor Kent reprobates the practice of letting the plaintiff's attorney become the purchaser. See, also, *Forman v. Hunt*, 3 Dana (Ky.) 614.

4. In an *Iowa* case, A, the execution defendant, was the successful bidder, and forfeited his bid. On the next day, the sheriff in good faith accepted B's, the next highest bid, without again exposing the property to competition. The court (Cole, Dillon and Lowe, JJ.) held that the certificate and deed to B were absolutely void. But Wright, C. J., dissented, saying: "A had no right to bid." *Sworstzell v. Martin*, 16 Iowa 529.

5. *Morris's Estate*, Crabbe 71; *Stratford v. Twynam*, Jacob 418. A sale made to the plaintiff, pending appeal, was, upon a reduction of the judgment, set aside. *Munson v. Plummer*, 58 Iowa 736.

6. *Daniel on Ch. Pr. & Pl.*, § 1271.

7. *Burr v. Mueller*, 65 Ill. 262.

8. But a purchase by solvent partners of the insolvent partner's share of a coal mine was declared void. *Perens v. Johnson*, 3 S. & G. 419.

may purchase his co-defendant's property; the latter having a remedy by compelling contribution.¹

4. Inability to Contract.—The sheriff may refuse the bid of a person clearly irresponsible.² An infant or other bidder under disability would not be bound by the bid.³

If a municipal corporation were the bidder, its power to acquire and hold property could be inquired into at suit of the State.⁴

5. The Highest Bidder—*a*. IN GENERAL.—In the absence of any statutory restriction to the contrary, the sale must be to the highest qualified cash bidder.⁵ If his bid be refused, he can by proceeding in equity compel resumption thereof.⁶ A certificate or deed to another, when so proven, would be set aside.⁷

Until the property is actually struck off, a bid may be withdrawn,⁸ or the sheriff may recede.⁹

Non-payment of the highest bid necessitates a resale; the second highest cannot thereupon be accepted.¹⁰

1. Neilson v. Neilson, 5 Barb. (N. Y.) 565; Doe v. Parker, 3 Smed. & M. (Miss.) 114; Kilgo v. Castleberry, 38 Ga. 512; 95 Am. Dec. 406.

2. Merwin v. Smith, 2 N. J. Eq. 182; Michel v. Kaiser, 25 La. Ann. 57.

3. See Benjamin on Sales (Bennett's ed., 1888), Am. note, p. 36, *et seq.*

In Kinney v. Showdy, 1 Hill (N. Y.) 544, it was held that at a tax sale the officer might disregard an infant's bid.

In Alabama, it has been held that a married woman who was a fraudulent grantee, might purchase at an execution sale under a paramount lien, and thus acquire a valid title. Seals v. Pfeiffer, 77 Ala. 278.

4. The Minnesota statute, allowing a county to purchase lands for its public use cannot be extended to lands not intended for public use; and it could not be a purchaser thereof even at its own execution sale. Williams v. Lash, 8 Minn. 496.

In Tennessee, the district attorney has no authority to purchase in the name of the State, land sold under execution to satisfy a judgment in favor of the State. Littleton v. State, 2 Lea (Tenn.) 669.

5. For exceptions to the rule that the sale must not be on credit, see *infra*, this title, *Cash or Credit*.

Under a California statute a sale of land for taxes to the highest bidder instead of to the person who would take the least quantity of the land and pay the judgment and costs, is void. Reynolds v. Lincoln, 71 Cal. 183.

6. Duffy v. Rutherford, 21 Ga. 363; 76 Am. Dec. 459.

7. Dickerman v. Burgess, 20 Ill. 266.

A sheriff's deed to one of several joint purchasers would be invalid. Rice v. Smith, 18 N. H. 369. The deed must be to the purchaser or to the assignee of the certificate. Davis v. McVickers, 11 Ill. 327.

8. Blossom v. Milwaukee, etc., R. Co., 3 Wall. (U. S.) 196.

A bona fide bid, made under mistake of a principal's instructions, may, if promptly, be withdrawn, on payment of the costs. Fuson v. Connecticut Gen. L. Ins. Co., 53 Iowa 609.

9. So held where the officer stopped the sale on being tendered payment by an agent of the judgment debtor. U. S. v. Vestal, 4 Hughes (U. S.) 467.

The execution plaintiff cannot withdraw his bid without the defendant's consent. Downard v. Crenshaw, 49 Iowa 296.

10. Thompson v. McManama, 2 Disney (Ohio) 213.

Where, after a sale to A, he transferred his bid to B, who failed to pay, it was held that the execution plaintiff could not have the property resold and hold B liable for the difference; the first sale was not obligatory on B as a sheriff's sale. Mathews v. Clifton, 13 Smed. & M. (Miss.) 330.

But it has also been held that where the supposed highest is found not to be a legal bid, the bidder next below is the highest, and his bid can thereupon be accepted. Cummings v. McGill, 2

The superlative "highest" is predicable of a single bid.¹

b. DEVICES TO STIMULATE.—Formerly, especially in *England*, the fact that at an auction the owner secretly employed a person to attend and bid up to a certain price, was adjudged to be *prima facie* evidence of fraud.² But now, where the intent is only to prevent a sacrifice, and not to get an exorbitant price, the device is countenanced both by Parliament³ and by the court.⁴

The English chancery practice even provides for an order, on motion, to the master to make an estimate, fix a reserved bid accordingly, and transmit it under seal to the officer selling.⁵

Murph. (N. Car.) 357. And in *Swortzell v. Martin*, 16 Iowa 529, the dissent of Wright, J., was based on the ground that the sheriff should have disregarded the bid of the judgment defendant.

1. It has been held to be a misdemeanor for the sheriff to refuse to sell upon a solitary proper bid; the rule as to returning the execution for want of "bidders," meaning, for want of "any bidder." *State v. Johnston*, 1 Hayw. (N. Car.) 293. And in *State v. Joyce*, 1 Hayw. (N. Car.) 43, the court, by Williams, J., remarked that otherwise "no execution could ever be satisfied where the defendant could procure a friend to attend and bid more than the property was worth at first bid."

2. So held in *Green v. Bavestock*, 14 C. B., N. S., 204; 108 E. C. L. 202; the court, by Earle, C. J., citing for authority, *Lord Mansfield*, in *Bexwell v. Christie*, Cowp. 395; *Lord Kenyon*, in *Howard v. Castle*, 6 T. R. 642; and *Lord Tenterden* in *Wheeler v. Collier*, M. & M. 123. Compare *Veazie v. Williams*, 8 How. (U. S.) 134.

3. By Stat. 30 and 31 Vict., ch. 48, a vendor of real estate may employ a person to bid for him, upon the auctioneer's announcement of a reserved price. After a recital, "Whereas there is at present a conflict between Her Majesty's courts of law and equity in respect of sales by auction of land where a puffer has bid," etc., section 5 provides that the particulars or conditions of sale shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved; if without reserve, the seller cannot employ a puffer, nor the auctioneer knowingly receive the bid.

4. In *Gilliat v. Gilliat*, L. R. 9 Eq. Cas. 60, the court, by Romilly, M. R., distinguished, in section 5, of ch. 48, between a reserved bidding and a re-

served right to bid, and set aside a sale whereat the latter was not expressly stipulated for.

Compare *Mortimer v. Bell*, L. R., 1 Ch. App. Cas. 10.

In *Steele v. Ellmaker*, 11 S. & R. (Pa.) 86, 89, the court, by Tilghman, C. J., animadverted upon Lord Mansfield's reasoning in *Bexwell v. Christie*, Cowp. 395, as, "upon general principles," and as having "certainly been shaken by subsequent decisions," adding: "If it is generally understood that the seller reserves the right of bidding his goods in, at a limited price, unless the contrary be expressed as a condition of sale, then it is difficult to conceive how it can be a deception to employ an agent to bid up to that price. Perhaps the tone of Lord Mansfield's morals was too lofty for the common transactions of business. Some men may think it immoral to purchase a thing at less than its value. Such was the opinion of the famous Roman lawyer, Scævola, who having purchased a commodity at less than its value, held himself bound to pay the difference. But in all probability it will be long enough before an act of this kind will be recorded of any of our bidders at auction. We must look at both sides of the question. The seller may be deceived as well as the buyer. Combinations may be formed among the buyers not to bid against each other; and thus, unless the seller be permitted to defend himself, his goods may be sacrificed."

The court also said that, at a simple auction, the auctioneer is liable if he sells under the price limited.

Whether the employment of a by-bidder was in good faith is a question of fact for the jury. *Reynolds v. Dechaums*, 24 Tex. 174; 76 Am. Dec. 101.

5. Daniel's Ch. Pl. & Pr. (5th ed.), § 1268.

If the purchaser at a sheriff's sale promptly on discovery shows that he has suffered injustice from fictitious bids of puffers, the courts refuse to compel him to comply with his bid.¹ And he need not return the property if discovery comes too late therefor.² Otherwise, in order to relief, he must promptly tender the property, and offer to rescind.³ But even where puffers have been employed, if they have ceased, and the successful bid occurs in a competition between *bona fide* bidders, the purchaser will not be released therefrom.⁴

In order to insure good faith, the sheriff may require a reasonable deposit.⁵ He may also adopt safeguards approved by courts of equity and of probate.⁶

c. COMBINATIONS TO DEPRESS.—The courts will not enforce an agreement made with intent to defeat competition at the sale.⁷

In *Smith v. Clarke*, 12 Ves. 477, Grant, M. R., stated that it was the duty of the vendors, who were assignees under a commission in bankruptcy, thus to protect the interests of the creditors.

1. See *Story on Eq. Jur.* (13th ed.), § 292, notes.

This is done the more readily where there were no bids except from the puffer and the purchaser. *Howard v. Castle*, 6 T. R. 642.

2. In *Staines v. Shore*, 16 Pa. St. 203; 55 Am. Dec. 492, the court, by Gibson, C. J., stated that he has a right to purchase at an undervalue if he can; and a ruling that "if the horse was actually worth the sum to be paid for him, the buyer got the value of his money and could not have been defrauded," was thus animadverted upon: "The fallacy of the principle is in assuming that there is a standard of value independent of the wishes and wants of the bidders, and that every man is willing to buy by it."

3. A tender comes too late, if, in the first instance, made after accepting the sheriff's deed and taking possession thereunder. *McDowell v. Simms*, 6 Ired. Eq. (N. Car.) 278; *Tomlinson v. Savage*, 6 Ired. Eq. (N. Car.) 430. Compare the case of a sale by administrators, *Backenstoss v. Stahler*, 33 Pa. St. 257.

4. *Story on Sales* (4th ed.), § 482; *Bramley v. Alt*, 3 Ves. 624; *National Bank v. Sprague*, 20 N. J. Eq. 165.

5. At a sale of a valuable summer hotel a requirement of a deposit of \$5,000 was upheld. *National Bank v. Sprague*, 20 N. J. Eq. 159. So, also, at a master's sale of large railway interests, an order of court that each bid-

der make a deposit of \$50,000 was, on appeal, sustained. *Blossom v. Milwaukee, etc., R. Co.*, 3 Wall. (U. S.) 196.

6. See *infra*, this title, *Imposing Terms*.

In *National F. Ins. Co. v. Loomis*, 11 Paige (N. Y.) 431, the court, by Walworth, Ch., states that the principle on which the employment of puffers, as mere instruments to deceive other bidders, is disallowed, does not apply to a sale under decree, where the persons bidding, or as the agents of another, are bound to take the property.

7. In *Troup v. Wood*, 4 Johns. Ch. (N. J.) 254, the court by Kent, Ch., said, the creditor who suffers an execution, which the law lent him for his security, to be perverted to such a purpose, ought to be deprived of any further use of it.

In the complicated case of *Hamburgh Mfg. Co. v. Edsall*, 5 N. J. Eq. 249 (and 658), where there was a written agreement among certain creditors interested in valuable properties levied on under two executions, that one should bid as trustee for the others, the court by Halsted, Ch. (at p. 317), says: "It would not only be disastrous in its consequences, but it would be a reproach upon the courts to allow property to be sacrificed at sales on executions by means of such arrangements to prevent fair competition."

Similar views are expressed by Williams, C. J., in *Spencer v. Champion*, 13 Conn. 19; by Rhodes, C. J., in *Packard v. Bird*, 40 Cal. 378; by Spencer, J., in *Thompson v. Davies*, 13 Johns. (N. Y.) 112; by Church, C. J., in *Woodworth v. Bennett*, 43 N. Y. 273; by Hitchcock, J., in *Seymour v.*

In absence of evil intent, persons may combine at the sale to prosecute an honorable business enterprise. Lienholders may properly agree that only one shall bid, and that his purchase shall inure to the benefit of all.¹

A partnership of bidders is also allowable where one has not means to buy alone, or only desires to purchase a part of the property.²

d. FALSE REPRESENTATIONS.—The courts will, in a proper proceeding, vacate the sale if effected by bribery,³ or by false statements concerning the title,⁴ the value of the property,⁵ the time of the sale,⁶ the validity of the proceedings,⁷ or the pur-

Milford, etc. Turnp. Co., 10 Ohio 489, and by Miller, J., in *Fleming v. Hutchinson*, 36 Iowa 523, where A promised B, if B refrain from bidding, to take him in as joint purchaser, and B promised C to give C \$50 to refrain from bidding.

In *Reagan v. Bishop*, 25 S. Car. 590, the court by McGowan, J., stated that, "It is well settled, in this State, that no party to any agreement, the object and effect of which is to chill the sale and stifle competition, shall derive benefit from the sale."

In *Hamilton v. Hamilton*, 2 Rich. Eq. (S. Car.) 364; 46 Am. Dec. 58, the court, by Harper, Ch., distinguishes "those desirous of purchasing property upon a speculation of inordinate profit" from "creditors merely desirous of securing their debts."

1. *Myers v. Dorman*, 34 Hun (N. Y.) 115. See *Capital Bank v. Huntington*, 35 Kan. 588, wherein the court, by Valentine, J., distinguishes what in Kansas are reviewable irregularities in this regard.

Upon an execution sale of A's undivided interest in land of A, B, and C, B to prevent D, who has foreclosed a trust deed on C's interest, from bidding, may properly agree with the execution creditor, that the sale shall not affect D's title. *Kell v. Worden*, 110 Ill. 315.

2. In *National Bank v. Sprague*, 20 N. J. Eq. 169, the court, by Zabriskie, Ch., says: "If two country merchants in the same village should agree that one should attend an auction sale of flour in a distant city, and should purchase 200 barrels to be divided between them, it would not be illegal, though the effect might be that, instead of each bidding in competition with the other for 100 barrels, the purchase would be made with less competition and at a lower price. Or if, at an auction

sale of sugars by the hogshead, two persons, neither of whom wanted to purchase or would purchase a whole cask, were to agree that one should purchase for the common benefit, such arrangement is not against public policy; for, instead of preventing competition, it brings in a bidder who would not otherwise be one."

3. Buying off an intended bidder for ten dollars was held to render the title worthless in the trickster's hands. *Abbey v. Dewey*, 25 Pa. St. 416.

4. *E. g.*, the holder of a tax deed representing that he had a deed from the execution defendant. *Taylor v. Courtney*, 15 Neb. 190. Or, the defendants representing that a judgment in a former action was a lien on the land, and that they intended to purchase at a low price to secure themselves, thus deterring V from bidding. *Vantrees v. Hyatt*, 5 Ind. 487.

5. *E. g.*, describing a city lot as extending to an alley of ill-repute. *Whitaker v. Birkey*, 11 Phila. (Pa.) 199.

6. *E. g.*, the execution defendant's brother promising the plaintiff's attorney that the sale should not take place until a certain hour, and allowing the sale to occur a few minutes before, thus buying for \$150 property worth over \$400. *Ward v. Duer*, 70 Tex. 231. Or falsely stating that the sheriff had promised to notify an intended bidder as to the moment of starting sale. *Stewart v. Nelson*, 25 Mo. 309. Or, maneuvering to have the notice inadequate, thereby buying, for \$22, land worth \$5,000. *Stockton v. Owings*, Litt. Sel. Cas. (Ky.) 256. Or, swiftly entering in the circuit court a transcript of a justice's judgment, the execution creditor thereby bidding off property worth twenty times the judgment. *Hobson v. McCambridge*, 130 Ill. 367.

7. *E. g.*, publicly impeaching the

pose of the bid,¹ or by other chicanery and false promises.² But a promise by creditor to deliver over the property to defendant after reimbursing himself from the profits must be shown to be false; and this by evidence other than that afforded by the presumption arising from the mere fact of delay in settling.³

The preponderance of decision regards the title of such fraudulent purchaser as void while in his hands, and capable of being resisted at law;⁴ in trover or trespass if the property be personalty, and in ejectment if realty, or in the corresponding proceedings under the codes.⁵

regularity of the judgment and execution, thereby buying for \$1,415. land worth over \$5,000. *Collins v. Smith*, 75 Wis. 392. Or, inducing the officer to declare that he could not, under the circumstances of the advertisement, accurately tell the number of shares of stock he was selling. *Jones v. Portsmouth, etc., R. Co.*, 32 N. H. 544.

1. *E. g.*, representing that the purchase was to allow the debtor to redeem. *Forelander v. Hicks*, 6 Ind. 448. Or to give the grantor of an incumbrance time to redeem. *Miltenberger v. Morrison*, 39 Mo. 71. Or to restore the property to the debtor. *Arnold v. Cord*, 16 Ind. 177. Or to the debtor's wife. *Carson v. Law*, 2 Rich. Eq. (S. Car.) 296. Or to benefit his family. *Stewart v. Severance*, 43 Mo. 322; 97 Am. Dec. 392; *Aldrich v. Wilcox*, 10 R. I. 405. Or to give bond to reconvey to the debtor on reimbursement. *Griffith v. Judge*, 49 Mo. 536.

2. *E. g.*, promising bystanders if they would refrain from bidding, to resell to them in such parcels as they might want. *Mills v. Rogers*, 2 Litt. (Ky.) 217. Or otherwise to share with them the consequent benefits. *Wooton v. Hinkle*, 20 Mo. 290. Or the execution defendant's diminishing the attendance by falsely saying the judgment had been arranged, and there would be no sale. *Black v. Bayless*, 86 N. Car. 527. Or the plaintiff causing the execution to be returned *nulla bona*, and another to be issued to another county, thereby buying for \$10 lots worth \$1,000. *McLaury v. Miller*, 64 Tex. 381.

So, also, as to one's expostulating with rival bidders, and gaining their sympathy by alleging losses and other misfortunes. *Fenner v. Tucker*, 6 R. I. 551.

3. *Oram v. Rothermel*, 98 Pa. St. 300.

4. F, at an execution sale of a barge worth £150, said he had not been paid for building it, and bid £52. No one bid against him. The auctioneer refused to knock it down to him; whereupon a friend of F advanced the bid a guinea, and F advanced this a shilling, and paid a deposit. The auctioneer declared it unfair, and afterwards resold the barge to another for £100. In trover, it was held that F acquired no title. *Fuller v. Abrahams*, 6 Moore 316.

5. In *North Carolina*, where the code provisions as to the preliminaries of the sale are merely directory, a purchaser who is a stranger will get a good title, notwithstanding any irregularities in the sheriff's management; hence the sale cannot be collaterally avoided. *Oxley v. Mizle*, 3 Murph. (N. Car.) 250.

In *Hill v. Whitfield*, 3 Jones (N. Car.) 120, the court, by Pearson, C. J., distinguished between a fraud practiced by the defendant and one by collusion between the sheriff and the purchaser.

In *Burton v. Spiers*, 92 N. Car. 509, the court, by Ashe, J., says that an action to recover the land sold on the ground of such collusion is a legal action, and a defendant having equities must set them up in the defense.

In *Underwood v. McVeigh*, 23 Gratt. (Va.) 429 [an ejectment case incidental to the celebrated confiscation controversy, *McVeigh v. U. S.*, 11 Wall. (U. S.) 259] the court, by Christian, J., says, it has been held in numerous cases (citing five) that a purchaser who used unfair means to prevent competition cannot hold the property.

See, also, *Jones v. Portsmouth, etc., R. Co.*, 32 N. H. 544, and cases cited by Bell, J.; also *Abbey v. Dewey*, 25

In many States, however, the sheriff's acts being presumed to be regular, the sale is considered to be valid until set aside, and the remedy to lie rather in equity.¹

VIII. CONDUCTING THE SALE—1. In General—*a.* **IMPOSING TERMS.**—In the act of selling, the sheriff is the agent of the court and of the law. He can impose no terms unauthorized by the writ² or statute.³ But he may impose regulations to assure himself of bidders' good faith and to prevent by-bidding.⁴

Pa. St. 416; *Barton v. Hunter*, 101 Pa. St. 406.

1. *Cocks v. Izard*, 7 Wall. (U. S.) 559; *Crews v. First Nat. Bank*, 77 N. Car. 110; *Myers v. Sanders*, 7 Dana (Ky.) 507.

2. Under which of several executions to sell, see *supra*, this title, *Justification Under Process*; also *infra*, *Disposal*, etc.—*As Between Rival Executions*.

3. As to statutes prescribing the hour of sale, see *supra*, this title, *The Time of Sale—In General*. Some statutes inhibit sale of more property than will satisfy the writ; e. g., *California Code*, Civil Proc. 1885, § 694. For statutes otherwise regulating his conduct, see *infra*, this title, *Sheriff's Rights and Liabilities—Amercement*; *Loomis' Appeal*, 22 Pa. St. 312.

In *Pennsylvania*, before the act of 1830, conditions imposed by the sheriff for incumbrances, were not obligatory upon the purchaser. *Aulenbaugh v. Umbehauer*, 3 W. & S. (Pa.) 259. And this not even upon a purchaser with notice of a parol agreement therefor made by the parties at the sale. *Mode's Appeal*, 6 W. & S. (Pa.) 280. The sheriff can continue no lien to affect subsequent incumbrancers of the purchaser. *Randolph's Appeal*, 5 Pa. St. 242.

Where a sale was to be made subject to payment of a mortgage, a condition added by the sheriff: "and the several bonds secured by said mortgage," was held not to bind the purchaser. *Stevenson v. Black*, 1 N. J. Eq. 338.

In a sale of land the sheriff cannot, unless commanded, reserve emblements or way-going crops. *Howell v. Schenck*, 24 N. J. L. 89.

4. *Supra*, this title, *Devices to Stimulate*. A sheriff or a master in chancery may demand a deposit or an immediate compliance with the bid. *Irby v. Irby*, 11 Lea (Tenn.) 165. As to the *Canada* statute thereon, etc., see *infra*,

this title, *Resale—How Soon—At Law*.

In *Utah* "when a purchaser refuses to pay, the officer may in his discretion, thereafter reject any subsequent bid of such person." *Utah Comp. Laws*, 1888, § 3438. The officer is only liable for the amount bid by the subsequent purchaser and the amount collected from the purchaser refusing to pay. § 3439.

In cases of real or apparent bad faith, practical questions often arise very perplexing both to the sheriff and the courts as to how to adjust the relative rights of bidders and the parties without inflicting any hardship. Difficulty may not always be escaped, even by taking a bond.

In *Virginia*, in an ejectment suit, *Taylor v. King*, 6 Munf. (Va.) 366, 8 Am. Dec. 746, the court, by Roane, J., said, that in a court of law upon a bond or deed founded on a false statement of facts, the principle that fraud and covin vacates every contract is to be taken in subordination to another principle, namely, that the party is estopped from averring a matter of the kind against a specialty.

In *North Carolina*, it seems that in a case of fraudulent collusion between a sheriff and purchaser under a first execution a purchaser under a subsequent execution must seek relief in the equitable jurisdiction of the court. Compare *Currie v. Clark*, 90 N. Car. 355, and *Crews v. First Nat. Bank*, 77 N. Car. 110. In the latter case the court, by Rodman, J., suggested "to the parties as a plan of compromise apparently fair that the land be sold with a clear title, so as to bring a full price and the proceeds divided among the judgment creditors according to their legal priorities."

So, also, where the execution plaintiff, who had been a ward of the absent defendant, announced at a sale of land and slaves, that the land was put up merely to bring the latter to a set-

All the sheriff's arrangements and terms must be for the interests of the parties.¹ He must obey all reasonable directions of execution plaintiffs.² He may accept payment in any manner satisfactory to them.³ He must not imperil any of those interests by demanding immediate cash payment if the circumstances render it oppressive.⁴ He should not decline a bid from one, as

tlement, thus preventing competition. *Hill v. Whitfield*, 3 Jones (N. Car.) 120.

In *Alabama*, a sheriff's deed to a purchaser who, in order to get the lot below price, disclosed existence of deeds made to him by the defendant, was held to be only impeachable in equity. *Costillo v. Thompson*, 9 Ala. 937.

Under the *Pennsylvania* act of 1810, requiring a "public vendue," a sale to the plaintiff when no one else was present, was held to be void. *Ricketts v. Unangst*, 15 Pa. St. 90.

See *infra*, this title, *Recourse on the Sheriff; Misconduct of the Sheriff; Liability to Third Parties*.

1. On finding that the execution plaintiff is absent, and the bids inadequate, the sheriff should adjourn the sale. *State v. Moore*, 72 Mo. 285.

The sheriff should allow the plaintiff's agent to withdraw a bid made in excess of his authority. *Fuson v. Connecticut G. L. Ins. Co.*, 53 Iowa 609.

2. Disobeying the plaintiff's request to suspend the sale may be assigned as a breach, in an action on the sheriff's official bond. *Morgan v. People*, 59 Ill. 58.

3. Although the plaintiff bidder tendering fees, etc., is not bound to pay his bid, it seems that, if a dispute afterwards arises with other creditors as to which execution the money is to be applied on, the sheriff, if not thereupon paid, may refuse to deliver the property, and may resell. *Russell v. Gibbs*, 5 Cow. (N. Y.) 390.

Where, after the sheriff had sold goods to the execution plaintiff as highest bidder, without receiving the money, the judgment and execution were set aside as fraudulent, and the sheriff ordered to apply the moneys collected thereon to satisfy other executions, it was held that a return *nulla bona* was not false. *Nichols v. Ketcham*, 19 Johns. (N. Y.) 92.

The fact that the property was bid in by the execution defendant's agent and remained in the defendant's hands thereafter, was held not to render the proceeding any less a "sale" within the

North Carolina Code, § 461, imposing a penalty for making a sale contrary to the statute. *Freeman v. Leonard*, 99 N. Car. 274. And where the sheriff, with consent of the parties, disposed of the property at private sale on credit, as the defendant's agent, it was held that his principal could maintain an action on the purchaser's promise. *Jones v. Loftin*, 2 Hawks (N. Car.) 199.

Where the sheriff's deed remained with him as an escrow, it was held that he was not estopped to claim the land as trustee of the judgment debtor. *Robins v. Bellas*, 2 Watts (Pa.) 359.

An indemnified sheriff, delivering the goods sold on the purchaser's promise to pay will be required to pay to the plaintiff the amount of the bid less cost. *Disston v. Strauck*, 42 N. J. L. 546. So, also, if he takes the bidder's check; whatever he takes must be treated as money and applied on the execution. *Robinson v. Brennan*, 90 N. Y. 213.

The sheriff may make payment of his fees a condition precedent to accepting the execution plaintiff's bid. *Isler v. Andrews*, 66 N. Car. 552. And he may refuse to credit the plaintiff's bid on a specified one of several executions. *Isler v. Colgrove*, 75 N. Car. 334. But compare *Blum v. Rogers*, 71 Tex. 668; *Wood v. Morehouse*, 45 N. Y. 368.

In *North Carolina*, it has been held that the purchaser has a right to buy up the debts of the execution plaintiff, and thus partly get control of the sale, and have them credited in his bid, instead of paying the whole in cash. *Thorpe v. Beavans*, 73 N. Car. 241.

4. *Aldrich v. Wilcox*, 10 R. I. 405.

The sheriff may stop the sale on receiving from an agent of the execution defendant a sufficient tender of the amount of the judgment and costs. *U. S. v. Vestal*, 4 Hughes (U. S.) 467.

Where a sheriff did not demand instant payment from the bidder, and made no proper memorandum, a tender meanwhile made by a grantor of the execution defendant, was held to be effective, although the sheriff made a certificate of purchase to the bidder. *Ruckle v. Barbour*, 48 Ind. 274.

to whose solvency and good faith the execution plaintiff is assured.¹

6. CASH OR CREDIT.—The sheriff cannot sell on credit except by consent of the parties, or by special mandate of the court, or by statutory provision therefor.²

1. So held where a bidder showed a letter from the plaintiff's attorney stating that the bid was satisfactory and that he would give a receipt for the amount. *Lane v. White*, 12 Wis. 381.

2. The *Virginia* act of 1870, allowing a year's credit in a sale of personalty, where the debt was contracted before April 10, 1865, does not contravene the constitutional inhibition of acts for stay, or acts impairing the obligation of contracts. *Garland v. Brown*, 23 Gratt. (Va.) 173.

In *Ohio*, the court may order a sale of realty to be one-third for cash, one-third to be paid in one year and the other third in two years, with interest on the deferred payments, to be secured by mortgage on the premises so sold. *Ohio Rev. Stat.* 1890, § 5381.

In *Kentucky*, if the right of replevin has not been exercised, the sheriff may allow three months' credit, upon the purchaser's giving bond. *Kentucky Gen. Stat.* 1887, p. 559, § 1. As to restrictions upon his accepting a sale-bond, see *Spradlin v. Pieratt*, 12 Bush (Ky.) 496.

In *Arkansas*, the three months' credit is allowed only when the right of stay is given and not exercised. *Hall v. Doyle*, 35 Ark. 445.

In *Louisiana*, the sheriff may sell on credit, stating the fact in his return. *Louisiana Code*, § 702.

In *California*, if the judgment does not call for gold, the sheriff may receive U. S. treasury notes. *People v. Mayhew*, 26 Cal. 655. As to bank post-notes, see *Griffin v. Thompson*, 2 How. (U. S.) 244.

In *Wisconsin*, cash payment can only be delayed by the act or consent of the parties. *Sauer v. Steinbauer*, 14 Wis. 70. So also in *New Hampshire*. *Chase v. Monroe*, 30 N. H. 427; *Chandler v. Goodrich*, 58 N. H. 525.

In *Vermont*, the plaintiff's direction at the sale is held to leave the sheriff no discretion to regard a previous arrangement for credit. *Walworth v. Readsboro*, 24 Vt. 252. But compare

Kilgore v. Peden, 1 Strobb. (S. Car.) 18.

In *Indiana*, the sheriff can receive only an unconditional cash bid. *Swope v. Ardery*, 5 Ind. 213. But the right in case of non-payment, to re-expose on a subsequent day, imports the privilege of having a reasonable time to pay, if a proper memorandum is made. *Ruckle v. Barbour*, 48 Ind. 274. The plaintiff, in applying his bid, etc., has not the ordinary rights of a *bona fide* purchaser for value. *Carnahan v. Yerkes*, 87 Ind. 62. Compare *O'Brien v. Harrison*, 59 Iowa 686.

In *New York*, he cannot take the defendant's accepted draft. *Mumford v. Armstrong*, 4 Cow. (N. Y.) 553. Nor could he, in satisfaction of a *capias*, take the defendant's negotiable note. *Bank of Orange Co. v. Wakeman*, 1 Cow. (N. Y.) 46. Even so held where the defendant paid the note to another to whom it was transferred. *Sherman v. Boyce*, 15 Johns. (N. Y.) 443. As to "satisfaction," see *People v. Hopson*, 1 Den. (N. Y.) 574; *Robinson v. Brennan*, 90 N. Y. 208; *Hayden v. Agent of State Prison*, 1 Sandf. Ch. (N. Y.) 195. Where a sheriff gave time, it was held that one of the two execution defendants might, by tendering him the amount, avoid the inchoate sale. *Holmes v. Richmond*, 19 Hun (N. Y.) 634.

In *Illinois*, he is liable to the plaintiff if, without his concurrence, he gives credit and surrenders the property to the purchaser. *McCluskey v. McNeely*, 8 Ill. 578. As to effect of a prior mortgage on notes given by the purchaser under private arrangement, see the complicated case, *Holmes v. Shaver*, 78 Ill. 578.

In *Georgia*, no agreement between the sheriff and the purchaser to defer payment can affect the rights of the plaintiff or other creditors. *Jones v. Thacker*, 61 Ga. 329.

In *Pennsylvania*, a sheriff who accepts the purchaser's notes, has no power to assign them to a third person to pay a debt. The parties interested could reclaim them in the hands of an assignee with notice, and need not

c. DESIGNATION.—The sheriff must clearly designate the property.¹ The interest sold must be all whereof the execution defendant was seized.² In some States he must disclose the interest to be sold;³ also any defects of title.⁴

If the sheriff, in selling chattels, proceeds in substantial compliance with the law, the title will pass, without formal and

look to the sheriff's sureties. *Reed's Appeal*, 34 Pa. St. 207.

In *Texas*, a guardian paying his bid by crediting a judgment foreclosing a mortgage owned by his ward, is not a *bona fide* purchaser for value. *Delespine v. Campbell*, 52 Tex. 4.

Where the sheriff and A, the defendant, had agreed with B, that whatever B should bid in excess of the execution debt should be satisfied by paying only the execution, and B's bid was in excess, and was paid partly in a draft drawn by A on himself and accepted by the sheriff, it was held that A was estopped to deny the validity of the sale; also that C, a purchaser at a second execution sale under the same judgment, could not prevail against the first without showing that the draft had not been paid. *Pope v. Davenport*, 52 Tex. 206.

1. *E. g.*, a description: "A parcel of land containing 100 acres, known as the Neill McLean homestead, situate about sixteen miles northwest of the town of Lockhart," was held to be so indefinite as to render void the sheriff's deed. *Wooters v. Arledge*, 54 Tex. 395.

2. A sale of an undivided interest, where the defendant estate owned the complete title, was held void. *Eberstein v. Oswalt*, 47 Mich. 254. But *compare dictum* in *Perkerson v. Overby*, 59 Ga. 414.

3. In *New York*, a sale of a leasehold interest must be advertised and conducted as a sale of realty. *Mitnacht v. Cocks*, 65 How. Pr. (N. Y.) 84.

In *Indiana*, the sheriff must distinguish between personalty and chattels real (*e. g.*, machinery for coal mining), which may be sold at the door of the courthouse and out of view. *Hyatt v. Vincennes Nat. Bank*, 113 U. S. 408.

4. In *Kentucky*, a sheriff's omission to mention that the sale was subject to a certain mortgage was held to render him liable to the purchaser to the

extent of the injury. *Com. v. Dickinson*, 5 B. Mon. (Ky.) 506, 43 Am. Dec. 139.

In *Connecticut*, in such case, the purchaser can recover of the sheriff in an action for money had and received. *Bartholomew v. Warner*, 31 Conn. 98; 85 Am. Dec. 251.

In *Young v. Marshall*, 8 Bing. 43, 21 E. C. L. 215, where an indemnified sheriff sold, without notice of the creditor's previous act of bankruptcy, and paid the money over to the creditor, the court, by Tindall, C. J., said: "Money paid over on an indemnify may be said not to be paid over at all."

A sheriff, who, without taking the bond of indemnity prescribed by the *Kentucky* Code, seized and sold property, whereof the title was not in the execution defendant, was held liable to the real owner for the consequent injury. *Harrison v. Shanks*, 13 Bush (Ky.) 620.

Also in *Minnesota*, it was similarly adjudged as to a sheriff's sale of a large quantity of grain against the protest of the real owner. *Hossfeldt v. Dill*, 28 Minn. 469.

In *Louisiana*, upon executive sale, unless the sheriff announces after reading the mortgage certificate, that the purchaser shall have the right to retain the amount of the anterior privileges, the adjudication of sale is held to be a "nullity." But in *Southern Mut. Ins. Co. v. Pike*, 33 La. Ann. 823, the court, by Bermudez, C. J., said: "Such nullity is not absolute but only relative, and the adjudication is susceptible of ratification." The sheriff, however, need not announce the amount of taxes due on the property offered. *Gusman v. Le Blanc*, 27 La. Ann. 280.

In *Texas*, no property is subject to a sale under the *vend. exp.*, save that to which a specific right has been acquired by the levy of the *fi. fa.* *Borden v. McRae*, 46 Tex. 396. But *compare Borden v. Tillman*, 39 Tex. 262.

immediate change of possession.¹ But a mandatory statute thereon must be complied with.²

d. ORDER OF OFFERING.—In case of simultaneous attachments, the sheriff may sell the whole property at once and divide the proceeds among the execution creditors.³ He should arrange goods in such lots as, in his best discretion, will realize the most satisfactory price. The rule against excessive levies applies to sales of more property than will suffice to satisfy the execution.⁴

An execution defendant must seasonably make known his statutory option to have lands sold in a certain order.⁵

2. Rule of Inverse Order.—It is a rule of equity that if there are two creditors, and two funds or properties, to both of which one creditor can resort, but the other only to one, then the first creditor must first resort to the other fund.⁶ This rule must be applied where the levy embraces parcels, subject to the judgment lien, conveyed by the defendant to different persons at different times; the sheriff must sell them in the inverse order of their alienation.⁷ If no one bids, then he must offer the lot or parcel that was first conveyed.⁸ So also where it includes lots sold by the debtor on some of which the purchase money was fully paid, and on others but partly; he must first sell the latter.⁹

1. *Fitzpatrick v. Peabody*, 51 Vt. 195; *Wolcott v. Hamilton*, 61 Vt. 79; *Bisbing v. Third Nat. Bank*, 93 Pa. St. 79; 39 Am. Rep. 726; *Cornell v. Levinson*, 36 N. J. Eq. 647.

A confessed a judgment in favor of B to secure B and X. B became the purchaser of chattels sold under the execution thereon. B left them with A to be sold, and B and X to be paid from the proceeds. C seized the chattels as A's. *Held*, that no interest passed under C's levy. *Miller v. Irvine*, 94 Pa. St. 405.

In *North Carolina*, the sheriff must have made an actual seizure of chattels capable thereof. *Perry v. Hardison*, 99 N. Car. 21.

2. *E. g.*, 2 *New York Rev. Stat.* 136, § 5; *Masten v. Webb*, 19 Hun (N. Y.) 172.

3. *Wilson v. Blake*, 53 Vt. 305; *Geney v. Maynard*, 44 Mich. 578.

4. Where the sheriff is ordered to sell personal property, and in case that prove insufficient, then to sell real estate, a sale of the latter will not be upheld without proof either that the former was sold, or that the execution plaintiff gave the bond on condition of which giving the order was granted. *Houston v. McClung*, 8 W. Va. 135.

A sale to the execution creditor of

parcels of land in addition to those already sold, sufficient to satisfy the writ, is void. *Plummer v. Whitney*, 33 Minn. 427.

In absence of any showing that land seized under several executions was capable of division, it was held that the sheriff might properly sell under the first execution without parceling, although there was an attempted sale under the others. *Ridenour v. Shideler*, 5 Ill. App. 180.

Where the rents and profits of the land have been offered without receiving any bid, the fee simple may be sold. *Piel v. Watson*, 44 Ind. 447.

5. *Richey v. Merritt*, 108 Ind. 347.

Compare Pearson v. Flanagan, 52 Tex. 266.

6. 1 *Story's Eq. Jur.* (13th ed.) 643. See, also, as to the fund primarily liable, *McCormick's Appeal*, 57 Pa. St. 60; 98 Am. Dec. 191.

7. For collation of authorities (by States), *in extenso*, see *Jones on Mort.* (4th ed.), § 1621.

8. *Ritter v. Cost*, 99 Ind. 80.

9. *In re Wallace's Estate*, 2 Pittsb. (Pa.) 145.

But the facts that a third person in good faith bought at private sale from the execution defendant one of the chattels that had been levied on, and paid the full value, and that the sheriff

3. Parceling.—It is an equitable rule that the sheriff must sell articles of personalty or parcels of real estate separately, unless it is clear that they will bring more if offered together.¹ This principle has, in many States, become embodied in the statute governing foreclosure sales;² and sheriff's sales are adjudicated upon as in the same category. Sometimes this is ordered by the court; sometimes it is prescribed by special equities,³ and sometimes it is required by the terms of a mortgage or trust deed.⁴

The rule is often indispensable in execution sales of equities of redemption. Two distinct equities in different parcels under mortgages to different persons cannot be sold together on execution against the mortgagor.⁵

sold this while enough of the other chattels remained to satisfy the execution, have been adjudged to raise no equity against the sheriff or purchaser, though both knew of the private sale. In *Bevis v. Landis*, 6 Jones Eq. (N. Car.) 312; 82 Am. Dec. 418, the court, by Pearson, C. J., remarked that such interference would greatly embarrass officers in the discharge of their duties. One man will say: "I have bought this negro and forbid your selling him, because the other property is sufficient." Another will say: "I have bought this negro," etc.

1. In *Rowley v. Brown*, 1 Binn. (Pa.) 61, where there were three tenements on one lot of ground, the court said: "It is the rule of this court to disallow in every case a lumping sale by the sheriff, where, from the distinctness of the items of property, he can make distinct sales. It is essential to justice as to the protection of unfortunate debtors, that this should be the general rule; any other would lead to the most shameful sacrifices of property. There may be exceptions, but the purchaser must bring himself within them."

And this, not only to obtain the largest price by parting with the smallest amount of property, but also to enable the execution defendant to redeem, etc. *Winters v. Burford*, 6 Coldw. (Tenn.) 328.

And the fact that the sale of all the tracts may be necessary to satisfy the execution, cannot justify the sheriff in selling *in solido*. *Gregory v. Purdue*, 32 Ind. 453.

2. "If the mortgaged premises consist of distinct farms, tracts, or lots not occupied as one parcel, they shall be sold separately and no more farms,

tracts, or lots shall be sold than shall be necessary to satisfy the amount due on such mortgage at the date of the notice of sale, with interest and the costs and expenses allowed by law; but if distinct lots be occupied as one parcel, they may be sold together." *Michigan Stat.* 1882, § 8503.

This does not apply to two lots fenced and used as one parcel. *Yale v. Stevenson*, 58 Mich. 537.

Such, also, is the *Minnesota Stat.* 1891, § 5350. *New York, Wisconsin, Dakota and Mississippi* have similar statutory provisions.

Under the *New York* statute, if one interested in the equity of redemption requests a sale in parcels, and offers in good faith to bid the amount of the mortgage and the expenses, the mortgagee should not sell the entire property in one lot. *Ellsworth v. Lockwood*, 42 N. Y. 89.

3. *Jones on Mort.* (4th ed.), § 1616.

Otherwise, in *Indiana*, in absence of such request, where the division into parcels was not made until after the execution of the mortgage; so held, as to an auditor's sale under a school-fund mortgage. *Shannon v. Hay*, 106 Ind. 589.

4. *Jones on Mort.* (4th ed.), § 1857.

5. And this, though there could be no beneficial sales of the equities separately because of the option of the debtor to claim his homestead from either, and the equity in neither would satisfy the debt if the homestead was taken out of it. *McCone v. Courser*, 64 N. H. 506.

After A's wife had mortgaged certain land that had been conveyed to her, it was again mortgaged in a single deed to B with another parcel belonging to A, who then conveyed the equity of redemption in the second

The principle also applies where the execution defendant's interest in the separate lots is an undivided one.¹

The statutes of some States provide that upon a levy on lots or on land susceptible of division, no more shall be offered for sale than shall be necessary to satisfy the execution.² In a few

parcel to C. The equity in each parcel was to D sold separately on an execution against A. In D's action for possession, it was held that this was proper, although the equities had been created by one instrument; A having severed his interest. *North v. Dearborn*, 146 Mass. 17.

1. In *Bell v. Taylor*, 14 Kan. 277, the court, by Brewer, J., said: "A man who owns two-thirds of one lot might be very anxious to buy the other third, if he could buy that separately, and at the same time be very unwilling to buy the undivided third of a dozen other lots in order to secure the third of that one."

2. The *Oregon* statute (Annot. Laws, 1887, § 292) directing sale "separately or otherwise as is likely to bring the highest price," is construed to leave it to the sheriff's discretion. *Bank of British Columbia v. Sage*, 7 Oregon 454.

The *Missouri* statute, § 2368, "shall sell only so much," etc., "and if susceptible," etc., is construed to be directory only. *Rector v. Hartt*, 8 Mo. 448; 41 Am. Dec. 650. So held where the evidence as to the susceptibility was contradictory. *Sheehan v. Stackhouse*, 10 Mo. App. 469.

But where a lot worth \$3,000, and having two houses fronting on different streets, was sold at \$51, for a street assessment of \$8.55, the sale was set aside. *Gordon v. O'Neill*, 96 Mo. 550.

In *Tennessee*, the title papers of the execution defendant must determine whether the land shall be treated as one lot or as several. *Ament v. Brennan*, 1 Tenn. Ch. 434. But in a mortgage or trust deed, the description is not always conclusive upon the question of parceling. *Jones Mort.* (4th ed.), § 1857. If the parcels are not contiguous nor beneficial, the one to the other in the uses for which they are respectively adapted, a lump sale to the execution creditor, at an inadequate price, is absolutely void. *Mays v. Wherry*, 58 Tenn. 133. And this, both at the election of the debtor and as to judgment creditors. *Cooke v. Walters*, 2 Lea (Tenn.) 116.

The *Illinois* statute requires that real or personal property, "if susceptible of division, shall be sold in separate tracts, lots or articles, and only so much as is necessary to satisfy the execution and costs." *Illinois Rev. Stat.* 1887, p. 863, § 12. This is construed to import that in case of a levy upon a farm composed of several adjoining tracts, the sheriff must offer first the smallest subdivision; if this will not sell, then another, and if this draws no reasonable bid, then offer *en masse*. *Phelps v. Conover*, 25 Ill. 312.

In *Morris v. Robey*, 73 Ill. 462, the prior pertinent *Illinois* decisions are reviewed, and it is held that on a levy upon several lots, if the first one offered receives no reasonable bid, a second must be added; if these two will not sell, then a third one be added, and so on.

A sale of three separate tracts, *en masse*, after offering them singly, but not offering two together, was set aside; the land bringing a grossly inadequate price. *Cohen v. Menard*, 31 Ill. App. 503; *Douthett v. Kettle*, 104 Ill. 356.

So, also, a mass sale of 720 acres lying in five different townships and not contiguous, worth \$4,000, for \$50.62. *Day v. Graham*, 6 Ill. 435.

So, also, a sale entire of a farm of 544 acres, capable of division, worth \$25,000, for \$704. *Bradley v. Luce*, 99 Ill. 234.

Even after a lapse of five years equity set aside a sale *en masse* of lots worth \$8,000, for \$65.38; the owner being led by a court clerk's memorandum to believe that the judgment had been paid. *Berry v. Lovi*, 107 Ill. 612.

The like statute of *Indiana* (Rev. Stat. 1881, § 756) is construed similarly. *Piel v. Brayer*, 30 Ind. 332; 95 Am. Dec. 699; *Mugge v. Helgemeier*, 81 Ind. 120; a lump sale of a stock of goods at one-fifth of their value was set aside. *Brake v. Brownlee*, 91 Ind. 359. In *Wright v. Mack*, 95 Ind. 332, the action of the sheriff in selling *en masse*, may be conclusive that the land was not susceptible of division. *Nelson v. Bronnenburg*, 81 Ind. 193.

If the quantity sold be not excessive,

a levy needlessly large is not fatal. *Drake v. Murphy*, 42 Ind. 82.

An execution was returned unsatisfied, save as to a small amount. A second and a third were issued, and without demand on the execution defendant for personalty, an eighty acre tract of land worth \$2,500 was sold *in solido* to the execution plaintiff for the balance due, namely, \$36.44. No demand was made for the deed until the period of redemption had expired. Under *Indiana* Rev. Stat. 1876, § 444, requiring the sheriff to attempt to satisfy the execution out of available personalty, before resorting to realty, it was held that the burden was on the grantee to show that the sale was not fraudulent. *Wright v. Dick*, 116 Ind. 538. But compare *Bardeus v. Huber*, 45 Ind. 235. Of course after the sheriff has in vain offered the parcels separately, he may sell them together. *Nix v. Williams*, 110 Ind. 234.

In *California*, when the land levied on is in "several known lots or parcels, they must be sold separately; or when a portion of such real property is claimed by a third person and he requires it." *California* Code Civ. Proc., § 694.

A sale *en masse* for an inadequate price, without first offering the parcels separately, was set aside; *Wallace, C. J.*, however, dissenting, the sale being to a stranger. *Browne v. Ferrea*, 51 Cal. 554.

After the redemption period has expired, the title cannot be attacked collaterally for a sale in mass. *Gregory v. Bovier*, 77 Cal. 121.

The *California* statute requiring the sheriff in a tax sale to sell only the smallest quantity which any purchaser will take and pay the judgment and costs, is mandatory. *French v. Edwards*, 13 Wall. (U. S.) 506.

The *Nevada* law is like that of *California*. *Nevada* Gen. Stat. 1885, § 3247.

The *Minnesota* statute requires the sale to be "in such parcels as are likely to bring the highest price." *Minnesota* Stat. 1891, § 4833. This is construed to be directory only, *Tillman v. Jackson*, 1 Minn. 183. If the owner can show that the sale in gross was at a sacrifice, and was the result of actual fraud, the court will relieve; otherwise, not. *Lamberton v. Merchants' Nat. Bank*, 24 Minn. 288; *Swenson v. Halberg*, 1 McCrary (U. S.) 96.

Although all in one instrument to

secure seven sums, a mortgage sale of seven lots for a gross sum was held void. *Hull v. King*, 38 Minn. 349. An execution sale of a homestead with other lands not exempt, as one parcel, was held void as to the whole. *Mohan v. Smith*, 30 Minn. 259.

The presumption in favor of the officer having performed his duty and sold the lots separately, holds in this case as well as another. *Eggers v. Redwood*, 50 Iowa 289. See *Iowa* Rev. Stat. 1888, § 4311, note. A lump sale to the execution plaintiff of city lots lying somewhat remote from the others, at an inadequate price, was held to be voidable as to those remaining in his hands. *Williams v. Allison*, 33 Iowa 278. A special execution sale of 240 acres in a body, after being offered in forty-acre tracts with no bids, was sustained, *Burmeister v. Dewey*, 27 Iowa 468. Objection deferred many years comes too late to set aside a sale for want of parceling. So held as to eleven years' delay. *Wood v. Young*, 38 Iowa 103. Of course, after the sheriff has in vain offered the parcels separately, he may sell them *en masse*, *Lamb v. McConkey*, 76 Iowa 47.

In *Nebraska*, the officer must, when required, levy and sell in separate parcels, "when, in the opinion of the appraisers, the same may be divided without material injury." *Nebraska* Comp. Stat. 1889, p. 922, § 505. In case of liens, the sale must be for not less than two-thirds of the appraised value of the defendant's interest, unless they equal or exceed its money value, § 491d. A homestead on two parcels may be sold as one. *Eaton v. Ryan*, 5 Neb. 47. Where the buildings on one of the three lots mortgaged extended to the two others, the sale was adjudged to be properly in gross. *Craig v. Stephenson*, 15 Neb. 362.

A lump sale of mining claims and a tunnel site in *Colorado*, after the claims had been unsuccessfully offered singly, was adjudged proper. *White v. Crow*, 110 U. S. 113.

In *New Jersey*, a sheriff's sale of the personal property of a horse railroad company *en masse*, and at a distance, was set aside at the instance of interested parties. *Boylan v. Kelly*, 36 N. J. Eq. 331.

In *Rhode Island*, a sale of land from the side of a lot—the sold and the unsold parts each abutting on the highway—was held proper. *Howland v. Pettey*, 15 R. I. 603.

the statutes provide for a sale in prescribed parcels, at the owner's option.¹

Whether such parcels are deducible from a tract, often depends less upon any printed or written description than on its actual use and occupation.² The same principles apply to sheriff's sales of personal property.³ So, also, as to foreclosure sales, and the sale of an equity of redemption.⁴ In some instances, the writ itself precludes a sale of the land as a whole.⁵

The law requiring sheriffs to sell, in parcels, land levied upon,

In a sale of a city lot whereon tenements are peculiarly situated, inadequacy of price does not, *ipso facto*, raise a presumption that the sheriff did not fulfill his duty to learn the situation and discriminate. *O'Donnell v. Lindsay*, 39 N. Y. Super. Ct. 523.

Where the land was described as two lots, and the dimensions of the whole given, leaving those of each to be ascertained from a map referred to it was held that—the execution defendant not acquiescing—a sale of both as one parcel should be set aside. *McIntyre v. Sanford*, 9 Daly (N. Y.) 21.

An appraisement and sale in gross of land under description, "lots seven and nine in block thirteen," was set aside on motion of the judgment debtor. *Johnson v. Hovey*, 9 Kan. 61.

1. The *Arkansas* statute (Dig. 1884, § 3052), requiring division at the owner's option, into lots of not more than forty nor less than twenty acres, is directory only. *Feild v. Dortch*, 34 Ark. 399. This is waived if he is present at a sale of the whole tract in a body, and neither asks for a division nor objects. *Reynolds v. Tenant*, 51 Ark. 84.

So, also, in *Texas*, if it appears that no greater price could have been obtained by such parceling. *Atcheson v. Hutchison*, 51 Tex. 223.

In *Missouri*, the fact that a sheriff's tax sale of land was not by the smallest legal subdivisions thereof, is no defense in ejectment by the purchaser. *Well-shear v. Kelley*, 69 Mo. 343.

2. "It may consist of parcels known by different names or numbers; it may have formerly been the property of different owners, from whom the defendant acquired it by separate purchases, and yet if the tracts are contiguous, he may have so improved and occupied them as to unite them into one tract. If so, a sale of the tract, by

its original parcels, is not required, and is manifestly improper." *Freeman*, Ex. (2d ed.) § 296.

See *infra*, this title, *Conducting the Sale—Massing*.

3. Sale of a negro and her child was held to be a proper exception to the rule as to selling in parcels. *Lawrence v. Speed*, 2 Bibb (Ky.) 401.

A lump sale of 300 shares of stock, worth \$20,000 for \$3,000, upon a "snap notice," while the defendant's attorney was preparing appeal papers, was set aside. *American Wine Co. v. Scholer*, 85 Mo. 496.

4. A common incumbrance creates no reason for selling lots together. *Baker v. Chester Gas Co.*, 73 Pa. St. 116.

After a release of a portion of the mortgaged premises, if the remainder can be sold in distinct parcels, a sale of the whole together is void. *Durm v. Fish*, 46 Mich. 312. But neither a party who has waived his right to redeem nor the mortgagee can object that the sale was not made in parcels. *Clark v. Stilson*, 36 Mich. 482.

If, after mortgaging two parcels by one deed, the mortgagor conveys his equity of redemption in each parcel to a different grantee, he thereby so far severs his interest that it is no ground of objection that his interest in each parcel is levied upon and sold separately on an execution against him. He is not aggrieved, for he severed his interest; the mortgagee is not injured, for the debt must be fully paid before he can be compelled to release any parcel. *North v. Dearborn*, 146 Mass. 17.

5. Such sale, to satisfy the aggregate debt of several defendants, would pass no title under an execution directing the sheriff to make a particular sum out of the land of each. *Brown v. Duncan*, 132 Ill. 413.

is intended for the benefit of the execution defendant, and such right may be waived by him.¹

According to the preponderance of the later decisions, a sale in violation of the requirement to offer in parcels is not absolutely void but voidable only.² But in absence of extraordinary circumstances to occasion delay, the application to set aside therefor must be made before expiration of the time to redeem.³

4. **Massing.**—In some cases a sale by separate parcels is impracticable; and in many cases, even where practicable, it would not be for the interest of the parties. It then becomes the duty of the sheriff to offer and sell the property *en masse*.⁴ This

1. *Joyce v. First Nat. Bank*, 62 Ind. 188.

2. It had been argued that the sheriff's act—unlike a commissioner's under a decree as agent of the court—being ministerial, he had no authority to sell more than necessary to satisfy the execution; hence, such sale was void. *Dawson v. Litsey*, 10 Bush (Ky.) 408.

In *Indiana*, if no person interested demands a division, the sale is valid, though the land be found susceptible thereof. *West v. Cooper*, 19 Ind. 1. A sale without division is voidable only. *Jones v. Kokomo Bldg. Assoc.*, 77 Ind. 340; *Nelson v. Bronnenburg*, 81 Ind. 193; *Brake v. Brownlee*, 91 Ind. 359.

In *Pennsylvania*, the earlier decisions (*Klopp v. Witmoyer*, 43 Pa. St. 219; 82 Am. Dec. 561, etc.) declared them void, but the later voidable only. *Smith v. Meldren*, 107 Pa. St. 348.

In *Michigan* they have been declared void. *Udell v. Kahn*, 31 Mich. 195. So, also, in *Tennessee*. *Cooke v. Walters*, 2 Lea (Tenn.) 116.

3. *Vigoureux v. Murphy*, 54 Cal. 346; *Love v. Cherry*, 24 Iowa 210; *Raymond v. Holburn*, 23 Wis. 57; 99 Am. Dec. 105.

The sheriff's deed cannot be collaterally attacked therefor. *Foley v. Kane*, 53 Iowa 64.

4. In *Michigan*, however, it has been held that the debtor has a right to have the parcels so sold that he may redeem any one without being compelled to redeem the others; accordingly, if they cannot be sold separately, they must not be sold at all. *Udell v. Kahn*, 31 Mich. 197.

In *Furbush v. Greene*, 108 Pa. St. 507, the court, by Gordon, J., said: "These goods were sold in two lots; in one was the machinery of the establishment, in the other, a quantity of shawls, some in cases, and others, perhaps samples, on the counters.

Should these goods, the product of a large manufacturing establishment, in a commercial city like this, have been sold by the piece; auctioned off day by day to the rabble which might happen to drop in? Certainly not; for no better way could have been devised for the sacrifice of this property."

A sale in bulk of the personal property in a large hotel for \$33,000, was held not to be an abuse of discretion. *National Bank v. Sprague*, 20 N. J. Eq. 159.

So, also, was held proper, a sale in one parcel, of two lots whereon had been erected a single building covering one of them and a small part of the other. *Geney v. Maynard*, 44 Mich. 578.

So, also, a sale of several ditches, and water rights appertaining thereto, constituting but a single connected system of water supply. *Gleason v. Hill*, 65 Cal. 17.

A homestead in two parcels may be sold as one. *Eaton v. Ryan*, 5 Neb. 47.

The fact that contiguous tracts were acquired by their owner at different times is no ground for their being sold separately. *Stephens v. Taylor*, 6 Lea (Tenn.) 307. But, *compare Hammett v. Farmer*, 26 S. Car. 566.

Several government subdivisions, used together as one farm, can all be sold as one. *Maxwell v. Newton*, 65 Wis. 261.

Land under one ownership, but divided by stone walls into six lots, was held to be properly sold as one lot. *Howland v. Pettey*, 15 R. I. 603.

A sale of a central portion of a tract thereby greatly injuring the remainder, accompanied with other circumstances indicating fraud, was set aside. *Parker v. Glenn*, 72 Ga. 637.

A bulk sale of the machinery and fixtures of an oil well, was held not to be

principle has especially been recognized in foreclosure sales.¹ And the decree will direct the sale so to be made as to prejudice little as possible, parties having equities subject to the mortgage.²

5. Reopening on Advance Bid.—In *England*, and in some of the States, it is in practice to allow, on motion, in arrest of confirmation, an opening of the biddings by reason of an advance bid having been made.³

void. *Smith v. Meldren*, 107 Pa. St. 348.

It is only on the ground of fraud, whereby some one is injured that a bulk sale will be set aside. *Ross v. Mead*, 10 Ill. 171. Especially if nobody requested a sale in parcels. *McMullen v. Gable*, 47 Ill. 67. And the motion to set aside must be made by a party whose rights are injured by the massing. *Hicks v. Perry*, 7 Mo. 346. In absence of fraud, a general creditor of the defendant will not be heard to complain. *Yost v. Smith*, 105 Pa. St. 628; 51 Am. Rep. 219.

Where the execution creditor was purchaser at a lump sale of a quarter section of land, it was set aside on motion; the court taking judicial notice of the irregularity; and he being presumed to have retained the land, although he has assigned his judgment, after the sale. *Meacham v. Sunderland*, 10 Ill. App. 123.

As to what is deemed to have passed by the sale, see *infra*, this title, *Restriction to Defendant's Interest*.

As to evidence whether a sale under two executions embraced two lots or only one, see *Ditto v. Woodfill* (Ky. 1888), 7 S. W. Rep. 542.

1. In *Olcott v. Bynum*, 17 Wall. (U. S.) 62 (as to a mortgage sale of 14,000 acres under a power to sell the whole on failure to pay each of the installments at maturity), the court, by Swayne, J., said: "If enough of it to satisfy the amount due could be segregated and sold without injury to the residue it would have been the duty so to sell. . . . But it has upon it water power, timber, ores, mills and furnaces; each part is necessary to every other. Dismemberment, instead of increasing, would have lessened the aggregate value."

So, also, as to a sale of a railway. *Wilmer v. Atlanta, etc.*, R. Co., 2 Woods (U. S.) 453. Compare *Dunham v. Cincinnati, etc.*, R. Co., 1 Wall. (U. S.) 254.

So, also, as to parcels used together as

one farm. *Anderson v. Austin*, 34 Barb. (N. Y.) 319; *Grover v. Fox*, 36 Mich. 461; *Craig v. Stephens*, 15 Neb. 362.

There is no obligation on foreclosure to sell suburban residence property in parcels, in order to obtain a greater price. *Cleaver v. Green*, 107 Ill. 67. Or unimproved city lots. *Abbott v. Peck*, 35 Minn. 499.

Where parcels not covered by the mortgage were sold with a parcel covered by it, as one tract, and for a gross sum, it was held that this did not avoid the sale as to the parcel covered by the mortgage. *Bottineau v. Aetna L. Ins. Co.*, 31 Minn. 125.

2. *De Forest v. Farley*, 62 N. Y. 628.

The remedy for an erroneous foreclosure order to sell in parcels is by amendment of the final decree. *Horne v. Corning*, 28 N. J. Eq. 254.

In *American L. & F. Ins. Co. v. Ryerson*, 6 N. J. Eq. 488, the court, by Halsted, Ch., stated that although there be a decree for the sale of the whole premises, the court may, in its discretion, regulate execution thereunder, and on payment of some installments, let the decree remain a security for subsequent defaults, if they occur. *Citing Judd v. Evans*, 6 T. R. 399.

The court will protect junior lienholders by selling entire, although the mortgage describes the property in separate parcels. *Johnson v. Hambleton*, 52 Md. 385. So held, even where the premises consisted of many acres within city limits; it not appearing that specific parcels could be sold for cash. *Gregory v. Campbell*, 16 How. Pr. (N. Y.) 417.

3. In *England*, an advance bid of £60 on £430; *Bourn v. Bourn*, 13 Simons 189; and in *North Carolina*, on one of ten per cent. advance. *Dula v. Seagle*, 98 N. Car. 458.

Sometimes there has been a second opening therefor. *Scott v. Nesbit*, 3 Bro. C. C. 475.

In some States, the practice rests

IX. THE MEMORANDUM.—The sheriff can consummate no valid sale without some official memorandum or return. Whether prescribed by a statute for prevention of frauds and perjuries or not, it is evidently his duty to have one sufficient to meet a denial, in case any party should resist the confirmation of the sale.¹ According to the preponderance of decisions, his indorsing the return upon the writ is a sufficient memorandum to satisfy the Statute of Frauds.²

In those States, the statutes of which require his proceedings to be stated in the return, or in a certificate of sale, his compliance therewith gives the requisite evidence.³ On the point

entirely within the discretion of the court. *State Bank v. Green*, 11 Neb. 303; *Wakeman v. Price*, 3 N. Y. 334; *Dupuy v. Gorman*, 9 Lea (Tenn.) 144.

In *Pennsylvania*, this has been allowed upon an administrator's report as to a higher offer. *Hays' Appeal*, 51 Pa. St. 58.

In *West Virginia*, this was permitted in a commissioner's sale on an upset bid of twenty per cent. advance. *National Bank v. Jarvis*, 28 W. Va. 805.

As to re-opening, in general, see Lord Eldon's remarks in *White v. Wilson*, 14 Ves. 151. See, also, *Forman v. Hunt*, 3 Dana (Ky.) 614; and *Williamson v. Dale*, 3 Johns. Ch. (N. Y.) 292.

1. In *Smith v. Arnold*, 5 Mason (U. S.) 420—where the memorandum of an administration auction sale of a farm failed to state the price and material terms—the court, by Story, J., distinguished such sales from chancery sales, where the court's own superintendence remedies the mischief supposed by the Statute of Frauds.

In *Blagden v. Bradbear* 12 Ves. 472, the court, by Grant, M. R., said: "From the public nature of a sale by auction, it does not follow that what passes there must be matter of certainty; so far from it, that I never saw more contradictory swearing than in those cases where attempts were made to introduce evidence of what was said or done during the course of the sale. . . . I should therefore hesitate to say the policy of the statute does not extend to such sales."

2. This rests upon the principle of the maxim, *omnia præsumuntur rite esse acta*, that official acts must be presumed to have been done as prescribed by the statute governing. Thus the return is *prima facie* evidence of the

sale. *Hyskill v. Givin*, 7 S. & R. (Pa.) 369; 26 Am. Dec. 254; *Nichol v. Ridley*, 5 Yerg. (Tenn.) 63; *Hand v. Grant*, 5 Smed. & M. (Miss.) 508.

In *Missouri*, a sale without memorandum, though within the Statute of Frauds, and not divesting the owner's title, is not void; the deed when made will relate back and take effect from the sale. *Alexander v. Merry*, 9 Mo. 514.

In *Remington v. Linthicum*, 14 Pet. (U. S.) 92, the court, by Taney, C. J. (after reviewing pertinent *Maryland* decisions), said: "The sale by the marshal being within the Statute of Frauds, must be proved by written evidence. This may be procured before or after the jury are sworn in the trial of ejectment."

3. Even if a sale was voidable for non-compliance with the Statute of Frauds, a subsequent sufficient certificate of sale renders it valid as to persons who have not acquired any intervening rights. *Elston v. Castor*, 101 Ind. 426; 51 Am. Rep. 754.

In *Armstrong v. Vroman*, 11 Minn. 220; 88 Am. Dec. 81, the court, by Berry, J., said: "The majority of the court are of opinion, that the proper evidence of a sale of real estate upon execution, is prescribed by statute on the subject, and that no note or memorandum other than the certificate of sale is required."

In *National F. Ins. Co. v. Loomis*, 11 Paige (N. Y.) 431, the court, by Walworth, Ch., after observing that the statute (2 *New York Rev. Stat.* 135, § 8) only requires the memorandum to be signed by the party acknowledging the sale, remarked that the master's report is a sufficient compliance.

In *Simonds v. Catlin*, 2 Cal. (N. Y.) 65, the court, by Kent, Ch., (after animadverting upon a *dictum* of Lord

whether or not his omission to make a written memorandum, even if bringing the case within the Statute of Frauds, invalidates the sale, the authorities are not unanimous.¹

X. RESALE—1. How Soon—*a*. AT LAW.—Upon the purchaser's failure to complete his purchase it is the duty of the sheriff to resell. The practice therein is not uniform. Ordinarily, on his acceptance of the bid, he must forthwith demand payment, and in default thereof, re-offer before departure of intended bidders.²

Hardwicke in *Attorney-Gen'l v. Day*, 1 Ves. 221, says: "The minute provisions in our own statute regulating sale on execution, and even the facts in the case before us [of a sale by a deputy while the sheriff was on his deathbed, and a return erroneously made in the deputy's own name] are sufficient to show that these kinds of sales are equally within the danger of the mischiefs which the act sought to prevent. The court of chancery [in *Forster v. Hale*, 3 Ves. 696] itself has latterly admitted that it had gone rather too far in permitting part performance, and other circumstances, to take cases out of the Statute of Frauds."

1. In *Indiana*, a sheriff's testimony that his return was made on the execution "immediately after" the sale, is but a statement of his conclusion, and, in absence of deed or of certificate of sale, is not sufficient, in connection with the return, to take the sale out of the Statute of Frauds. *Gossard v. Ferguson*, 54 Ind. 519. Compare *Chapman v. Harwood*, 8 Blackf. (Ind.) 82; 44 Am. Dec. 736.

In *Kentucky*, a memorandum made on a separate piece of paper, and not embodied in the return, will not bind the parties. *Linn Boyd Tobacco Warehouse Co. v. Terrill*, 13 Bush (Ky.) 463.

In *Pennsylvania*, a sheriff's sale is not adjudged to be within the statute. In *Emley v. Drum*, 36 Pa. St. 123, the court, by Read, J., says: "It is acknowledged that if there had been a formal return by the sheriff in his own name, it would have been at least *prima facie* evidence of a sale; and this shows that a judicial sale, with us, is not within the Statute of Frauds, for the return is of course not signed by the purchaser, who is the party to be charged."

In *North Carolina*, the return itself is a sufficient memorandum. In *Tate v. Greenlee*, 4 Dev. (N. Car.) 151, the court, by Gaston, J. (upon deciding

that an execution sale is not within their statute of 1819, which declares parol contracts for sale of land or of slaves to be void), argues as follows:

"It is highly improbable that the Legislature intended that the sheriff should have an arbitrary discretion to make a title or not to make a title to the purchaser, and, if he be 'the party to be charged,' he must have this discretion, because he is not bound to avail himself of this legal objection, but may, like every party sought to be charged, waive it if he pleases. Should he refuse to make title, it is plain that vast confusion must arise."

"If the Legislature intended to vest the sheriff with so dangerous a power, it would have laid down some rule by which the consequences resulting from its exercise would be defined, instead of leaving them to be inferred by judicial conjecture. . . . The sheriff cannot claim the protection of this act against one paying the price of his purchase and demanding a conveyance, nor, conversely, can the purchaser set up the statute as a bar to the demand of the sheriff, for the purchase money, on tendering a conveyance."

2. In *Louisiana*, it has been held that the bid may be disregarded if not paid "at once." *Durnford v. Degruys*, 8 Martin (La.) 223; 13 Am. Dec. 285.

So, also, in *Nebraska*, if he elects to resell instead of suing the purchaser. *Jones v. Null*, 9 Neb. 254.

In *Massachusetts*, a reoffering within twenty minutes was sustained. *Wilson v. Loring*, 7 Mass. 392.

In *Georgia*, a resale on the same day within legal hours, and without readvertisement, was upheld. *Humphrey v. McGill*, 59 Ga. 649.

In *Missouri*, even a resale not taking place immediately, may be without readvertisement. *Illingworth v. Miltenberger*, 11 Mo. 80.

In *South Carolina*, the vendue act of

The restriction of the sale in the first instance to the period of the lien, applies also to resales.¹

In some States resales are expressly prescribed by statute.²

b. IN CHANCERY.—In chancery practice and under some codes the purchaser may be summoned to show cause, and on his contin-

1785 required seven days' notice of resale. In *Minter v. Dent*, 2 Bailey (S. Car.) 291, where a slave, bid off for \$300, was resold on the next day for \$173, it was held that the restriction did not apply to sheriff's sales; the court, by Harper, J., observing that, as the law required the latter to take place on the first Monday and Tuesday of every month, to allow a week would, in effect, be allowing a month.

In *Pennsylvania*, the sheriff need give the purchaser only a general notice of the resale, without specifying the time or place. *Gaskell v. Morris*, 7 W. & S. (Pa.) 32. But payment, unless neglected until after the return must be demanded, in order to maintenance of an action for the consequent loss. *Vastine v. Fury*, 2 S. & R. (Pa.) 426.

In *Missouri*, neglect to pay is not considered tantamount to refusal to pay; and, in absence of actual repudiation, the sheriff must not only demand the purchase money but tender a deed before making a resale of realty. *Phillips v. Goldman*, 75 Mo. 686.

So, also, in *Illinois*, *Hill v. Hill*, 58 Ill. 239. Moreover, the purchaser must be notified that he will be held responsible for the consequent deficiency. *Maulding v. Steele*, 105 Ill. 644.

1. See *supra*, this title, *The Time of Sale*.

In *Settlemyre v. Newsome*, 10 Oregon 446, in deciding that land sold for less than the debt and redeemed by a grantee of the judgment debtor, might be sold a second time for the balance—the court, by Waldo, J., said: "The execution comes as a power to seize the debtor's title and pass it to the purchaser. . . . It is not sufficient to divest the lien that the power should be partly executed by an inchoate sale. The sale is but one of the steps in the exercise of the power."

In *Massachusetts*, in case no rights of third persons have intervened after a purchaser has made a deposit but refused to complete the sale, the sheriff may, after notice, resell without making or recording another seizure.

Croacher v. Oesting, 143 Mass. 195. And where, on the purchaser's default the sheriff, without return, handed the execution back to the creditor's attorney who elected to treat the sale as a nullity, and in good faith indorsed on the execution that it had never been, in the sheriff's hands, and obtained an *alias* execution whereunder a resale was made, it was held valid. *Slater v. Lamb*, 150 Mass. 239. Compare *Byrnes v. Morris*, 53 Tex. 213; and *Maher v. Aetna L. Ins. Co.*, 116 Ind. 486.

2. E. g., in *Indiana*: "Whenever the purchaser of any property sold on execution, shall fail or refuse to pay the purchase money, he shall be liable, on motion, to be made by the sheriff or the execution plaintiff or defendant in the proper court, five days being given, to judgment for the amount of the purchase money and damages not exceeding ten per cent. and interest with costs; and no stay of execution shall be allowed upon the judgment."

"Or, the sheriff may re-expose and sell the property on the same or any subsequent day, according to law; and if the amount bid at the second sale shall not equal the amount bid at the first sale and the costs of the second sale, the first purchaser shall be liable for the deficiency and damages thereon not exceeding ten per cent. and interest and costs, to be recovered by a like notice and motion. In case he sells on a subsequent day he shall readvertise as in other cases." Rev. Stat. 1881, §§ 760, 761.

See, also, *Virginia Code* 1887, § 3592; *West Virginia Rev. Stat.* chap. 88, § 10.

In *Nebraska*, on failure of sale for want of bidders, the sheriff must make return with inventory, and the plaintiff sue out an *alias* writ, whereupon the sheriff readvertises and resells. *Nebraska Comp. Stat.* 1889, p. 919, § 490.

In *Ohio*, the sheriff may resell without making return or obtaining an order of court. *Bisbee v. Hall*, 3 Ohio 449.

In *Lower Canada*, whenever two resales on false bidding have taken place,

ued default, a resale may be made. If the terms are as beneficial to him as those of the original sale, he can be compelled to pay any consequent deficiency.¹ Otherwise, if they materially differ.²

2. Sheriff's Action for Deficiency.—The loss consequent upon a resale may be recovered of the defaulting purchaser.³ Some statutes provide for a suit therefor by the officer making the sale.⁴ In some States this naturally results from his official responsibility.⁵ In order to such recovery, the terms of the new sale must not vary materially from those of the original sale;⁶ nor must there have intervened any deterioration of the title of the execution defendant.⁷

the court may order every bidder to deposit a sum equal to one-third of the debt. Rev. Stat. P. *Quebec*, 1888, § 5940.

1. *Shinn v. Roberts*, 20 N. J. L. 435; 43 Am. Dec. 633.

2. *Riggs v. Pursell*, 74 N. Y. 370.

In *Virginia*, an order will issue to have the property resold to pay an installment overdue from the purchaser; and this, without having, to resort to collateral securities collectible only by suit. *Mosby v. Withers*, 80 Va. 82.

The fact that the purchaser has obtained a conveyance from the officer is not conclusive; mistake or fraud may be shown in rebuttal. *Williams v. Blakey*, 76 Va. 254.

In *Tennessee*, the motion may be *ex parte*, and at any time before confirmation the purchaser may apply to the court and show cause for relief from the order. *Still v. Boon*, 5 Sneed (Tenn.) 380. But after confirmation, payment of any residue must be compelled by another suit. *Van Bibber v. Sawyers*, 10 Humph. (Tenn.) 81.

So, also, in *West Virginia*. *Glenn v. Blackford*, 23 W. Va. 185.

3. See JUDICIAL SALES, vol. 12, p. 233.

4. In *Georgia*, as to the sheriff's option, see *Georgia Code*, 1882, § 3655; also *Barlow v. Toole*, 80 Ga. 9.

In *Missouri*, the sheriff may recover the amount of the loss by motion. *Missouri Rev. Stat.* 1889, § 4946. Compare *Utah Civ. Proc.*, Act of 1884, § 578. *Nevada Gen. Stat.* 1885, §§ 3248-49.

In *Nevada*, the sheriff may so proceed against an execution creditor purchasing and refusing to pay the fees. *Sweeney v. Hawthorne*, 6 Nev. 129.

In *New Jersey*, he may sue therefor in his own name, even in case of a foreclosure sale; the remedy in chancery

is not exclusive. *Townshend v. Simon*, 38 N. J. L. 239.

5. *E. g.*, in *Pennsylvania*; *Gaskell v. Morris*, 1 W. & S. (Pa.) 32; *Freeman v. Husband*, 77 Pa. St. 389.

In *Tennessee*, if there is a deficiency on resale, the sheriff is not liable to the execution defendant for failure to sue the first purchaser therefor. *Roberts v. Westbrook*, 1 Coldw. (Tenn.) 115. Nor can the execution plaintiff recover it from the first bidder. *Harvey v. Adams*, 9 Lea (Tenn.) 289.

In *Mississippi*, the sheriff cannot recover the difference of price without showing that he has been rendered liable therefor, or suffered damage thereby. *Adams v. Griffin*, 3 Smed. & M. (Miss.) 556.

In *Missouri*, if the proceeds of the second sale satisfy the execution, the sheriff cannot have judgment on motion against the first purchaser. *Reed v. Shepperd*, 38 Mo. 463.

6. *Supra*, this title, *Resale*—In *Chancery*. On the same ground as the rule that an executor's resale must not be clogged with terms likely to lower the price; where it seems that if the conditions of the first sale were for security by bond and mortgage, an addition requiring that the bond be with "warrant of attorney," would be so essential a variance as to discharge the purchaser. *Paul v. Shallcross*, 2 Rawle (Pa.) 326.

7. In *Hare v. Bedell*, 98 Pa. St. 485 (where the debtor had meanwhile conveyed the land to his wife), the court, by Sterrett, J., argued that the inferior quality of title, or the less advantageous terms would effect a reduction, and we would be left without any reliable standard by which to measure the loss. But Mercur, J., dissented from the applicability in this instance; remarking that there was amply sufficient to

3. Plaintiff's Rights on Reoffering.—The sheriff, although in one sense the trustee of the execution plaintiff, derives all his authority from the law; he alone is responsible for the legal appropriation of the proceeds of a sale. Accordingly as there is no privity of contract between an execution plaintiff and the purchaser, the former cannot sue for the purchase money.¹

At the request of the execution plaintiff, the sheriff may keep the sale open, in order to resell, if the bidder does not make good his offer.² A foreclosure sale was set aside where the officer unreasonably refused a twenty-minute adjournment.³

XI. CERTIFICATE OF SALE—1. Requisites.—In some States the sheriff is required by statute to give the purchaser a certificate of the sale, and to cause a duplicate to be registered. Such certificate should give the names of the parties to the suit, the dates of the judgment and sale, the description of the property, the amount of the judgment and of the bid, and the redemption time. A few statutes prescribe that it state, besides the consideration paid, the price for each distinct parcel.⁴

amend by, and the parol evidence should have been received.

1. *Adams v. Adams*, 4 Watts (Pa.) 160; *Harvey v. Adams*, 9 Lea (Tenn.) 289.

In *New York*, in an action for a false return, it has been held, that it is the duty of the sheriff, when the property is struck off, to demand money, and, if this is not paid, to resell; if he delivers the property and takes a check, this must be treated as money in his hands, to be applied on the execution. *Robinson v. Brennan*, 90 N. Y. 208.

In *Maryland*, where the sheriff, without consent of A, the execution plaintiff, gave B, the bidder, ten days' indulgence for payment of a balance, a temporary injunction on the resale, thereupon advertised, was dissolved; A not being bound by the credit sale. *Hardesty v. Wilson*, 2 Gill (Md.) 481; 41 Am. Dec. 439.

In *Wisconsin*, conversely, it has been held that the sheriff had no right to disregard a bid approved by the execution creditor's attorney and resell, merely because the bidder had not on hand cash enough to pay the fees, etc. *Lane v. White*, 12 Wis. 381.

In *Missouri*, in partition proceedings, the law makes the sheriff the agent of the vendor, with no power to abrogate the sale without his consent; without this, his assumed resale would afford no defense to a suit for specific performance. *Stewart v. Garvin*, 33 Mo. 103.

The *North Carolina Code*, § 261—requiring satisfaction out of the real property "belonging to the debtor on the day when the judgment was docketed"—has been construed not to import that a second writ can be levied on the same property effectually sold under the first; it must be upon other lands of the debtor. *Peebles v. Pate*, 86 N. Car. 437.

In *Utah*, a marshal's sale of two lots, one to V and the other to W, was set aside by the court upon V's refusal to pay and the non-acceptance of W's bid. On resale, P was the highest bidder for the V lot. The marshal made no attempt to collect the excess of V's bid over P's, and at the execution defendant's request, did not resell the W lot, but accepted her tender of the balance of the judgment remaining over P's bid, and gave her a receipt in full, whereupon she mortgaged the W lot. P refused to pay his bid. It was held that the marshal on readvertising both lots for sale, was properly enjoined from reselling the W lot; it was the execution plaintiff's duty to see that he resold at V's risk. *Kershaw v. Dyer* (Utah 1889), 21 Pac. Rep. 1000.

2. *Baring v. Moore*, 5 Paige (N. Y.) 48; *Isbell v. Kenyon*, 33 Mich. 63.

3. *Breese v. Busby*, 13 How. Fr. (N. Y.) 485.

4. *E. g. New York*: "The sheriff who sells real property, by virtue of an execution, must make out, subscribe and acknowledge before an officer

These statutes are merely directory.¹ Ordinarily the certificate should be acknowledged like a deed.²

2. **Effect.**—Statutes of some States provide that the certificate shall pass all the execution defendant's "right, title and interest."³

authorized to take the acknowledgment of a deed, duplicate certificates of sale containing: 1. The name of each purchaser and the time when the sale was made. 2. A particular description of the property sold. 3. The price bid for each distinct parcel separately sold. 4. The whole consideration money paid." *New York Code*, § 1438. (B's R. S. 1889, § 79, p. 1078.)

The whole purchase money must be recited. *Mascraft v. Van Antwerp*, 3 Cow. (N. Y.) 334. But a recital of the sale is not *prima facie* evidence of issuance of execution, the statute not prescribing it. *Goldman v. Kennedy*, 49 Hun (N. Y.) 157.

The *Wisconsin* statute requires the certificate also to state "the time when such sale will become absolute." *Wisconsin Annot. Stat.* 1889, § 3000.

The *Indiana* statute requires it also to state "the estate therein sold, whether in fee for life or for years." *Indiana Rev. Stat.* 1881, § 766.

In *Illinois*, "the time when the purchaser will be entitled to a deed unless the premises shall be redeemed." *Illinois Rev. Stat.* 1887, p. 864, § 16. It is a void act to give the certificate to another than the one shown by the return to be the purchaser. *Dickerman v. Burgess*, 20 Ill. 266.

In *California*, "when subject to redemption, it must be so stated," also, when the judgment is for a specified kind, etc., "the kind of money or currency in which such redemption may be made." *California Code Civ. Proc.* 1885, § 700. Compare *Montana Comp. Stat.* 1887, p. 151, § 351.

In *Michigan*, the officer "shall make and subscribe as many certificates as shall be necessary, of such sale," and shall indorse on each "the rate of interest borne by the judgment." *Michigan Annot. Stat.* 1882, § 6117.

In *Minnesota*, "a description of the judgment, execution, decree or order." *Minnesota Stat.* 1891, § 4936.

The *Tennessee* statute also prescribes the contents. *Tennessee Code* 1884, § 3766.

In *Upper Canada*, the whole form of the sheriff's certificate upon sale of

an equity of redemption is prescribed. *Ontario Rev. Stat.* 1887, p. 736, § 23.

1. *Jackson v. Young*, 5 Cow. (N. Y.) 269; 15 Am. Dec. 473.

"The statute imposes a strict duty upon the sheriff, a failure to perform which would subject him to any costs or expenses necessary to compel his performance. His neglect would not invalidate the proceedings between the parties, nor prejudice the rights of the purchaser." *O'Brien v. Hashagen*, 20 Hun (N. Y.) 564.

As in case of a deed, a misdescription, in the certificate of sale, of the execution, is not fatal if the execution is fairly identified. *Bartleson v. Thompson*, 30 Minn. 161. Nor an explainable variance between the description in the certificate and that in the deed. *Holman v. Gill*, 107 Ill. 467. Nor one between the certificate and an abstract of the judgment as to the amount. *Chicago Dock, etc., Co. v. Kinzie*, 93 Ill. 415. Nor a clerical error, "township" instead of "town." *Herrick v. Merrill*, 37 Minn. 250.

2. But the copy filed with the register is evidence without the sheriff's acknowledgment. *Knowlton v. Ray*, 4 Wis. 288; *Foorman v. Wallace*, 75 Cal. 552.

3. "Such certificate, so proved or acknowledged and recorded, shall, upon expiration of the time for redemption, operate as a conveyance to the purchaser or his assignee, of all the right, title, and interest of the person whose property is sold in and to the same, at the date of the lien upon which the property was sold, without any other conveyance whatever." *Minnesota Stat.* 1891, § 4937.

In case of a levy upon land held by a debtor under a subsisting contract of sale, his interest will therefore pass without being specified. *Reynolds v. Fleming*, 43 Minn. 513.

In *New York*, a recital in the certificate, after a general description, that it was "embracing all of said lands of said A, but the widow's thirds, which the law gives according to law" was held superfluous, and simply declaring that the sale did not interfere with her enjoyment of her dower; all

Otherwise, the certificate confers on the holder no title to the land.¹

3. Recording.—Where statutes require such certificate they also make it the sheriff's duty to cause a duplicate to be registered.² The ordinary rules of consequent notice to third parties apply.³

4. Amendments.—The certificate may be amended by order of court.⁴

5. Assignments.—In some States the rights of an assignee of the certificate are indicated by statute.⁵

A's right, title and interest passed. *Holman v. Holman*, 66 Barb. (N. Y.) 215.

In *Indiana*, where there had been no valid memorandum of sale, it was held that the effect of a tender of the amount of the execution, made by a grantor of the debtor, could not be avoided by a subsequent execution of a certificate of purchase. *Ruckle v. Barbour*, 48 Ind. 274.

1. "No title or interest in the land." *Huftalin v. Misner*, 70 Ill. 55. It will not disturb the execution defendant's possession until after the redemption period and the sheriff's conveyance of title. *Curtis v. Swearingen*, 1 Ill. 160.

Failure to make the deed within the five years after the redemption period has expired annuls also the certificate. *Ryhiner v. Frank*, 105 Ill. 326.

2. *E. g.*, in *New York*: "The sheriff must within ten days after the sale, file one of the duplicate certificates in the office of the clerk of the county and deliver another to the purchaser." . . . *New York Code*, § 1439. If the clerk fail to record it, it will be void as against subsequent purchasers whose conveyance was recorded sooner than was the sheriff's deed. *Bowers v. Arnoux*, 33 N. Y. Super. Ct. 530.

In *Indiana*, the clerk of the circuit court must record the duplicate in the *lis pendens* record. *Indiana Rev. Stat.*, 1881, § 766.

In *Minnesota*, if the sheriff should die without giving a certificate, the purchaser could perfect the evidence *aliunde*. *Barnes v. Kerlinger*, Minn. 82.

3. In *Michigan*, the sheriff's neglect to file the certificate within the ten days prescribed by *Michigan Comp. Laws*, § 4638, does not affect the purchaser's title, unless the execution debtor or innocent third parties have

been thereby misled to their prejudice. *Taylor v. Gladwin*, 40 Mich. 232. The *Michigan* act of 1875, § 123, makes the recording of the certificate constructive notice to subsequent purchasers; and, in ejectment this imposes on them the burden of proving themselves to be, or to derive title from *bona fide* purchasers. *Atwood v. Bearss*, 45 Mich. 469.

So also in *California*. *Foorman v. Wallace*, 75 Cal. 552.

4. *E. g.*, to insert an omitted parcel of land. *Smith v. Hudson*, 1 Cow. (N. Y.) 430. To identify an execution where the plaintiff in another had died. *Gansevoort v. Gilliland*, 1 Cow. (N. Y.) 218. To strike out a lot to which the execution defendant had merely an equitable title. *Richards v. Varnum*, 8 How. Pr. (N. Y.) 79. To state the price and the purchaser's name; and this, after the expiration of the sheriff's official term. *Bixby v. Rowe*, 2 Mich. N. P. 152.

It seems that an inherently insufficient description could not be helped out by evidence of extrinsic facts showing what property the sheriff intended to sell. *Herrick v. Morrill*, 37 Minn. 250.

5. That of *Indiana* provides that the certificate shall be assignable by indorsement, and the assignment, duly acknowledged, be similarly recorded, at request of the assignee. *Indiana Rev. Stat.*, 1881, § 766.

In case of non-redemption, the holder may make a valid assignment after the year has expired. *Maddux v. Watkins*, 88 Ind. 74. Compare *Hasselman v. Lowe*, 70 Ind. 414. The assignee on receiving a deed is in legal effect the purchaser at the sale. *Turner v. First Nat. Bank*, 78 Ind. 19.

A purchaser from the purchaser cannot be bound by any agreement or trust between his vendor and the execution defendant, whereof he had no notice. *Parmlee v. Sloan*, 37 Ind. 469.

XII. DISPOSAL OF THE PROCEEDS—1. As Between Rival Judgments.—Ordinarily, the purchaser at an execution sale on a junior judgment, takes the property subject to the lien of a senior judgment. And the junior judgment creditor is entitled to the proceeds, the senior judgment creditor being confined to his lien on the property.¹ But in those States where the sale transfers the title to the property regardless both of senior and of junior liens,

An assignee without recourse was held not entitled to recover from the purchaser merely for an irregularity—*e. g.*, omission from the summons, which, in absence of fraud or concealment, did not avoid the judgment. *Martin v. Cole*, 38 Ind. 379.

In *New York*, the assignee is not entitled to a conveyance until he has filed the assignment as required by the law of 1835. *People v. Ransom*, 2 N. Y. 490. But after receiving the sheriff's deed, an omission to file the assignment will not affect his title. *Phillips v. Shiffer*, 7 Lans. (N. Y.) 347.

In *California*, one taking an assignment of the certificate as security against his liability for debts of the judgment debtor, agreeing to cancel the same when the debts are paid and his liability discharged, ceases on their payment to have any interest in the certificate, and if he obtains a sheriff's deed, neither he nor his assignee with notice acquires any title to the land. *Baber v. McLellan*, 30 Cal. 135.

1. *Commercial Bank v. Yazoo Co.*, 6 How. (Miss.) 530, 535; *Calmes v. Ford*, 6 Smed. & M. (Miss.) 190; *Andrews v. Wilkes*, 6 Smed. & M. (Miss.) 554; *Hanauer v. Casey*, 26 Ark. 352; *Worsley v. Bryan*, 86 N. Car. 343; *Love v. Williams*, 4 Fla. 126; *Walker v. Anderson*, 31 Tex. 646. See *EXECUTIONS*, vol. 7, p. 158. As between attaching creditors, those only who have reduced their claims to judgments will be heard, though others, who have not, have older attachments. "A judgment is necessary to give effect to the attachment lien. By possibility on a trial, the defendant in the attachment may defeat a recovery, and put an end to the attachment lien. It is wholly incomplete and imperfect until judgment; and none but judgment creditors can be regarded." *Edwards v. Toomer*, 14 Smed. & M. (Miss.) 75.

A judgment and execution of A against B bore the same date as those of C against B and D, late copartners,

and under A's the sheriff sold a house and lot, the property of B. It was held that A was entitled to the whole proceeds of the sale. *Roberts v. Roberts* 8 Rich. (S. Car.) 115.

Where a non-negotiable note had been transferred verbally by the payee, and sued on in his name, for the holder's benefit, it was held that, in the disposal of proceeds, the holder took preference to the payee's judgment creditors; and his right could be enforced on motion for a rule against the sheriff. *Ex parte Cark, Dudley* (S. Car.) 111.

In *Mississippi*, when judgments on the same day and in the same court have been rendered against the same defendant in favor of different plaintiffs, and afterwards been enrolled on the same day in the order in which they were rendered, the one first entered on the judgment roll is entitled to be first satisfied out of the proceeds of a sale made under executions issued upon all the judgments. *Reed v. Haviland*, 38 Miss. 323.

Where A's judgment against C was of the same date as B's against C, and the executions were levied simultaneously, and A gave the sheriff indemnity, but B refused, it was held that A was entitled to priority. *Townsend v. Henry*, 26 Miss. 203. But compare *Girard Bank v. Philadelphia, etc., R. Co.*, 2 Miles (Pa.) 447.

A, B, and C were successive judgment creditors of D, whose land was sold under A's and C's executions to C, who paid enough of his bid to satisfy A's judgment, and directed the sheriff to credit the remainder on his own execution, which he did, but returned the execution unsatisfied, stating that C had failed to pay the balance of his bid, wherefore the sale was void. B purchased under his execution and brought a bill to enjoin conveyance to C. *Held*, that B need not tender the amount paid to satisfy A's judgment; the fund should have been applied in the order of the dates of the judgments. *Carnahan v. Yerkes*, 87 Ind. 62.

the senior lienholders must first be paid out of the proceeds.¹ Liens are determined as they existed at the date of the sale.²

2. As Between Rival Executions.—When one execution has been levied, and before the sale another, regularly issued on an older judgment, comes to the sheriff's hands, the senior judgment creditor is entitled to the proceeds.³ Otherwise, in case of irregu-

1. *Foulke v. Millard*, 108 Pa. St. 230. *Vickory v. Vickory*, 1 Harr. (Del.) 193; *Dowdell v. Neal*, 10 Ga. 148; *Woodley v. Gilliam*, 67 N. Car. 237. But (as to the law before the *North Carolina Code*) see *Isler v. Moore*, 67 N. Car. 74.

Where A's judgment against B and C was entered on the same day as one in favor of B against C, and B's land was sold under the former, it was held that B could claim no part of the proceeds as against A. *Vierheller's Appeal*, 24 Pa. St. 105; 62 Am. Dec. 365.

Where an execution has issued against land the terre-tenant of which, erroneously believing the judgment to be a lien thereon, has paid the amount of the execution to the officer, he cannot recover it back; it must go to the execution plaintiff. *Boas v. Updegrove*, 5 Pa. St. 516; 47 Am. Dec. 425.

A grantee from the execution defendant anterior to the judgment, having recourse on the purchaser, is not entitled to the proceeds of the sale in preference to the plaintiff. *Helfrich's Appeal*, 15 Pa. St. 382.

2. *Douglass' Appeal*, 48 Pa. St. 223. One to whom the defendant had conveyed after inception of the lien and before the sale, is entitled to the surplus, in absence of paramount liens. *Every v. Edgerton*, 7 Wend. (N. Y.) 259.

Under the *Georgia* act of 1829, regulating assignments of judgments, the holder of an execution which has been twice transferred is subrogated to the original plaintiff in the distribution of the proceeds. *Price v. Bradford*, 5 Ga. 364.

In *Pennsylvania*, in distribution of the proceeds of a sheriff's sale of the land taken by a cognizor, the widow's administrator and the heirs were held to be entitled to the portion of the valuation due at her death in preference to the holders of a judgment obtained against the cognizor, after the date of the recognizance. *Riddle's Appeal*, 37 Pa. St. 177.

In *Delaware*, where a judgment and execution were obtained in fraud of

creditors, it was held that a subsequent and *bona fide* judgment creditor was entitled to the proceeds of the sale. *Taggart v. Phillips*, 5 Del. Ch. 237.

3. *Bagby v. Reeves*, 20 Ala. 427; *Lawson v. Jordan*, 19 Ark. 297; 70 Am. Dec. 596; *Thompson v. McCordel*, 27 Ga. 273; *State v. Salyers*, 19 Ind. 432; *Brown v. Hamlin*, 23 Miss. 392; *Barker v. Gates*, 1 How. Pr. (N. Y.) 77; *Dunn v. Nichols*, 63 N. Car. 107; *Cooper v. Scott*, 2 McMull. (S. Car.) 150; *Watmough v. Francis*, 7 Pa. St. 206. See EXECUTIONS, vol. 7, p. 158.

In *Florida*, when the sheriff executes first the writ last delivered, he must pay over the money to the plaintiff under whose writ the sale was made. The other has a remedy against the sheriff, in an action on the case. *Love v. Williams*, 4 Fla. 126.

In *Kentucky*, a sheriff is bound first to pay off the execution first received by any one deputy, though a junior execution is first levied and a sale made thereunder. *Million v. Com.*, 1 B. Mon. (Ky.) 310. Similarly in *New Jersey*. *Mushback v. Ryerson*, 11 N. J. Eq. 346.

In *Kansas*, as to the rights of rival execution claimants, see the complicated case *Jones S. & Paper Co. v. Hentig*, 29 Kan. 75.

In *Pennsylvania*, proceeds of sale of personal property levied on and sold on three writs of *fi. fa.* must be appropriated to the first that came to the sheriff's hands, although the property sold was acquired by the debtor after the first two, and before the third had been received by him. *Shafner v. Gilmore*, 3 W. & S. (Pa.) 438.

In *South Carolina*, interest which has accrued on an execution must be paid before money collected by the sheriff can be applied to satisfy a junior execution.

In *Mississippi*, although proceeds of a sale under a junior judgment go first to pay that one, in absence of prior levy under the older one, and

larity,¹ or covin.² Sometimes intervention of an injunction, and proceeding thereunder may, incidental to suspension, vary the order of distribution.³ So also as to appeal,⁴ stay,⁵ or *certiorari*.⁶ So also in case of proceedings in bankruptcy or insolvency,⁷ or in probate or orphans' court.⁸ The rights of attaching creditors as to precedence are usually well defined by statute.⁹

It is a common law rule (and consequently, in the absence of contrary evidence, presumed by the court to prevail in a sister State), that where, under two executions issued upon judgments which were docketed at the same time, property not of a sufficient value to discharge both is simultaneously levied on, the proceeds are to be applied equally between the two executions till the smaller one is satisfied, and not *pro rata*. When the smaller is satisfied, the surplus goes to the larger execution.¹⁰

the surplus to the older, yet if the sheriff had both executions in his hands, his neglect to levy the older one first cannot prejudice the creditor, and the older must first be satisfied. *Mobile, etc., R. Co. v. Trotter*, 36 Miss. 416.

1. *E. g.*, issuance after lapse of five years without revivor. *Lytle v. Cincinnati Mfg. Co.*, 4 Ohio 459.

2. See EXECUTIONS, vol. 7, p. 146. *Wandling v. Thompson*, 41 N. J. L. 309.

3. See INJUNCTIONS, vol. 10, p. 777.

Where collection of an execution is enjoined, and the sheriff, holding a junior execution, proceeds to sell, he cannot apply the proceeds to the execution enjoined, although before the return of the process the injunction is dissolved. *Newlin v. Murray*, 63 N. Car. 566.

4. *McCants v. Rogers*, 1 Treadw. Const. (S. Car.) 443.

5. See EXECUTIONS, vol. 7, p. 146. In *Pennsylvania*, if a *fi. fa.* be levied on personal property, and stayed on the defendant's giving bond as provided by *Pennsylvania* act of 1842, and a second execution is levied and a sale made during the stay time, the proceeds must be applied to the first. *Sedgwick's Appeal*, 7 W. & S. (Pa.) 260.

6. *Walker v. Inman*, 78 Ga. 53.

7. See BANKRUPTCY, vol. 2, p. 67; INSOLVENCY, vol. 11, p. 167.

Though a claimant of proceeds of sale of personal property of his debtor has the prior execution, he cannot, by virtue thereof, if insolvent, receive the fund to the prejudice of a subsequent execution creditor, for whose claim he was bound as the surety of the debtor,

but the proceeds will be appropriated to the latter claimant. *Worrall's Appeal*, 41 Pa. St. 524.

8. See EXECUTORS AND ADMINISTRATORS, vol. 7, p. 165.

In *South Carolina*, where an executor does not plead *plene administravit*, and several judgments of different dates are thereupon recovered against him, under which the sheriff sells real estate, the proceeds must be applied to the executions in the order of their dates, without regard to the grade of the claims on which the judgments are founded. *Huger v. Dawson*, 3 Rich. (S. Car.) 328.

9. See ATTACHMENT, vol. 1, p. 926.

In *Pennsylvania*, a creditor whose attachment was served before entry of other judgments against the defendant on which executions were issued, and his interest sold, is entitled to priority of payment out of the proceeds when paid into court for distribution. *Straley's Appeal*, 43 Pa. St. 89.

10. *Campbell v. Ruger*, 1 Cow. (N. Y.) 215; *Rutledge v. Townsend*, 38 Ala. 706. Compare *McAfoose's Appeal*, 32 Pa. St. 276; *Wilcox v. May*, 19 Ohio 408; *Friar v. Ray*, 5 Mo. 510.

Where a sheriff has two executions against the same defendant, and, after levying part of the prior one, proceeds after its return day to make another levy, he must apply the proceeds of the latter levy to satisfy the junior execution. *Slingerland v. Swart*, 13 Johns. (N. Y.) 255.

A mere delay in selling property levied on does not render the sale void as against an execution issued after the sale. *Linnendoll v. Doe*, 14 Johns. (N. Y.) 222.

3. **Mortgagees and Other Lienholders.**—In general, a sheriff's sale is made subject to all liens paramount to that of the execution;¹ this, whether mortgagees,² vendors,³ landlords,⁴ mechanics,⁵ or dower interests.⁶

4. **Proceedings.**—The statutory practice in *England, Canada* and the States, in distributing the proceeds and adjusting interposed claims, is not uniform.⁷

1. See *infra*, this title, *Prior Liens*. See also *EXECUTIONS*, vol. 7, p. 158.

2. In *Georgia*, although the sale transfers the title free from the lien of prior judgments, it is subject to prior mortgages. *Harwell v. Fitts*, 20 Ga. 723. As between equities otherwise equal, the elder should be given the precedence. *Allen v. Sharp*, 65 Ga. 417. Compare *Simms v. Kidd*, 55 Ga. 626, stated in *EXECUTIONS*, vol. 7, p. 158, and the *Georgia* cases.

In *Massachusetts*, as to surplus proceeds remaining in the hands of a mortgagee on sale under a power, pending attachment of the equity of redemption, see the complicated case of *Gardner v. Barnes*, 106 Mass. 505.

In *Pennsylvania*, one claiming adversely to a mortgage cannot share in the proceeds of a sale of the property; his remedy is in ejectment against the purchaser. *Housekeeper's Appeal*, 49 Pa. St. 141.

3. In *Georgia*, judgment creditors of a vendee of land who has paid part of the purchase money, and is in possession, but has received no deed, are entitled to the proceeds of an execution sale of his title, in preference to the vendor. *Wilkerson v. Burr*, 10 Ga. 117. Compare *English v. Reid*, 55 Ga. 240.

In *Mississippi*, the rule that the purchaser acquires only the interest of the execution defendant applies to a sale of land subject to a vendor's lien. *Lissa v. Posey*, 64 Miss. 352.

4. See *LANDLORD AND TENANT*, vol. 12, p. 757c.

Upon an execution sale of a tenant, any lien which the law gives the landlord thereon must be first satisfied out of the proceeds. *Weltner's Appeal*, 63 Pa. St. 302.

But money due for use and occupation is not to be preferred as rent, etc. *Farmers' Bank v. Cole*, 5 Harr. (Del.) 418.

As to emblements, see *infra*, this title, *Products and Growing Crops*.

Where after a *fi. fa.* had been levied on land, grain was thereon sowed, which another creditor levied upon and sold, it was held that the latter was entitled to keep the proceeds of the grain. *Stambaugh v. Yeates*, 2 Rawle (Pa.) 161.

5. See *MECHANICS' LIENS*, vol. 15, p. 86.

The *Pennsylvania* exemption act of 1849, has been held not to entitle the debtor to any part of the proceeds of an execution sale of his land, until mechanics' liens upon buildings erected thereon are first satisfied. The appraisalment thereunder does not affect the claimant's rights, etc. *Lauk's Appeal*, 24 Pa. St. 426. Compare the *Pennsylvania* cases stated in *EXECUTIONS*, vol. 7, p. 159.

6. See *supra*, this article, *Preliminaries—Dower*.

In *Ohio*, where separate parcels of one's real estate were levied upon by A and other creditors, and after his death, the widow's dower in the whole was set off entire upon A's parcel, and the whole was sold, and the proceeds of each paid to the creditors, respectively, who had levied thereon, it was held that A was entitled to contribution from the others. *Bank of U. S. v. Delorac, Wright (Ohio)* 285.

7. In *Pennsylvania*, the sheriff may pay the money into court and claimants interplead. *Pennypacker's Appeal*, 57 Pa. St. 117.

Thereupon, if any claimant so demands, issues of fact must be tried by a jury. *Appeal of Benson*, 48 Pa. St. 159. The decision is then final and conclusive. *Noble v. Cope*, 50 Pa. St. 17. Where there is a prior judgment, and the sheriff incurs no risk of mispayment in appropriating proceeds of sale of realty, he has no right to impose conditions, or take a promise to refund. *Lewis v. Rogers*, 16 Pa. St. 18.

As to the *Pennsylvania* interpleader act, see *infra*, this title, *Liability to Third Persons*.

In *New Hampshire*, a claim must be

Otherwise, however, as to grounds for aid in equity.¹

XIII. THE PURCHASER'S TITLE—1. In General—*a*. RESTRICTION TO DEFENDANT'S INTEREST.—The English doctrine that a sale in market *overt* cuts off all prior liens, and gives the purchaser an absolutely good title, is not adopted in any of the States.² The general rule is that the lien of the judgment and execution attaches only to the defendant's real interest,³ and, accordingly, that nothing more or less than this, except what title he may acquire before the sale,⁴ goes into the purchaser's title.⁵ Thus,

interposed before the debt has been satisfied by the levy and the lapse of a year afterwards. *Bowker v. Smith*, 48 N. H. 111.

In *Georgia*, the rights of contestants may be settled by a rule on the sheriff to distribute the fund. *Crawford v. Williams*, 76 Ga. 792. See *Georgia Code*, 1882, §§ 3664, *et seq.*

In *Missouri*, if the sheriff has obeyed the direction of the writ in distributing the proceeds, he is not affected by any subsequent action of the court relating to them. *State v. Spencer*, 30 Mo. App. 407.

In *Arkansas*, the sheriff has the responsibility of determining the distribution, and aggrieved claimant must seek redress against him. *Trapnall v. Jordan*, 7 Ark. 430.

In *Alabama*, an agreed case may be made, and the sheriff not be a party. *Turner v. Lawrence*, 11 Ala. 427.

In *South Carolina*, the money can be awarded only to a party claimant. *Caskey v. McMullen*, 3 S. Car. 196. But in *Mississippi*, an order injurious to a claimant may be reversed, though he did not join in the appeal. *Heizer v. Fisher*, 13 Smed. & M. (Miss.) 672.

The surplus proceeds of a sale of land must be dealt with as land. *Matthews v. Duryee*, 45 Barb. (N. Y.) 69; *Wills v. Van Voorhies*, 20 N. Y. 412; *Jones v. Jones*, 1 Bland (Md.) 443; 18 Am. Dec. 327.

Liens that are subordinate to that under which the sale is made are to be satisfied in the order of their priority. *Averill v. Loucks*, 6 Barb. (N. Y.) 470; *Benton v. Shreeve*, 4 Ind. 66; *Polk Co. v. Sypher*, 17 Iowa 358.

An officer selling under a junior writ and paying the money to the plaintiff therein, may be compelled to pay it on the writ properly entitled thereto. *Drewe v. Lainson*, 11 Ad. & E. 529; 39 E. C. L. 529; *Kirk v. Vonberg*, 34 Ill. 440; *Peck v. Tiffany*, 2 N. Y. 451; *Jones v. Jud-*

kins, 4 Dev. & B. (N. Car.) 454; 34 Am. Dec. 302; *Kennon v. Ficklin*, 6 B. Mon. (Ky.) 414; 44 Am. Dec. 776.

1. See *EQUITY*, vol. 6, pp. 719, 723.

2. See *supra*, this title, *Definition*.

3. See *EXECUTIONS*, vol. 7, p. 127; *JUDICIAL SALES*, vol. 12, p. 225. For a collation of the statutory provisions of the States upon what interests in realty are subject to levy and sale, see 1 *Washburn on Real Prop.* *464 (2d ed.; omitted in 5th ed., as explained in vol. 2, *469, note).

4. See *JUDICIAL SALES*, vol. 12, p. 256.

5. See *Story on Eq. Jur.* (13th ed.), § 1231.

In *Kentucky*, the purchaser acquires not only the execution lien, but also an inchoate title, to be perfected by the deed relating back thereto. *Greer v. Wintersmith*, 85 Ky. 516.

In *Tennessee*, the purchaser's title relates back to the levy; the inhibition in *Tennessee Code*, § 1779, of champertous sales does not apply to sales under execution. *McClain v. Easley*, 4 Baxt. (Tenn.) 520. But he derives no title until the sale is confirmed. *Eakin v. Herbert*, 4 Coldw. (Tenn.) 116.

In *Illinois*, the execution defendant can only dispute the purchaser's title when, after abandoning the land, he returns to it under an outstanding title. *Gould v. Hendrickson*, 96 Ill. 599. And, conversely, the fact that the defendant turned out land for the levy, imports no warranty of title, nor any legal or moral obligation to redeem; and this, though the land was incumbered to its full value. *Vanscoyoc v. Kinler*, 77 Ill. 151.

The purchaser's acceptance of redemption money from a junior execution creditor is a waiver of the irregularity of the latter's levying within the year. *Kell v. Worden*, 110 Ill. 310.

In *Indiana*, a deed issued without payment of the bid, passes no title. *Ruckle v. Barbour*, 48 Ind. 274; *Mc-*

the writ operating upon the title of no other than the defendant, the purchaser is always liable to be sued by the true owner.¹ As a general rule, the maxim *caveat emptor* applies.² There is no warranty express or implied.³

In some States the purchaser's interest is defined by statute.⁴ In absence of fraud or any extraordinary circumstances to pre-

Cormick v. W. A. Wood M. & R. M. Co., 72 Ind. 518.

From a purchaser at sale under levy on land of a widow, whose estate therein was determinable on her death, to whom the land has been set off in partition, her children after her death can recover. *Miller v. Noble*, 86 Ind. 527.

In *Maryland*, the purchaser acquires whatever title the defendant had at the time of the judgment; the defendant cannot, by an agreement thereafter made, to hold the land as tenant of a third party, defeat the purchaser's *hab. fac. poss.* *Miller v. Wilson*, 32 Md. 297.

In *Louisiana*, if the defendant possessed only as lessee, the adjudicatee takes as such. *Parish Board of School Directors v. Edrington*, 40 La. Ann. 633.

In *Michigan*, an execution sale of an undivided interest in lands where the defendant has the complete title is void, and the defect cannot be cured by *Michigan Comp. L.*, § 4596. *Eberstein v. Oswalt*, 47 Mich. 254.

Where the sale is under several executions, whereof only one is valid, the purchaser under this one takes the title. *Dearkins v. Rex*, 60 Md. 593.

The purchaser acquires the right to resist a mortgage made by the defendant, tainted with usury. *Dix v. Van Wyck*, 2 Hill (N. Y.) 522. The purchaser of a lessee's interest may maintain ejectment against a purchaser from an assignee taking the lease to secure an usurious loan. *Mason v. Lord*, 40 N. Y. 476.

The purchaser's title cannot be collaterally impeached on the ground that the judgment was entered against the defendant after he was dead. *Taylor v. Snow*, 47 Tex. 462; 26 Am. Rep. 311.

The fact that a judgment or decree was erroneous on its face was held not to be fatal to the purchaser's title in a collateral attack. *Mays v. Foley*, 40 Cal. 281. As to the effect of satisfaction of the judgment, see *Judson v. Lyford* (Cal. 1889), 23 Pac. Rep. 58.

1. *Infra*, this title, *The Purchaser's Liabilities*. As to invalidations of the sale, see *infra*, this title, *Grounds for Vacating*.

The mere fact that the defendant was in possession is immaterial. *Pekin Min., etc., Co. v. Kennedy*, 81 Cal. 356.

2. Besides the instances presented in JUDICIAL SALES, vol. 12, p. 225, the following are illustrative:

The purchaser must notice any discrepancies between the judgment and execution. *Stotsenburg v. Stotsenburg*, 75 Ind. 538.

In *Alabama*, an execution plaintiff buys and credits the price on the judgment at the risk of the defendant's having no title. *Goodbar v. Daniel*, 88 Ala. 583.

Where by an agreement between the judgment creditor and the mortgagee the lien of the judgment had been postponed and subordinated to that of a junior mortgage, it was held that a purchaser without notice thereof took subject thereto. *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553; 26 Am. Rep. 627.

So also the purchaser was adjudged to take nothing, where the execution defendant held only under a deed that lacked a seal. *Hinsdale v. Thornton*, 74 N. Car. 167.

A purchaser who has paid for a worthless title cannot repudiate the transaction. *Wells v. Van Dyke*, 106 Pa. St. 111; *Hexter v. Schneider*, 14 Oregon 184.

3. *Shaw v. Smith*, 9 Yerg. (Tenn.) 97; *Treptow v. Buse*, 10 Kan. 170.

4. *E. g.*, *Nebraska Code*, § 500, making the sheriff's deed vest in the purchaser the same estate as was in the judgment debtor at or after the time when the land became liable to the satisfaction of the judgment. While a deed from A to B remained unrecorded the land was levied on as A's but two days before the sale the deed was recorded; it was held that the sale passed no title. *Mansfield v. Gregory*, 1 Neb. 432. Compare *Miller v. Finn*, 1 Neb. 254.

vent attendance or a fair sale, if the statutory requirements have been fulfilled as to the rendition of the judgment, the issuance and levy of the execution, the advertisement and the sale, the purchaser gets a good title, however inadequate the price.¹ The statutes regulating priority of liens determine the respective rights and titles in case of rival executions.² Ordinarily, any title acquired by the execution defendant after the sale, does not inure to the purchaser's benefit.³

b. VENDOR AND VENDEE.—If the defendant holds only under a contract of purchase, the purchaser also becomes subordinated to the rights of the vendor.⁴

Under *Louisiana Rev. Code*, § 2266, —declaring all unrecorded sheriff's sales of real estate in New Orleans to be void, except between the parties thereto—nothing passes if the adjudication of the sale be not recorded before the judgment debtor sells the property to another party. *Huntington v. Bordeaux*, 42 La. Ann. 346.

In *New York*, the purchaser takes only the debtor's interest at the time when the judgment was docketed. *Snedeker v. Snedeker*, 18 Hun (N. Y.) 355.

A purchaser's title was held to be unaffected by an appeal whereof he had no notice; the defendant having acquiesced in the justice's refusal to stay execution. *Kramer v. Wellendorf*, 129 Pa. St. 547.

See *supra*, this title, *Preliminaries—Injunction*, etc.

1. *Van Dyke v. Martin*, 53 Ga. 221.

2. See *infra*, this title, *Vacating Sales—Inadequacy*, etc. See *supra*, this title, *Disposal*, etc.—*As Between Rival Executions*.

Thus in some States a prior purchaser at a sale under a junior execution acquires a better title than a subsequent purchaser under a senior execution. And this especially where the executions are of equal *teste*. *Isler v. Moore*, 67 N. Car. 74.

3. See JUDICIAL SALES, vol. 12, p. 226; also certain exceptions noted *infra*, this title, *What Passes*. Compare also *Westheimer v. Reed*, 15 Neb. 662; *Gritchell v. Kreidler*, 12 Mo. App. 497.

The defendant is not estopped to assert it. *Gentry v. Callahan*, 98 N. Car. 448.

An execution defendant wishing to secure title in himself free from liens, and sell without sacrifice, procured A, his attorney, to bid off the land, B to advance the money, and the deed to be

made to B. A, but not B, knew that the judgment had been paid, this not appearing of record. It was held that B, on such purchase, upon receiving a quitclaim from the defendant, acquired an absolute title against liens subsequently entered. *Saunders v. Gould*, 124 Pa. St. 237.

Where land was sold at a sheriff's sale, and before the time for redemption had expired a tax deed executed to the same land, a purchase by the judgment debtor before the expiration of the right to redeem from the sheriff's sale of the outstanding tax title will be regarded in equity merely as the discharge of his obligation to redeem from the tax sale, and he will not be permitted to set up the title thus acquired against the purchaser's title. *Dayton v. Rice*, 57 Iowa 429.

4. *National Bank v. King*, 110 Ill. 254.

In *Illinois*, if the judgment debtor had only a contract of purchase not performed, the sheriff's grantee must complete it. Where, after the lien of the judgment, another acquires a deed from the original vendor, and seeks to have the sheriff's deed set aside as a cloud on his title, the sheriff's grantee must, in order to defeat the relief sought, show such a contract of purchase in favor of the debtor as can be specifically enforced in equity in his favor. *Carbine v. Morris*, 92 Ill. 555.

In *Iowa*, the purchaser's title has been held not to be affected by an unfulfilled agreement for the defendant to repay him the purchase money and retake. *Alston v. Wilson*, 44 Iowa 130.

See *Smith v. Lytle*, 27 Minn. 184, where the sale was of an estate in fee and the defendant had only an equitable interest under a contract of purchase.

In *North Carolina*, when a vendor of land retains the title to secure pay-

c. INCIDENTS OF CO-TENANCY.—If the defendant is a co-tenant, the purchaser's interest is subject to all the burdens and incidents of the co-tenancy.¹ If the writ be against several defendants, and the levy is made upon their joint property as the property of one, the sale will carry only such one's interest.² If one of them holds a mortgage on the property levied on, the sale does not affect the lien, this being simply an incident, and transferable only by the proper proceeding for reaching the debt.³

d. TRUSTS.—The purchaser takes title subject to any trust that affects the property.⁴ The preponderance of the decisions is to the effect that the legal title held by a trustee is not subject to a levy and sale unless he has a beneficial interest in the subject of the trust.⁵ Ordinarily, any concomitant essential to the use and

ment of the purchase money a sale thereof under *fi. fa.* against him, confers only the naked title; it does not vest in the purchaser any right to the purchase money. *Tally v. Reed*, 74 N. Car. 464. Nor does he acquire any interest, equitable or otherwise, in the notes given to secure the purchase money. *Blackmer v. Phillips*, 67 N. Car. 340.

In *Texas*, upon a sale under a judgment for the purchase money due to one vendor, on an executory contract of sale of the land, the other joint vendor having been paid, the purchaser takes title to the whole property, as against one having notice, and claiming under a mortgage executed by the original vendee. *Turner v. Phelps*, 46 Tex. 251.

A leased to B a newspaper office, contracting to convey on payment of several installments, the contract to be void and the lease to be ended on default thereof. This occurring, A got judgment, and under the execution, sold all B's interest, the purchaser to take subject to the conditions of the lease and agreement. It was held that the sale discharged any lien A had, and conveyed the title of both A and B, notwithstanding the terms of the sheriff's sale. *McCay v. Forwood*, 15 Phila. (Pa.) 137.

A executed to B a bond to convey land on payment of twelve cotton bales. B assigned the bond to C, and A conveyed his interest to C. Afterwards, D recovered a judgment against A and levied on the land, without notice of the deed, it being unrecorded. Held, that knowledge thereof obtained before the sale did not invalidate the priority of his lien. *Taylor v. Lowen-*

stein, 50 Miss. 278. Compare *Roper v. Hackney*, 15 Fla. 323.

1. So held in a case of voluntary partition. *Polhemus v. Empson*, 27 N. J. Eq. 190. Also in case of a sale under a redemption by a judgment creditor of one of two tenants in common, both of whom had joined in the mortgage. *Fischer v. Eslaman*, 68 Ill. 78. So also where a co-tenant purchased at the sale his co-tenant's interest, it was held that the equity for a division under a covenant to sell and to divide the proceeds did not pass. *Threadgill v. Redwine*, 97 N. Car. 241. Compare *Flaniken v. Neal*, 67 Tex. 629.

Where the execution defendant is only the equitable owner of an undivided half interest in the land, the purchaser is entitled to a decree vesting the title in him; also to half the money received from the sale of timber cut therefrom. *Thorn v. Weatherly* (Ark. 1889) 12 S. W. Rep. 159.

2. *Frederick v. Missouri River, etc., R. Co.*, 82 Mo. 402. Compare *Flanniken v. Neal*, 67 Tex. 629.

3. *Rahm v. Butterfield*, 82 Ind. 163.

4. *Pindall v. Trevor*, 30 Ark. 249.

5. In *Mississippi*, a purchaser under a judgment against a trustee of property in which there is an implied trust does not acquire the right of the *cestui*; *Mississippi Code*, 1880, § 1212, placing creditors without notice on the same footing as purchasers for value without notice, does not apply. *Nugent v. Priebatsch*, 61 Miss. 402.

In *North Carolina* (where the court is one both of equity and law), it has been held that a purchaser can acquire the title of a trustee, and be entitled to possession as against a defendant who failed to connect himself in any way

benefit of the property, easements, fixtures and the like, passes with the sale.¹

e. NON-PARTNERSHIP.—The ultimate effect of a levy upon a partnership interest is to confer on the purchaser nothing more than the right to an accounting.² Some statutes make the good will of a business to be "property transferable like any other."³

f. EVIDENCE OF TITLE.—The requisites of the evidence to sustain the purchaser's title are analogous to those in case of voluntary transfers generally.⁴ It cannot be impeached by any declarations of the judgment debtor.⁵

2. What Passes⁶—*a.* RUNNING COVENANTS.—The defendant's title acquired by the purchaser includes such covenants as pass with the land, and the right to compel specific performance.⁷

with the *cestuis*. *Stitti v. Lookabill*, 71 N. Car. 25.

See *Perry on Trusts* (4th ed.), § 328; and (for collation of the Statute of Uses in the several States, and consequent liabilities of trustees), § 299.

1. As to fixtures, see *infra*, this title, *The Purchaser's Title—Fixtures*, 2, (b).

Whatever right to use a patented machine an execution defendant may have passes with the machine to the purchaser upon a sale by the sheriff. *Wilder v. Kent*, 15 Fed. Rep. 217.

Otherwise, as to the proceeds of a fire policy on the premises sold and burnt. *Slimpton v. Farmers' Mut. F. Ins. Co.*, 43 Vt. 497.

2. *Barrett v. McKenzie*, 24 Minn. 21; *Durborrow's Appeal*, 84 Pa. St. 404; *Fourth Nat. Bank v. Carrolton R. Co.*, 11 Wall. (U. S.) 624.

The purchaser cannot be a partner by reason of the *delectus personarum*; but simply a claimant for a share of the surplus. *Bates, Partn.*, § 1111; 1 Story, Eq. Jur. (13th ed.), § 677.

This rule applies, even though the same purchaser has bought the separate interests of all the partners. *Osborn v. McBride*, 16 Nat. Bank Reg. 22.

The purchaser at a sale of partnership property under an execution upon a judgment for a firm debt, gets a perfect title, as against the lien of a judgment of prior date docketed against a partner for his individual debt. No presumption arises that there was a residuum or ratable share in him to be bound by the judgment against him, so as to subject the purchaser's title to contribution. *Martin v. Wagener*, 1 Thomp. & C. (N. Y.) 509.

As to the effect of a levy on firm property under *Georgia Code*, §§ 1899,

3351, and of the sale, see *Parler v. Johnson*, 81 Ga. 251 (*sub nom.* *Porter v. Johnson* (Ga. 1888), 7 So. Rep. 317).

"The law with respect to the levy of a writ on a partner's interest in firm property involves many perplexities, the solution of which is worthy of legislative aid." *Freeman, Ex.* (2d ed.), § 254a.

3. *California Civil Code*, 1885, § 993; *Dakota Comp. Stat.* 1887, § 3201. It may accompany firm property decreed to be sold. *Bell v. Ellis*, 33 Cal. 620.

4. 1 *Greenleaf, Ev.* (Redf. ed.), § 263.

5. In *Baker v. Miller*, 1 Yeates (Pa.) 305, the court remarked: "If declarations of the debtor that he had sold the land to another could be brought forward to overreach a judgment against him, no one would ever purchase at a sheriff's sale." *A fortiori*, his declarations that his wife owned the land. *Wall v. Staley*, 91 Pa. St. 27.

In ejectment by the purchaser, he must prove that the execution defendant had some interest in the land, on which the judgment could operate. *Hendon v. White*, 52 Ala. 597.

In *Kentucky*, the original judgment execution returned replevied, with the name of the surety, and the corresponding execution on the bond, are sufficient to establish the purchaser's title without producing the bond. *Locke v. Coleman*, 4 T. B. Mon. (Ky.) 315.

6. As to what is conferred in general, see *supra*, this title, *Restriction to Defendant's Interest*.

7. 2 *Roscoe, Ac. Real Prop.* 435.

Spencer's Case, 5 Coke, 17. The leading *English* decision that a covenant of seizin runs with the land, is

In some States, he, being the real party in interest, can sue on any covenant for seizin to any predecessor in the chain of title.¹

Kingdom v. Nottle, 1 M. & S. 355; 4 M. & S. 53; Morgan v. Bouse, 53 Mo. 219.

1. Colby v. Osgood, 29 Barb. (N. Y.) 339; Devore v. Sunderland, 17 Ohio 60; 49 Am. Dec. 442; Kimball v. Bryant, 25 Minn. 496; Dickson v. Desire, 23 Mo. 151; Walker v. Deaver, 5 Mo. App. 139. Compare Bethell v. Bethell, 54 Ind. 428; 23 Am. Rep. 650; Mechlem v. Blake, 22 Wis. 495; Cole v. Kimball, 52 Vt. 639; M'Crady v. Brisbane, 1 Nott & M. (S. Car.) 104; 9 Am. Dec. 676.

The English Property Act of 1881 [L. R. XVII. Stat. 119, § 7, (E) (6)] provides that the benefit of covenants to convey, of quiet enjoyment, freedom from incumbrances and further assurance "shall be annexed and incident to, and shall go with the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part of the time, vested."

For citations of conflicting decisions whether the covenant of seizin is present or future, see COVENANT, vol. 4, p. 478.

"It is a settled rule on both sides of the Atlantic that until breach the covenants for title, without distinction between them, run with the land to heirs and assigns. But a strong current of American authority has set in favor of the position that the covenants for seizin, for right to convey, and perhaps against incumbrances, are what are called covenants *in præsenti*—if broken at all, their breach occurs at the moment of their creation. . . .

"The question may be considered as at least temporarily settled in favor of the technical rule in *Massachusetts*, and most of the other States, except *Maine*, *Colorado*, *Georgia*, *New York*, *Ohio*, *Minnesota*, *Missouri*, *Indiana*, *Wisconsin*, *Iowa*, *South Carolina*, *Vermont*, and possibly *Michigan*, unless when the covenant against incumbrances is so linked to another covenant as to have a prospective operation and not be a covenant *in præsenti*." Rawle, Cov. (5th ed.) §§ 205, 212.

As to the distinction between covenants *in præsenti* and covenants *in futuro*, see 3 Washburn Real Prop. *649.

In *Hayes v. New York Gold Min. Co.*, 2 Colo. 273, an action on a bond covenanting to surrender mill and fixtures in good repair at expiration of lease, the court, by Hallett, C. J., said: "I have not found any case in which the rule has been applied to a covenant which attached to the land after the sale, and before conveyance by the sheriff, as in this case. But it is believed that the principle is applicable to such covenants, and to whatever estate is acquired by the judgment debtor prior to the conveyance by the sheriff. Any other rule would divorce the covenant from the land for the benefit of which it was intended, and practically annul its obligation."

Under *Colorado* Annot. Stat., 1891, p. 586, § 436, covenants of seizin, peaceable possession, freedom from incumbrances and warranty run with the land, and inure to the benefit of subsequent purchasers.

In *California*, every covenant "made for the direct benefit of the property, or some part of it then in existence, runs with the land." *California* Civil Code, 1885, § 1462. This includes covenants of warranty or for quiet enjoyment or payment of taxes on the part of the grantee, § 1463. But a covenant to add some new thing, made for the assigns, "runs with the land so far only as the assigns thus mentioned are concerned." § 1464.

In *Texas*, where, at an execution sale, A purchased the interest of B, one of six judgment debtors, in a portion of the land held by them in common, equal to one-sixth of the whole, and C claimed through the other five, it was held that A was not entitled to have the entire portion so purchased by him allotted to him as vendee of B, since this was not a case of a sale by B of the whole interest which might create certain equities; A took only B's interest. *Flaniken v. Neal*, 67 Tex. 629.

So, also, in *Georgia* "unless the transmission of such covenants is expressly negatived in the covenant itself." *Georgia* Code, 1882, § 2702.

In *Maine*, the right passes to an assignee after eviction by a better title, and an action lies on release of covenants. *Maine* Rev. Stat. 1888, p. 697, § 18. See *Trask v. Wilder*, 50 Me. 453; *Littlefield v. Pinkham*, 72 Me. 369.

A covenant to insure passes with a leasehold interest, the sale operating as an assignment at law.¹ By some statutes, instruments essential to the title of real property, not kept in a public record office pursuant to law, belong to the person in whom for the time being such title may be vested, and pass with it.²

b. **FIXTURES.**—Ordinarily, upon a sheriff's seizure and sale of realty, only buildings having their foundation in the soil pass to the purchaser.³ Fallen timber, but, at the date of delivery of sheriff's deed, not converted into sawlogs, rails, etc., passes to the purchaser as part of the realty.⁴

c. **IMPROVEMENTS BY LESSEE.**—The purchaser, taking only the defendant's interest, would be bound by the covenants of a lease executed before the lien of the judgment or execution attached. Similarly, as to an execution of a leasehold interest.⁵

3. Equities Against the Owner—*a.* **NOTICE IN GENERAL.**—The purchaser is protected from claims acquired before the judgment,

In *Connecticut*, the leading case on the subject decides that an intermediate purchaser's right of action for breach of covenant of a prior vendor cannot be enforced until recovery of damages by a purchaser from himself. *Booth v. Starr*, 1 Conn. 244; 6 Am. Dec. 233. And this has been followed in *New York*. *Withy v. Mumford*, 5 Cow. (N. Y.) 137.

In *New York*, the leading case thereon is *Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1. But see therein the opinion of Livingston, J., dissenting from that of Kent, C. J. And see *Ernst v. Parsons*, 54 How. Pr. (N. Y.) 163.

In *Indiana*, the leading case was *Martin v. Baker*, 5 Blackf. (Ind.) 232.

In *Pennsylvania*, on a judgment in covenant for ground rent reserved, the sheriff's deed discharges a mortgage on the premises subsequent to the ground rent deed; and this, though the purchaser is the husband of one of several heirs at law to the land who have suffered the ground rent to get in arrear. *Rushton v. Lippincott*, 119 Pa. St. 12.

An execution sale of lands of a tenant in tail, does not pass the heir's title, but it divests the wife's title to dower. *Elliott v. Pearshall*, 3 Pa. L. J. 157.

1. The purchaser takes, liable to the lessee's covenant, all the interests of the assignor, whether in possession or expectancy. *Simons v. Van Ingen*, 86 Pa. St. 330. Compare *Thompson v. Rose*, 8 Cow. (N. Y.) 266.

As to the lessee's privity of estate

and contract thereon, see *Taylor, Landl. & T.* (8th ed.) §§ 436, 439.

2. *California* Civil Code, 1885, § 994; *Dakota* Comp. Stat. 1887, § 3202.

3. But under *Louisiana* Code, art. 464,—declaring all buildings to be immovables,—the nature of the foundation is immaterial, and the whole passes. *Polhman v. De Bouchel*, 32 La. Ann. 1158.

As to buildings, when and when not, of the realty, see 1 Washburn, *Real Prop.* (5th ed.) 3.

In *Colorado*, fixtures erected by the execution defendant after the sale and before the deed, pass with the land to the grantee; so, also, as to fixtures purchased by the debtor from a tenant holding under him. *Hayes v. New York Min. Co.*, 2 Colo. 273.

4. *Leidy v. Proctor*, 97 Pa. St. 486.

As to trees, when and when not, of the realty, see 1 Washburn, *Real Prop.* (5th ed.) p. 13.

5. In *Tennessee*, where a leasehold interest in a race track, etc., was purchased on execution by one who sought to repudiate the lease on the ground of its not being registered, and attempted to remove certain improvements, which he claimed to be personal property, although the lease stipulated that they should be removed, only on performance of specified conditions, it was held that if the purchaser repudiated the lease, he could not remove the property, and that, if he claimed under the lease, such performance was a prerequisite to the removal; and this, notwithstanding,

by third persons from the execution defendant, whereof he had not actual nor constructive notice.¹ But ordinarily, if, at the time of the sale he knows of any legal or equitable right in a third person,² or if the instrument evidencing such right is properly of record,³ or if possession is held thereunder,⁴ his acquirement cannot prejudice such person's interests.⁵

in absence of express stipulation, the improvements might not be regarded as fixtures. *Snowden v. Memphis Park Assoc.*, 7 Lea (Tenn.) 225.

1. He is entitled to the same extent as other purchasers to the benefit of the registration statutes. *Jackson v. Chamberlain*, 8 Wend. (N. Y.) 625; *Goepp v. Gartsier*, 35 Pa. St. 130; *Milner v. Hyland*, 77 Ind. 458; *Butterfield v. Walsh*, 36 Iowa 534; *Duke v. Clark*, 58 Miss. 465; *Lee v. Birmingham*, 30 Kan. 312; *Low v. Blinco*, 10 Bush (Ky.) 331.

In *Arkansas*, the execution plaintiff also buys only subject to equities whereof he has notice, actual or constructive; not to any others. *Newman v. Davis*, 24 Fed. Rep. 609. So held, also, where a tract intended to be conveyed had been omitted from a trust deed. *Allen v. McGaughey*, 31 Ark. 252. Although chargeable with constructive notice of a latent equity or trust, he acquired all the rights of the execution defendant against whom a resulting trust in the land is asserted. *Walker v. Elledge*, 65 Ala. 51.

In *Mississippi*, in a contest of equities, the court will limit the execution lien to the defendant's actual interest. *Walton v. Hargroves*, 42 Miss. 18.

2. *Hoy v. Allen*, 27 Iowa 208; *Boro v. Harris*, 13 Lea (Tenn.) 36.

3. So held by the majority of the court where the deed was not recorded at date of the judgment. *Valentine v. Havener*, 20 Mo. 133.

4. *Hood v. Fahnestock*, 1 Pa. St. 470; 44 Am. Dec. 147.

5. By the registration statutes of some States, the judgment lien is superior to any unrecorded instrument of which the judgment creditor had no knowledge at date of the judgment. *Guiteau v. Wisely*, 47 Ill. 433; *Kelly v. Mills*, 41 Miss. 281; *Johnson v. Robinson*, 20 Minn. 189.

In *Alabama*, this holds, though the purchaser knew of the former deed. *De Vendell v. Hamilton*, 27 Ala. 156. So, also, in *New Jersey*. *Sharp v. Shea*, 32 N. J. Eq. 65.

And this, though there was, after the judgment lien attached but before the sale, a recording or actual notice of the deed. *Fash v. Raviesies*, 32 Ala. 451. Such subsequent registration does not relate back. *Pollard v. Cocke*, 19 Ala. 188.

In *Alabama*, it has also been held that the judgment lien will prevail at law over that of a vendee who at date of the judgment held the equitable title, and acquired before the sheriff's sale the legal title. *Sellers v. Hayes*, 17 Ala. 749.

In *Georgia*, also, a judgment creditor who is protected against a mere equity in his debtor's property for want of notice before his judgment lien attached, may at the execution sale thereof purchase and hold it, disincumbered of such equity, though meanwhile he received notice. *Humphrey v. Copeland*, 54 Ga. 543.

In *South Carolina*, the prior deed prevails over the judgment, if recorded before the sheriff's deed is executed. *Leger v. Doyle*, 11 Rich. (S. Car.) 109; 70 Am. Dec. 240.

In *New York*, a purchaser was held to be bound by an agreement of the judgment creditor with a fourth mortgagee, whereof he had no notice to postpone the judgment lien. *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553; 26 Am. Rep. 627. Compare the complicated case, *Clute v. Emmerich*, 99 N. Y. 350, wherein, applying the maxim *caveat emptor*, and placing the purchaser on the footing of the judgment creditor, the court, by Finch, J., remarked: "If more came by an enlargement of the lien, that was simply the creditor's good fortune; if it did not so come, the good fortune vanished, but no right of the creditor was invaded." So held also, where the execution creditor knew that the goods levied on had been fraudulently purchased by the debtor. *Devoe v. Brandt*, 53 N. Y. 462.

In *Iowa*, the right of a grantee failing to record before the sale a deed, given by the debtor after the judgment, of land wherein the grantee had, before the rendition a trust interest, was held to be subordinated to that of the judgment

b. LIS PENDENS.—In some States, the rights of a purchaser, whether at private or forced sale, *pendente lite*, are defined by statute.¹

creditor purchasing at his own sale. In *Gower v. Doheney*, 33 Iowa 40, the court, by Day, C. J., said: "It is a wholesome rule of equity that where one of two innocent persons must suffer, the loss will fall upon that party who has been guilty of the first negligence. *Vigilantibus*," etc.

Where A obtained a judgment against B, and caused levy on land whereof C, the owner of the equitable title, had long been in possession, the majority of the court presumed that C was holding under B's legal title and protected the execution purchaser accordingly. *Bonnell v. Allerton*, 51 Iowa 166.

In a complicated case of exchange of properties in Memphis, where the execution plaintiff died soon after purchasing at the sale, the court, by Ballard J., said that the purchaser will prevail at law over the owner of the junior legal title, even if it be founded on the older equity; this, notwithstanding a decree divesting the legal title before the execution sale. *Doe v. Plunkett*, 1 *Flip*. (U. S.) 427.

In *Indiana*, at the same term when *Vitito v. Hamilton*, 86 Ind. 137, was decided, but contrary thereto, yet without record of intent to overrule it, the court in *Carnahan v. Yerkes*, 87 Ind. 67, declared that an "execution creditor who bids off property, at a sale upon his own execution, and applies the bid to the payment of his own judgment, is not regarded as a *bona fide* or innocent purchaser;" citing *Hermann, Ex.*, § 328; *Freeman, Ex.*, § 300. In *Rooker v. Rooker*, 75 Ind. 579, *Elliott, J.*, had argued (in his dissenting opinion): "It is incontestably true that a judgment in the hands of a judgment plaintiff is only a general lien on the actual interest of the judgment debtor and subject to all existing equities. . . . It seems to me, that giving to a judgment in the hands of an assignee a force so vastly increased as to compel existing equities to yield to it, is annexing to the fact of assignment an unreasonable importance." And in the *Vitito* case (where *Niblack, J.*, also dissented) he remarked that the plaintiff's "title mounts no higher than his judgment." Compare *Heck v. Fink*, 85 Ind. 6.

In *Texas*, an execution creditor is not

considered a *bona fide* purchaser. In *Ayres v. Duprey*, 27 Tex. 606; 86 Am. Dec. 657, the court, by Moore, J., said: "The consideration was not advanced on the faith of the purchase." In *Orme v. Roberts*, 33 Tex. 773, the court, by Walker, J., reaffirmed this, and approved the majority opinion (by *Birchard, C. J.*) in *Boos v. Ewing*, 17 Ohio 519; 49 Am. Dec. 478.

But see (in the Ohio case) the dissenting opinion of *Hitchcock, J.* And later also it is held that the plaintiff purchaser is chargeable with equities in favor of one in possession of land under a parol contract, who has paid purchase money and made valuable improvements. *Barnett v. Vincent*, 69 Tex. 685. Compare *Oberthier v. Stroud*, 33 Tex. 522.

The execution defendant, upon the plaintiff's purchase and reconveyance to him, retakes the estate subject to all trusts affecting his conscience before the execution sale. *Ellis v. Singletary*, 45 Tex. 27.

In *North Carolina* the plaintiff purchaser fares no better. In the case of the lost *vend. exp.*, *Rollins v. Henry*, 78 N. Car. 342, 352, the court, by *Rodman, J.*, said: "It is settled law in this State that he takes subject to all equities against the defendant in the execution, whether he has notice of them or not." So held, also, in *Hicks v. Skinner*, 71 N. Car. 539; 17 Am. Rep. 16.

In *Pennsylvania*, the plaintiff purchaser is bound by express notice of a reserved parol trust, if given him before the sale. *Sill v. Swackhammer*, 103 Pa. St. 7.

Where A conveyed to B his equitable title under contract for purchase of land from C, who made title to B, A taking contemporaneously a judgment bond, under which the land was finally sold, it was held that the sheriff's vendee took a good title free from all equitable claims by contract purchasers from A, prior to his conveyance to B. *Barb v. Sayers*, 107 Pa. St. 246.

1. See LIS PENDENS, vol. 13, p. 897. See also *Jones, Mort.* (4th ed.), §§ 599, 1411, 1442.

In *New York* a purchaser is chargeable with constructive notice of the equitable rights of a defendant's vendee in actual possession under a con-

4. **Equities in Favor of the Owner.**—In some States the Statute of Frauds makes an exception whereunder becomes valid one's parol promise to purchase land for the benefit of another and permit him to redeem.¹ In absence of covin on the part of the execution defendant such promise, in absence of direct statutory recognition, is enforceable on his behalf on the general principle of equity granting relief against fraud.²

tract antedating the judgment lien. Such vendee is not a *lis pendens* purchaser. So held in *Parks v. Jackson*, 11 Wend. (N. Y.) 442; 25 Am. Dec. 656, by nineteen judges; Walworth, Ch. dissenting, that equitable rights are not decidable in ejectment.

In this case, after citing Chancellor Kent's opinion in *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 556, on *lis pendens*, the court, by Seward, Sen., said: "Although this principle may sometimes operate harshly upon a purchaser who has no actual notice of the pending litigation, it seems to be essential to the due administration of justice;" and recommended certain legislation providing for filing notice of pendency of litigation. This has resulted in provisions not only for notice of suits to recover possession and use but also of other proceedings.

See B.'s *New York Rev. Stat.* 1890, pp. 218, 219; *Massachusetts Pub. Stat.* 1882, p. 745, § 13; *Ohio Rev. Stat.* 1890, § 5050; *Michigan Annot. Stat.* 1883, § 6619; *Indiana Act of 1889, Supp.*, § 14; *Wisconsin Annot. Stat.* 1889, §§ 761, 3187; *Minnesota Stat.* 1891, §§ 4309, 5443; *Nebraska Comp. Stat.* 1889, p. 864, § 85; *Dakota Comp. L.* 1887, § 4897; *California Code Civil Proc.* 1885, §§ 409, 755; *Iowa Code* 1888 (Miller's), § 2628; (McClain's), § 3834.

1. Brightly's *Purdon's Pennsylvania Dig.*, 1885, p. 831, § 3. This proviso in the act of 1856 applies to trusts arising by implication and construction of law. Seichrist's Appeal, 66 Pa. St. 237.

As to resulting trusts, see Perry on Trusts, §§ 133, 181, 215.

In *Morey v. Herrick*, 18 Pa. St. 123, 128, the court, by Bell, J., said: "It is well settled that if one be induced to confide in the promise of another that he will hold in trust or that he will so purchase for one or both, and is thus led to do what otherwise he would have forbore, or to forbear what he contemplated to do, in the acquisition of an estate whereby the promisor

becomes the holder of the legal title, an attempted denial of the confidence is such fraud as will operate to convert the purchaser into a trustee *ex maleficio*."

But in *Dollar Sav. Bank v. Bennett*, 76 Pa. St. 402, the court, by Sharswood, J., declared that a parol promise by a bank to purchase at foreclosure sale, then sell, cancel the debt, and pay over the surplus proceeds, was a mere *nudum pactum*, without consideration, and consequently not enforceable.

2. In *North Carolina* such aid is afforded when there has been no concealment or attempt thereby to overreach the defendant's creditors. *Peebles v. Pate*, 90 N. Car. 348. In *Mulholland v. York*, 82 N. Car. 510, such promisor, purchasing at a sale by the promisee's assignee in bankruptcy, was adjudged to hold the land subject to the promise; the court, by Smith, C. J., distinguishing such case as that of *McKee v. Vail*, 79 N. Car. 194, where there were no confidential relations, and the parol promise a mere gratuitous undertaking.

The promise will be enforced even after a deed executed by the sheriff to the purchaser. *Byrnes v. Morris*, 53 Tex. 213.

In *New Jersey* such reconveyance has been ordered on payment of the redemption money and fair compensation to the purchaser for his trouble and expense. *Combs v. Little*, 4 N. J. Eq. 310; 40 Am. Dec. 207.

In *Kentucky*, where A, the execution plaintiff's attorney, after such parol promise to let B, the defendant, redeem, purchased the land at one-third its value, and sold it to C (B's brother), who made a like promise to B, this was enforced, even after a lapse of five years. *Martin v. Martin*, 16 B. Mon. (Ky.) 8. As to what evidence was deemed sufficient to establish the trust under such oral agreement, after a lapse of fifteen years, see *Williams v. Williams*, 8 Bush (Ky.) 241.

Sometimes such tenure of title by the purchaser as trustee for the execution defendant has been declared to be upon the principle of equity, that instruments which would have been executed but for fraud, are to be treated as if actually existing.¹

Sometimes a sheriff's sale has thus been turned to consummate a mortgage.²

5. Prior Liens.—In some of the States, any senior liens are unaffected by the judgment and remain enforceable as before.³

1. *Arnold v. Cord*, 16 Ind. 177.

2. A, being embarrassed, agreed with B, his surety, that certain lien encumbered land be sold by the sheriff under one of the liens, to C. C, buying, conveyed it to D, who mortgaged it to C for a loan to pay the liens, D to hold for five years, appropriate the income to pay the liabilities, and convey to C on his paying any balance, including compensation, for D's trouble. It was held that the transaction was sustainable as a mortgage on parol evidence. *Sweitzer's Appeal*, 71 Pa. St. 264.

3. *Rankin v. Scott*, 12 Wheat. (U. S.) 177; *Isler v. Colgrove*, 75 N. Car. 334; *Shotwell v. Murray*, 1 Johns. Ch. (N. Y.) 512.

Upon the enforcement, at law and in equity of mortgage and judgment liens upon the same property, see 2 Story Eq. Jur. (13th ed.) §§ 1216, 1216a-b-c; *Jones, Mort.* (4th ed.) §§ 665, 701, 1229.

In *Massachusetts*, the execution purchaser of an equity of redemption, can aver no seizin or title, against any other person than the execution debtor or his immediate tenants or assigns. *Russell v. Dudley*, 3 Met. (Mass.) 147.

The interest described in a second mortgage, fraudulent as to creditors, may be seized and sold, though the mortgagor has conveyed away the right to redeem both mortgages. The levy carries a superior title to the amount of the execution not exceeding the value of such interest. *Verry v. Richardson*, 5 Allen (Mass.) 107.

In *Pennsylvania*, the sheriff need not state the existence or extent of the prior liens. *Carson's Sale*, 6 Watts (Pa.) 140. Where, on a partition sale, he stated that the land was sold subject to a dower judgment, which was fully set forth in the records, the purchaser took subject thereto, and this, though the execution was for interest due her thereon. *Tospon v. Sipe*, 116 Pa. St. 588.

There, a purchaser at a sale under a judgment for purchase money, takes the whole estate, legal and equitable, and the vendor takes the proceeds regardless of the date of his judgment. *Zeigler's Appeal*, 69 Pa. St. 471.

A purchaser's agreement to take subject to prior incumbrances will be enforced. *Randolph's Appeal*, 5 Pa. St. 242.

An agreement among lien creditors as to purchasing at the sale, if without the defendant's privity, would not discharge his liability to them. *Allen v. Rafsnyder*, 9 Phila. (Pa.) 199.

A mortgage to the State is not released by the sale. *Duncan v. Rieff*, 3 P. & W. (Pa.) 368.

A mortgage prior to all other liens except other mortgages, ground rents or sums due the State, is not affected by sale under *vend. exp.* or under *lev. fac.* in a suit on a subsequent mortgage, or by sale under executive process, except by decree of the Orphan's Court. *Stimson, Am. Stat. Law*, § 1862; B's P. Dig. p. 589, § 128.

The sale discharges the lien of annual interest due on a recognizance given to secure dower in the land but not the lien of accruing interest not then due. *Luther v. Wagner*, 107 Pa. St. 343. Otherwise as to lien of arrears of ground rent then due; a sale under a subsequent judgment against the covenantor for the arrears passes no title. *Foulke v. Millard*, 108 Pa. St. 230.

After A conveyed to his son B, subject to existing liens, land on which C had a judgment lien and the deed was recorded, D recovered a judgment against A; but before the execution issued thereon, by deed not recorded, B reconveyed to A, and, at D's execution sale, gave notice that he, B, still owned the land by the deed from A through which false declaration B purchased at a nominal sum, and received a deed from the sheriff. C then issued a *sci. fa.* to revive his judgment, and served it on B as terre tenant. It was held

that B was estopped from insisting that C's judgment lien was discharged by the sheriff's sale. *Hiestand v. Williamson*, 128 Pa. St. 122.

An execution sale under a judgment upon a mortgage note or bond discharges the mortgage lien. *Hartz v. Woods*, 8 Pa. St. 471.

In *New York*, the purchaser may attack the validity of any prior mortgage whereto the sale was not made expressly subject. *Wagner v. Jones*, 7 Daly (N. Y.) 375. Compare *Carpenter v. Simmons*, 28 How. Pr. (N. Y.) 12.

A purchaser at a sale subject to all incumbrances is not entitled to have the surplus proceeds applied to pay a recorded mortgage whose existence was, through an index error, unknown to all the parties. *Buttron v. Tibbitts*, 10 Abb. N. Cas. (N. Y.) 41.

By *New York*, Code Civil Proc. § 1676, in partition, dower and foreclosure, "expenses of sale" include payments which the officer must first make from the proceeds for taxes and water rates and to redeem from unpaid tax sales.

Purchasers of lots have been ordered to contribute towards the satisfaction of a mortgage debt according to the relative value of the lots purchased by them, without regard to the purchase price at the sheriff's sale. *Cheesebrough v. Millard*, 1 Johns. Ch. (N. Y.) 409; 7 Am. Dec. 494.

In *Georgia*, an execution sale under a judgment junior to an unforced mortgage, divests the lien of a judgment older than the mortgage, only upon that interest in the land which is sold. If the proceeds be insufficient to pay off the older judgment, an execution issued thereon may be levied upon the residue of the estate in the land, and the sale thereunder will pass title good against the mortgage. *Tarver v. Ellison*, 57 Ga. 54.

Therein was cited *Harwell v. Fitts*, 20 Ga. 723, an action by a sheriff to recover the purchase money on slaves he had sold under execution to a mortgagee whose mortgage thereon had been foreclosed, and who gave at the sale notice of claim thereunder, and on acceptance of his bid, paid the sheriff the balance over the mortgage debt. The court, by Lumpkin, J., said: "Denominate the interest or thing sold the equity of redemption, or any other name, the legal result and effects are precisely the same. The negroes

being sold subject to the mortgage, we are bound to presume that the price at which they were knocked off, was their value only, above the sum for which they were mortgaged; and if the mortgage purchaser is permitted to retain the sum thus obtained it must be at the manifest injury and wrong of the common law creditor."

The sale frees the title from the lien of prior judgment. *Dowdell v. Neal*, 10 Ga. 148. But compare the complicated case of *Studdard v. Lemmond*, 48 Ga. 100.

The purchaser takes subject to a homestead, if notified of an application pending to have it set apart. *Kilgore v. Beck*, 40 Ga. 293.

In *Missouri*, the sale confers a better title than that under a deed of trust given after inception of the judgment lien, but before issuance of the execution. *Durrett v. Hulse*, 67 Mo. 201.

There a bill in equity by a purchaser of a definite portion of land subject to a vendor's lien, to subject the remainder to pay the lien, on the ground of mistake in not at first including the whole was dismissed. *McCann v. White*, 49 Mo. 96.

In *Texas*, the purchaser's title is not affected by a subsequent proceeding to enforce a vendor's lien, unless he be made a party thereto. *Davis v. Rankin*, 50 Tex. 279.

In *Mississippi*, the registration law does not protect him against an unrecorded vendor's lien. *Lissa v. Posey*, 64 Miss. 352.

In *New Jersey*, the purchaser takes title free from the lien of an unregistered mortgage antedating the judgment, whereof the execution plaintiff had no notice, but of which the purchaser had actual notice. *Sharp v. Shea*, 32 N. J. Eq. 65.

In *Illinois*, the purchaser's rights relate back to the attachment levy; thus taking precedence of an intervening tax warrant. *Gaar v. Hurd*, 92 Ill. 315.

There, a mortgagee purchasing upon the sheriff's announcement that the sale is subject to the mortgage, and forfeiting his title in default of redemption, not only extinguishes the lien of the mortgage, but loses his remedy on the note secured by it. *Biggins v. Brockman*, 63 Ill. 316.

A sold land to B, who assumed a prior mortgage and gave back his own; but before paying anything, B reconveyed to A and received satisfaction of the B mortgage. C, who meanwhile

In some States, an execution sale transfers the title regardless of both junior and senior liens; their holders being relegated to proceedings for distribution of the proceeds in the sheriff's hands.¹

The value of the paramount lien, when indeterminate would, as of course, remain a charge on the land; the proper deduction

had obtained judgment, levied an execution on the land, and at the sale became the purchaser. On foreclosure suit by the original mortgagee, it was held that C acquired nothing but the right to fulfill B's undertaking. *National Bank v. King*, 110 Ill. 254.

In *Kentucky*, an execution plaintiff purchasing with notice of a prior mortgage lien, and suffering therefrom is estopped from moving to quash the levy and sale. *Thomas v. McKay*, 5 Bush (Ky.) 475.

There, if the sale occurs pending a suit to enforce a vendor's lien on the land which results in a decree and sale, the execution purchaser is entitled to have the decretal sale set aside on discharging the vendor's lien. *Bush v. Williams*, 6 Bush (Ky.) 405. Compare *Campbell v. Wooldridge*, 6 Bush (Ky.) 321.

In *Florida*, the rule subjecting the sale to prior liens applies to the sale of a franchise under statutory power. *Holland v. State*, 15 Fla. 455.

In *South Carolina*, a sale under a junior judgment discharges the premises from the lien of any prior judgment, and gives the purchaser a perfect title, notwithstanding an intervening mortgage which has been marked "satisfied." *Blohme v. Lynch*, 26 S. Car. 300.

In *North Carolina*, the code prescribes the rule. *Perry v. Morris*, 65 N. Car. 221; *Woodley v. Gilliam*, 67 N. Car. 237. Under court rule XIX. (Supp. 63 N. Car. 669), a junior judgment creditor may force a sale. The purchaser cannot demand that the money paid by him shall be applied to the discharge of paramount incumbrances; nor can he enjoin a sale thereunder. *Fox v. Kline*, 85 N. Car. 173.

As to the rule under the *Iowa Code*, see *Holtzinger v. Edwards*, 51 Iowa 383; and the complicated case of *Teabout v. Jaffray*, 74 Iowa 28.

In *Indiana*, on execution sale of an equity of redemption, the purchaser's title is not affected by notice of pendency of a suit to foreclose the

mortgage. *Shanklin v. Franklin L. Ins. Co.*, 77 Ind. 268. A delivery under *Indiana Rev. St.*, § 722, only confers on the purchaser of the mortgaged chattels a title on satisfaction of the mortgage. *Slifer v. State*, 114 Ind. 291.

In *Ohio*, if a mortgagee recovers judgment for the mortgaged debt, a purchaser at the execution sale takes an indefeasible title, although the price does not satisfy the entire debt. *Fosdick v. Risk*, 15 Ohio 84; 45 Am. Dec. 562.

In *Maryland*, the execution purchaser of an equity of redemption may redeem, although the price paid by him was inadequate. *Stockett v. Taylor*, 3 Md. Ch. 537.

In *Wisconsin*, the purchaser may redeem from a prior mortgage by paying the amount thereof or his equitable proportion thereof, where the lands sold are only a part of those covered by the mortgage. *Raymond v. Holborn*, 23 Wis. 57; 99 Am. Dec. 105.

1. *Farmers' Bank v. Wallace*, 3 Harr. (Del.) 370; *Foulke v. Millard*, 108 Pa. St. 230.

One neglecting seasonably to present his claim would suffer the loss consequent upon consumption of the fund by paramount claims. See 1 Brightly Dig. Pa. Dec. 1101-6; 3 id. 3786.

A legacy charged on the land would be released as such. *McLanahan v. Wyant*, 1 P. & W. (Pa.) 112. But not a widow's dower interest. *Schall's Appeal*, 40 Pa. St. 170.

In *Lower Canada*, "conditional hypotheca are collocated in the report according to their rank, but the amounts are made payable to subsequent creditors whose claims are exigible, or, in default of these, to the defendant upon his giving sufficient sureties for the return of the money in the event of the condition being fulfilled. . . . In case neither party furnishes the requisite security, the amount of the conditional claim may be placed in the hands of a sequestrator." *Rev. Stat. P. Quebec*, 1888, § 5947.

to be consequently made from the proceeds of the sale being incalculable.¹

6. Effect of Irregularities—*a.* AS AGAINST COLLATERAL ATTACK.—In general, the purchaser's title is unimpeachable by any error in the proceedings not occurring through his own fault. Such irregularities must be corrected by a direct proceeding therefor; they are of no avail in a collateral attack.²

***b.* RELATION TO RETURN.**—Ordinarily, a sheriff's sale of personal property is not affected by the fact that it came off after the return day, the seizure giving him a special property therein. So, also, in general, his sale of real property.³

1. So held, where a deed had been made subject to payment to children on death of a widow. *Heist v. Baker*, 49 Pa. St. 9. Also, where there was a lien of a sheriff's recognizance. *In re McKenzey's Appropriation*, 3 Pa. St. 156. Also, where there was a lien of unpaid purchase money, the interest payable to a widow during life. *Lauman's Appeal*, 8 Pa. St. 473.

Release of a lien for a definite amount is not avoided by the fact that the date for its payment is later than the sale. *Lobach's Case*, 6 Watts (Pa.) 167.

2. In *Massachusetts*, against such attack the sale is good if conducted according to law, though the judgment be irregular. *Park v. Darling*, 4 Cush. (Mass.) 197. As to the statutory notice to the creditor after levy and before sale that the land is held in trust by the debtor, the declaration whereof has not been recorded, see *Colburn v. Jewell*, 130 Mass. 182.

In *Minnesota*, similarly held, notwithstanding an execution's misrecital of the judgment, and also an irregularity in its issuance. *Willis v. Lombard*, 32 Minn. 259. Compare *Ker v. Evershed*, 41 La. Ann. 15.

In *Maine*, a purchaser's title was held to be unaffected by the fact that the sale was made after the statutory limit for the legal existence of the "plantation." *Caldwell v. Blake*, 69 Me. 458.

3. *Supra*, this title, *The Time of Sale; Statutes Directory*, etc.

This seems to come from a similar rule at common law, where a *fi. fa.* or *ca. sa.* had been issued *post diem et an.*, without any revivor of the judgment by *sci. fa.* *Patrick v. Johnson*, 3 Lev. 403; *Shirley v. Wright*, 1 Salk. 273.

Thereupon, the defendant neglects at his peril to have the sale set aside.

Jackson v. Rosevelt, 13 Johns. (N. Y.) 97; *Jackson v. Robins*, 16 Johns. (N. Y.) 537; *Nagle v. Macy*, 9 Cal. 426.

So also in *Missouri*, as to a justice's execution returned unsatisfied sooner than authorized by law, before proceeding above. *Norton v. Quimby*, 45 Mo. 388.

So also in *Kentucky*, as to a mere failure of the return to state that the land had been sold at the time and place required by law. *Bell v. Weatherford*, 12 Bush (Ky.) 505.

In *Mississippi*, it is otherwise if the sale be in violation of expressly prescribed requisites. *Leher v. Doe*, 3 Smed. & M. (Miss.) 468.

In *Pennsylvania*, a statute was declared unconstitutional in assuming to validate an execution sale made by consent of the defendant after the return day of the writ, as against a subsequent purchaser at sheriff's sale under an incumbrance which would have been discharged by the former sale. *Dale v. Medcalf*, 9 Pa. St. 108.

An execution returned is defunct, and a levy and sale upon its reissue are void. *Paine v. Hoskins*, 3 Lea (Tenn.) 284.

But in *Iowa*, after the life of the justice's execution under which the levy had been made, a valid sale may be made, without its renewal, under another execution issued compliant with *Iowa Code*, § 3086. *Walton v. Wray*, 54 Iowa 531.

In *Kansas*, the fact that the sale was made two days after the sheriff's term expired was held not to prevent the purchaser in possession from taking title under the deed. *Head v. Daniels*, 38 Kan. 1.

In *Michigan*, in absence of consequent injury to the defendant or to third persons, the purchaser's title is not affected by the sheriff's failure to

c. ERRONEOUS RETURN.—In most States, a defect in the return does not invalidate the purchaser's title.¹

d. DEFECTIVE NOTICE.—In many States, the purchaser's title is not defeated by a defect in the advertisement of sale, whereto he was not privy;² especially if there be an adequate remedy by recourse on the sheriff.³ So, also, as to a defect in the affidavit of publication.⁴

e. DEFECTIVE LEVY.—An irregularity in the levy is not necessarily fatal to the purchaser's title, if the description be sufficiently certain.⁵

file the certificate of sale within the ten days prescribed by *Michigan Comp. L.*, § 4638.

1. See *infra*, this title, *The Return*.

In *Illinois*, the purchaser's title depends on a valid judgment levy and sheriff's deed appearing on its face to have been made by virtue of a sale under such judgment and execution. *Kinney v. Knoebel*, 47 Ill. 417. It is not defeated by a failure to make a proper return, or even by there being no return whatever. *Holman v. Gill*, 107 Ill. 467.

Similarly in *Georgia*. Compare *dicta* by Lumpkin, J., in *Hollingsworth v. Dickey*, 24 Ga. 434; and by McKay, J., in *Rikeman v. Kohn*, 48 Ga. 183—a case complicated by an injunction.

Similarly in *New York*; compare *dicta* of the court by Thompson, C. J., in *Monell v. Lawrence*, 12 Johns. (N. Y.) 534, where there had been an interlocutory order to stay proceedings, and by Morgan, J., in *Warner v. Blakeman*, 36 Barb. (N. Y.) 501.

In *Indiana*, the purchaser's title cannot be collaterally defeated by failure of the return to recite some statutory requisite, *e. g.*, that the land was appraised, it being presumed that the sheriff did his duty. *Talbott v. Hale*, 72 Ind. 1. Or, *e. g.*, to show that parcels sold *in solido* were first offered separately. *Ferrier v. Deutchman*, 81 Ind. 390.

In *Vermont*, the title depends on the sale and nothing subsequent; the sale may be proved by parol. *Hill v. Kendall*, 25 Vt. 528. And it is not defeated by failure of the return to recite demand and advertisement; the regularity of the sale being proven *aliunde*. *Murray v. Chadwick*, 52 Vt. 293.

In *Maryland*, the purchaser may deduce his title from any part of the sheriff's official proceedings that identifies with certainty the property actu-

ally seized and sold. *Wright v. Orrell*, 19 Md. 151.

2. *Supra*, this title, *Effect of Want of Notice*; *Hering v. Chambers*, 103 Pa. St. 172; *Burton v. Spiers*, 92 N. Car. 503; *Kilby v. Haggin*, 3 J. J. Marsh. (Ky.) 213; *Van Gelder v. Van Gelder*, 26 Hun (N. Y.) 356.

3. *White v. Cronkhite*, 35 Ind. 483; *Lenox v. Clarke*, 52 Mo. 115. And see *infra*, this title, *Sheriff's Rights and Liability—Liability to Third Parties*.

4. *Ogden v. Walters*, 12 Kan. 282. So held even where the purchaser was the execution plaintiff, he not knowing of the defect. *Humphrey v. McGill*, 59 Ga. 649.

In *Maine*, the purchaser's title cannot be collaterally impeached by informalities in the notice not shown to defeat the purpose of the statute thereon. *Ludden v. Kincaid*, 45 Me. 411. Compare *Newton v. State Bank*, 14 Ark. 9. A levy "beginning at the southeast corner" of a lot was harmonized by the court substituting "southwest." *Warren v. Ireland*, 29 Me. 62.

In *Vermont*, so also, by substituting "southwest" for "northwest" corner. *Barnard v. Russell*, 19 Vt. 334.

5. *Blood v. Light*, 38 Cal. 649.

In many States, the purchaser's contract is not by himself impeachable by a defect in the levy. In *Cooper v. Borrall*, 10 Pa. St. 494, where the levy stated land in Jackson township to be in Toboyn township, the court, by Rogers, J., said: "He cannot be permitted to fold his arms, and after suit point to irregularities in the process which do not affect the title, and which would have been instantly corrected . . . Sheriff's sales are not to be set aside on fanciful exceptions. . . . Speculators thereat are not to be encouraged." Compare *Bush v. Glover*, 47 Ala. 167.

So, also, where a *Delaware* statute

f. SELLING ABOVE LEVY.—The sheriff cannot sell a larger estate than that embraced in his levy.¹ A sale of less than the defendant's interest does not necessarily defeat the purchaser's title.²

g. CLERICAL BLUNDERS.—A failure to comply with a statute that is only directory is not necessarily fatal to the title of a purchaser without knowledge thereof.³

required the levy to state "a computed quantity," and 176 acres were put as "140 acres more or less." *Swiggett v. Kollock*, 3 Houst. (Del.) 326.

In *Vermont*, so, also, where a levy failed to state the amount of the debtor's interest. *Hyde v. Barney*, 17 Vt. 280; 44 Am. Dec. 335.

In *Missouri*, the purchaser's title cannot be collaterally defeated by an error in the *fi. fa.* issuing against other property than that attached. *Cabell v. Grubbs*, 48 Mo. 353.

In *North Carolina*, the purchaser's title cannot be collaterally impeached by an irregularity in adjourning the sale. *Pope v. Bradley*, 3 Hawks (N. Car.) 16.

In *Indiana*, not by the clerk's having issued the order of sale without the plaintiff's direction. *Sowles v. Harvey*, 20 Ind. 217; 83 Am. Dec. 315.

In *Tennessee*, not by seizing, contrary to the Code, property of a surety before exhausting the principal's. *Sellers v. Fite*, 59 Tenn. 120. But a purchaser asserting title, must prove the judgment. *Etheridge v. Edwards*, 1 Swan (Tenn.) 426.

In *Alabama*, not by a discrepancy between a judgment minute and the writ in stating the plaintiff's representative capacity. *Randolph v. Carlton*, 8 Ala. 606.

In *Texas*, not by a want of certainty in the entry and return. *Riddle v. Bush*, 27 Tex. 675.

1. Thus he cannot consolidate three levies of three several executions, each against a different defendant so as to make a single act of sale under the whole pass title. Where a sheriff holding three executions against A, B, and C, respectively, levied on A's life estate in certain realty, and on B's undivided half in remainder in the same realty, and on C's undivided half in remainder therein, a sale of the realty under all the levies for a gross sum was held to give the purchaser no title nor right to possession. *Bledsoe v. Willingham*, 62 Ga. 550.

In *Maine*, a sale for a gross sum of

all the debtor's right in equity to redeem a certain parcel from two or more mortgages, not being a sale of two or more equities when the mortgages severally covered only the same property, was held valid; a joint sale of distinct equities would have been invalid. *Bartlett v. Stearns*, 73 Me. 17.

2. *E. g.*, only a life-estate in a slave. *O'Conner v. Youngblood*, 16 Ala. 718. As to a sheriff's sale of a vested remainder in a slave, see *dicta* of Gaston, J., in *Knight v. Leak*, 2 Dev. & B. (N. Car.) 133.

Otherwise in *Pennsylvania*, as to a sale of a tenancy by the curtesy instead of the fee. *McLaughlin v. Shields*, 12 Pa. St. 283.

In *Kentucky*, a sheriff's mistake in selling land for \$23 more than debt, interest and costs, was held to be waived by the execution defendant's refusal to receive the excess, and directing its repayment to the purchaser. And the fact that the defendant had died did not prevent the sheriff's conveying to the purchaser after the redemption period expired. *Thomas v. Thomas*, 87 Ky. 343. Compare *Heard v. Sack*, 81 Mo. 610, where the purchaser knew not that, by reason of insanity, the defendant had failed to appear after personal service.

In *North Carolina*, where appraisers laid off a homestead to which the defendant had no right, and the sheriff proclaimed that without knowing the law in regard to homestead exemption, he sold such right as the defendant had, and that he had laid off his homestead which covered all the land offered for sale, it was held that the purchaser took a good title; the court, by Ashe, J., saying: "We have nothing to do with the hardship of the case. It is one of those quicksands of the law into which the defendant has fallen without power of the courts to rescue him." *Grant v. Edwards*, 86 N. Car. 513. Compare *Boles v. Johnston*, 23 Cal. 226; 83 Am. Dec. 111.

3. In *Pennsylvania*, so held, where an

h. REMEDIAL INCIDENTS—(1) *Defendant's Laches*.—Long neglect by the execution defendant to avail himself of an irregularity will be deemed a waiver thereof, especially where he fails to object until rights of innocent parties have intervened.¹

(2) *Defendant's Mistakes*.—The execution purchaser may take advantage of the defendant's errors to fortify his own title.²

i. VOID JUDGMENT.—The purchaser's title may be defeated by proof that the judgment on which the execution issued was on its face void,³ or had been satisfied by pay-

execution was issued on an award before the twenty days for appeal had elapsed. *Wilkinson's Appeal*, 65 Pa. St. 189.

In *Tennessee*, so held upon a clerical misprision in reciting the judgment. *Simpson v. Sparkman*, 12 Lea (Tenn.) 360. Also as to a failure of the clerk to itemize the bill of costs, as required by statute. *Meadows v. Earles*, 12 Lea (Tenn.) 299.

In *Indiana*, a sale of real estate under an *alias* execution is not void because the writ was improvidently issued without an order from the judgment plaintiff. *Johnson v. Murray*, 112 Ind. 154. Nor would a sale be there invalidated by an omission to credit on the execution payments made on the judgment. *Mulmine v. Bass*, 29 Fed. Rep. 632.

In *Louisiana*, where the note on which executory process issued appeared on its face to be prescribed, and the administrator of the succession against which suit was brought failed to plead the prescription, the sheriff's sale was held valid. *Munholland v. Scott*, 23 La. Ann. 1043.

In *Iowa*, the rights of the purchaser would not be affected by his failure to obtain a deed after the redemption year had expired; nor would a premature deed defeat his equitable title. *Conner v. Long*, 63 Iowa 295.

Where one claims under two independent execution sales, one of which is regular, the court will not inquire into the other. *Plant v. Anderson*, 16 Fed. Rep. 614. Compare *Kane v. Mackin*, 9 Smed. & M. (Miss.) 387; *Herrick v. Graves*, 16 Wis. 157.

In *Nebraska*, a sale of trespassing stock whose owner has refused to pay the damages, is valid, although the justice rendered a general "judgment," instead of issuing the execution directly as prescribed in *Nebraska Comp. Stat.*, art. 3, ch. 2, § 4; *Holmes v. Irwin*, 17 Neb. 99.

1. See *infra*, this title, *The Purchaser's Remedies—In Equity*. See also *Rigney v. Small*, 60 Ill. 416.

2. In analogy to the well established rule, that the holder of an equitable title may baffle adverse equities by buying in the outstanding legal title, the execution purchaser may so perfect his title against a sale that had been made by the judgment debtor, where both sales have been ineffectual by reason of a misdescription. *Whalen v. Bishop*, 58 Ill. 162.

As to "tacking," see *infra*, this title, *Bona Fides*.

3. See JUDGMENTS, vol. 12, pp. 139, 147; and JURISDICTION, vol. 12, p. 311. See, also, *Collins v. Miller*, 64 Tex. 118; *Roberts v. Stowers*, 7 Bush (Ky.) 295; *Grigsby v. Barr*, 14 Bush (Ky.) 330; *Reynolds v. Lincoln*, 71 Cal. 183; *Sanders v. Rains*, 10 Mo. 770; *Hunter v. Stevenson*, 1 Hill (S. Car.) 415.

In *Indiana*, a sale under writs simultaneously issued is void, if any of the judgments are void. *Ferrier v. Deutchman*, 111 Ind. 330. And, conversely, judgments valid on the face are *prima facie* sufficient to support the sale. *Langsdale v. Woolen*, 120 Ind. 16.

In *Missouri*, a sale under an execution issued upon a justice's judgment, gives no valid title if jurisdiction cannot be shown. So held where, in one proceeding, judgment was rendered against both the drawer and the acceptor of a bill of exchange for its amount, interest, and damages. *York v. Roberts*, 8 Mo. App. 140.

In *Michigan*, where land of A was assumed to be sold to B under an execution erroneously issued on a verdict, without a judgment, it was held that C, relying on the record and purchasing from A, could hold the land as against B, who long afterwards procured entry of judgment *nunc pro tunc*. *Ninde v. Clark*, 62 Mich. 124.

ment,¹ or by the defendant's imprisonment and discharge.² So, also, by proof that the lien of the judgment had expired.³

j. OTHER FATALITIES.—So, also, may his title be defeated by proof that the conduct of the sale was covinous;⁴ or, along with badges of fraud, brought inadequacy of price,⁵ or was otherwise in violation of a mandatory statute.⁶

In *Illinois*, issuance of execution pending appeal is an irregularity that will not defeat the title of a purchaser at sale thereunder, if not seasonably availed of by the defendant. *Shirk v. Metropolis, etc., Gravel Road Co.*, 110 Ill. 661.

As to effect of reversal, see *infra*, this title, *Effect of Reversal*.

As to effect of assignment of the judgment, see *Emory v. Joice*, 70 Mo. 537; *Southard v. McBrown*, 63 Cal. 545.

1. No legal execution could issue on a paid judgment. *Finley v. Gaut*, 8 Baxt. (Tenn.) 148; *Cameron v. Irwin*, 5 Hill (N. Y.) 272. So, also, if the purchaser knew the judgment or execution had been paid. *Kezar v. Elkins*, 52 Vt. 119. Similarly, a tax sale after payment. *Jackson v. Morse*, 18 Johns. (N. Y.) 441; 9 Am. Dec. 225.

In *New Jersey*, the satisfaction cannot be proven by parol evidence. *Nichols v. Disner*, 29 N. J. L. 293. Otherwise in *South Carolina*. *Hunter v. Stevenson*, 1 Hill (S. Car.) 415. And in *Georgia*. *New England Mort. Sec. Co. v. Robson*, 79 Ga. 757.

2. *Kennedy v. Duncklee*, 1 Gray (Mass.) 65.

In *Loomis v. Storrs*, 4 Conn. 440, the court, by Hosmer, C. J., said: "From the 28th of Car. II, it has been well established, if the body of the debtor has been taken in execution, and he is discharged from custody by the direction of the creditor, that the judgment is satisfied." But property tendered within a reasonable time of the levy on the body, the officer would be bound to receive. *Hall v. Hall*, 1 Root (Conn.) 124.

In *Texas*, one purchasing under an execution issued on an original judgment discoverable to be discharged in bankruptcy, acquires no title as against a former purchaser, of whose interest he had no actual notice. *Hart v. McDade*, 61 Tex. 208.

There, however, a sale under an execution issued on a dormant judgment is voidable only, and not subject to col-

lateral attack. *Hill v. Newman*, 67 Tex. 265. This, too, where the plaintiff is purchaser. *Riddle v. Turner*, 52 Tex. 145.

3. *Pierce v. Fuller*, 36 Hun (N. Y.) 179.

See *supra*, this title, *Time of Sale*.

4. *E. g.*, that it was made in the sheriff's interest after simulated assignment of judgments to his son. *Carpenter v. Stilwell*, 11 N. Y. 61. Compare *Faust v. Haas*, 73 Pa. St. 295; *Turner v. Adams*, 46 Mo. 95.

5. See *infra*, this title, *Effect of Fraud and Inadequacy*, etc. *Curd v. Lackland*, 49 Mo. 451.

6. *E. g.*, of the *Missouri* statute commanding that the sale be public. *Hutchinson v. Cassidy*, 46 Mo. 431. Or of the *Pennsylvania* requirement of inquisition unless the defendant waive the appraisement. *St. Bartholomew's Church v. Wood*, 61 Pa. St. 96. Or, in order to issuance of execution after the defendant's death, that the personal representatives be warned. *Cadmus v. Jackson*, 52 Pa. St. 295. Or, in *New Jersey*, selling a tract not within the advertisement. *Todd v. Philhower*, 24 N. J. L. 796. Or a *California* tax sale not to the person who would take the least portion and pay judgment and costs, but to the highest bidder. *French v. Edwards*, 13 Wall. (U. S.) 506.

A marshal's sale made under a wrong interpretation of the mandate was held invalid, although the record was confirmed by the court, whose attention was not specifically directed to the mistake. *Milwaukee, etc., R. Co. v. Soutter*, 2 Wall. (U. S.) 609.

In *Georgia*, if on a judgment against trustees, the execution fails to specify the property to be bound for its payment, and is levied on the trust estate, the sale will be enjoined. *Clinch v. Ferril*, 48 Ga. 365. Compare the case of a trust-deed or mortgage in *Alabama*. *Whitfield v. Clark*, 48 Ala. 555. And in *Indiana*, that of trustees' assignment of a leasehold to the *cestui*. *Hollingsworth v. Trueblood*, 59 Ind. 542.

7. **Effect of Fraud**—*a.* IN GENERAL.—A title acquired through false representation, trick, imposture, or other fraud upon the execution defendant by the purchaser is void.¹ So, also, if the fraud be practiced by the execution plaintiff with the purchaser's knowledge.²

A vendee of the fraudulent purchaser, if knowing of the fraud, will not be protected.³ Otherwise, as to an innocent purchaser's vendee with notice.⁴

In case of a conveyance within the statute, 13th Elizabeth, in fraud of creditors, if in a State where the judgment does not create a lien, the levy will do this, and equity may be invoked in aid of execution.⁵

b. HOLDING UP.—A junior execution plaintiff and his purchaser are protected against a prior execution fraudulently "held up."⁶

1. *E. g.*, Fraudulent procurement of a judgment as to the homestead. *Brown v. Thornton*, 47 Ga. 474. Or agreement to deliver proceeds to some member of the defendant's family. *Barton v. Hunter*, 101 Pa. St. 406. Or a commissioner deceiving the judge through false recitals in drafting an order of sale. *Martin v. Parsons*, 49 Cal. 94. Or a trustee unfairly buying the *cestui's* property at a foreclosure sale. *Ogden v. Larrabee*, 57 Ill. 389. Or an administrator so purchasing at his own sale. *Taylor v. Walker*, 1 Heisk. (Tenn.) 734. Or his announcing to bystanders that he was buying to aid the defendant's family; and after thereby purchasing much below value, violating his agreement to give the defendant a title-bond to reconvey. *Griffith v. Judge*, 49 Mo. 536.

2. As where he knew the plaintiff had fraudulently procured the judgment. *Adams v. Secor*, 6 Kan. 542; *Snow v. Hawpe*, 22 Tex. 168.

3. As where one had prevented laying off the homestead. *Kilgore v. Beck*, 40 Ga. 293.

4. A fraud committed by A in obtaining the sale, not participated in by B, the purchaser, will not impair the title of C, a vendee of B, although C knew thereof. *Stewart v. Reed*, 91 Pa. St. 287.

5. See *Freeman Ex.* (2d ed.), §§ 137, 430.

In some States, therefore, the execution must be returned *nulla bona* or be in the sheriff's hands for service. *Adsit v. Butler*, 87 N. Y. 585; *Dana v. Haskell*, 41 Me. 25.

Where A in fraud of his creditors conveyed land to B who mortgaged it

to C, who, without notice of the fraud, paid a valuable consideration, it was held that a levy on and sale by A's creditor of "all the right, title, and interest of A in the land," were valid, the *Massachusetts* statute allowing the land as well as the equity of redemption to be sold. *Cowles v. Dickinson*, 140 Mass. 373.

In *Missouri*, a stranger purchasing in good faith and not participating in a fraudulent conveyance, will be protected on reversal. *Gentry v. Robinson*, 55 Mo. 260; *Vogler v. Montgomery*, 54 Mo. 577.

In *Florida*, conveyances of uses, etc., with clause of revocation, are void against subsequent sales. *Florida Dig. Laws*, 1881, p. 211, § 3.

In *Pennsylvania*, fraud will not be inferred from the fact that a junior judgment creditor bought up prior judgments, and at his execution sale became the purchaser at less than the value, allowed the defendant to remain in possession, and agreed to reconvey to him on reimbursement. *Mead v. Conroe* (Pa. 1886), 8 Atl. Rep. 374.

6. In *England*, where an execution plaintiff directed the sheriff simply to seize the goods and leave them in the defendant's custody, and would not let the sheriff proceed further, it was held that the sheriff could properly return *nulla bona*, and seize and sell the goods under the execution of another creditor. *Rice v. Sarjeant*, 7 Mod. 37.

In *Pennsylvania*, if a plaintiff put his execution in the sheriff's hands with any other view than that of having it executed in good faith, and it be not so executed, it is not good against subsequent executions; and this, though

Otherwise, in case the delay or indulgence is that of the sheriff and not of the plaintiff.¹

8. Effect of Reversal—*a*. WHEN A STRANGER PURCHASES.—Under a judgment absolutely void, no valid sale can be made. So, also, under one rendered where lienholders were not before the court.² An appellant from a judgment that is simply erroneous must, in order to prevent its execution, stay proceedings by giving the statutory undertaking. Otherwise an execution may be levied on his unexempt property, and the title of a stranger purchasing at the sale will be valid, whether the judgment be affirmed or reversed.³ And this, although he was notified of the

he has not communicated to the sheriff the fraudulent design. *Weir v. Hale*, 3 W. & S. (Pa.) 285.

In *Massachusetts*, in the case of a collusive attachment tending to defeat by concealment of the property the rights of other creditors, an action on the case for conspiracy to abuse judicial process and obstruct other levy was held to be maintainable. *Adams v. Paige*, 7 Pick. (Mass.) 542.

In *Missouri*, a confession of judgment made with the understanding that the execution is to be "held up" until others come in, renders the execution dormant and fraudulent against subsequent executions, regardless of the motive. *Field v. Liverman*, 17 Mo. 218.

1. In *New York*, where A, the execution plaintiff told the sheriff to levy but not to take a receipt, as A did not wish to distress the defendant, who was A's father-in-law, and would not squander or conceal the property, and the sheriff complied until a second execution came to hand, when he sold on both, it was held that A did not lose the benefit of his execution; the court, however, remarking that had a long time intervened, the jury could infer the plaintiff's consent and fraud. *Doty v. Turner*, 8 Johns. (N. Y.) 20.

So, also, in the case of growing wheat levied on in December, and cut and sold by the sheriff the following August. *Whipple v. Foot*, 2 Johns. (N. Y.) 418.

So, also, where a mare levied upon by one deputy was removed from the State, and afterward levied on by another deputy under another execution. *Russell v. Gibbs*, 5 Cow. (N. Y.) 390.

See *infra*, this title, *Grounds for Vacating*.

2. So held, where the sale was void from being under an interlocutory de-

cree that had been erroneously amended *nunc pro tunc*. *Gray v. Brignardello*, 1 Wall. (U. S.) 627.

In *West Virginia*, in such case, the purchaser was held not to be protected by *West Virginia* code, ch. 132, § 8: "If a sale of property be made under a decree on order of a court, and be confirmed, though such decree or order be reversed or set aside, the title of the purchaser shall not be affected thereby; but there may be restitution of the proceeds of the sale to those entitled." *Underwood v. Pack*, 23 W. Va. 704.

3. A party may justify under a regular execution until reversal; for an erroneous judgment is the act of the court; otherwise as to an irregularity to which the plaintiff is privy. *Philips v. Biron*, 1 Stra. 509; *Gibson v. Lyon*, 115 U. S. 439; *Stinson v. Ross*, 51 Me. 556; 81 Am. Dec. 591; *Kissock v. Grant*, 34 Barb. (N. Y.) 144; *Shultz v. Sanders*, 38 N. J. Eq. 154; *Jernon v. Lyon*, 81 Pa. St. 107; *Dorsey v. Thompson*, 37 Md. 25; *Sutton v. Schonwald*, 86 N. Car. 198; 41 Am. Rep. 455; *Storm v. Smith*, 43 Miss. 497; *Feaster v. Fleming*, 56 Ill. 457; *Frost v. McLeod*, 19 La. Ann. 69; *Kramer v. Wellendorff* (Pa. 1887), 10 Atl. Rep. 892. See a case of sale under a second decree, after reversal of the first. *Wambaugh v. Gates*, 8 N. Y. 144.

So, also, where part was sold to the execution plaintiff and part to a stranger. *Corwith v. State Bank*, 18 Wis. 560; 86 Am. Dec. 793. So held where the defendant's remedy was through the attachment bond. *Estes v. Boothe*, 20 Ark. 583.

So held, as to a foreclosure decree involving rights of infant defendants affecting the purchaser's title. *Eisberg v. Shultz*, 38 N. J. Eq. 293.

So held, also, where the decree had

appeal.¹ Similarly is the purchaser protected on a vacating otherwise than by appeal.²

In some States the purchaser is, on reversal, protected by statute.³

b. WHEN THE PLAINTIFF PURCHASES—(1) Under Fieri Facias Generally.—The effect of a reversal when the plaintiff is the purchaser varies with the different statutory provisions for enforcement of the judgment. Ordinarily, he purchases at the risk of losing title by a subsequent reversal; it being his duty to make restitution of all things⁴ in his control thereby acquired. And this, whether he be the original plaintiff⁵ or an

been destroyed by burning of the court house. *Garrett v. Lynch*, 45 Ala. 204.

The *California* statute—that, on reversal, “the court may make complete restitution of all property and rights lost by the erroneous judgment or order”—does not apply to a judgment for recovery of money; it only operates on specific property so the title is not changed. *Farmer v. Rogers*, 10 Cal. 335.

In *Manning's Case*, 4 Coke R. (Pt. 8), fol. 96 *b*, the court, with subsequent affirmance by Sir Christopher Wray, said: “Although the judgment which was the warrant of the *fi. fa.* be reversed, yet the sale, which was a collateral act done by the sheriff by force of the *fi. fa.*, shall not be avoided; for the judgment was that the plaintiff should recover his debt. If the sale should be avoided, the vendee would lose his property and his money too, and thereupon great inconvenience would follow, that none would buy of the sheriff goods and chattels in such cases, and so execution of judgments, which is the life of the law, would not be done.”

And this, moreover, as errors in a judgment or decree are not subject to collateral attack. *McCahill v. Equitable L. A. Soc.*, 26 N. J. Eq. 531.

1. *Irwin v. Jeffers*, 3 Ohio St. 389.

The title of a purchaser of slaves was held not to be affected by a subsequent reversal. *Ponder v. Moseley*, 2 Fla. 207.

2. *E. g.* of a decree by review. *Moore v. Woodall*, 40 Ark. 42; *Watson v. Ulbrick*, 18 Neb. 186.

3. In *Iowa*, a purchaser who had not paid the entire amount of his bid, is not entitled to the benefit of *McClain's Iowa Rev. Stat.* 1888, § 4429. “Property acquired by a purchaser in

good faith, under a judgment subsequently reversed, shall not be affected by such reversal.” Mere payment of costs is not sufficient. *O'Brien v. Harrison*, 57 Iowa 686. But compare *Zimmerman v. National Bank*, 56 Iowa 133.

In *Nebraska*, reversal shall not defeat the purchaser's title, but restitution be made by the judgment creditor of the price paid with lawful interest from the day of sale. *Nebraska Comp. Stat.* 1889, p. 923; Civil Code, § 508. Compare p. 863, § 82, providing for the opening of a judgment had on mere constructive service, and for protection of one in good faith meanwhile purchasing thereunder. He will be protected though the judgment be afterwards vacated. *Keene v. Sallenbach*, 15 Neb. 200. He is not a purchaser *pendente lite*, though purchasing after the motion to open is filed. *Scudder v. Sargent*, 15 Neb. 102.

In *Pennsylvania*, reversal shall not avoid the sale. B. P. Dig. *Pennsylvania Laws*, 1885, p. 759, § 93. The fact that some months after the judgment the defendant was declared a lunatic from before its entry, was held not to avoid the title of a *bona fide* purchaser. *Shannon v. Newton*, 132 Pa. St. 375.

4. “*Restitutio in integrum*.” *Graham v. Eagan*, 15 La. Ann. 97.

5. *Mullin v. Atherton*, 61 N. H. 20; *Dater v. Troy Turnp. & R. Co.*, 2 Hill (N. Y.) 629; *Buchanan v. Clark*, 10 Gratt. (Va.) 164; *McDonald v. Mobile L. Ins. Co.*, 65 Ala. 358; *Munson v. Plummer*, 58 Iowa 736.

So held, where the defendant paid to the plaintiff's agents the amount of the debt and gave notice of suing out a writ of error. *Bank of U. S. v. Bank of Washington*, 6 Pet. (U. S.) 8.

In *Wisconsin*, the land still remaining in the plaintiff purchaser's hands,

assignee.¹ So, also, as to the plaintiff's attorney purchasing.² It seems that the title of a *bona fide* transferee for value, if a stranger to the suit, would be protected.³

(2) *Under Elegit*.—In *England*, and in those States whose statutes continue the practice of extent under an *elegit*, the land is not sold but given directly to the plaintiff in satisfaction. If the judgment is reversed, the title reverts in the defendant; and this, whether the plaintiff has meanwhile conveyed or not.⁴

c. WHEN A LIENHOLDER PURCHASES.—A lienholder is sometimes made a party to the judgment or decree, with a right

the sale was, on reversal set aside on the defendant's motion. *Corwith v. State Bank*, 15 Wis. 289; 18 Wis. 560; 86 Am. Dec. 793.

In *Ohio*, a mortgagee purchasing, continued to own the property. *Hubbell v. Broadwell*, 8 Ohio 127.

In *Missouri*, a plaintiff in an execution issued on an irregular judgment, will, on purchasing, hold the title subject to divestiture by a subsequent reversal of the judgment. *Holland v. Adair*, 55 Mo. 40.

In *Illinois*, his title fails on reversal, even though he obtain a subsequent judgment on the same demand. *Kingsbury v. Stoltz*, 23 Ill. App. 411. But a reversal of a decree does not, *ipso facto*, vacate a sale to him thereunder. *Puterbaugh v. Moss* (Ill. 1887), 11 N. E. Rep. 197.

In *Pennsylvania*, upon a sale to an execution plaintiff who thereupon conveyed the land to the defendant's wife, it was held that a subsequent sale under a prior judgment vested no title; the deed not having been contested for fraud. *McLaughlin v. McLaughlin*, 91 Pa. St. 462.

The *Kansas* provision (Comp. Laws, 664, § 467) that reversal shall not defeat the purchaser's title, does not apply to one obtaining an erroneous judgment and becoming the purchaser thereunder. *Hubbard v. Ogden*, 22 Kan. 671.

In *Louisiana*, the title of a plaintiff purchasing pending a devolutive appeal, is not affected by the appellate court's reduction of the amount of the judgment; he is only bound to restore the excess. *Pasley v. McConnell*, 38 La. Ann. 470.

In *Kentucky*, the rule that the purchaser's title is unaffected by reversal applies where the plaintiff buys. *Yocum v. Foreman*, 14 Bush (Ky.) 494; *Galpin v. Page*, 18 Wall. (U. S.) 350.

But this would not apply to a sale under a decree absolutely void. *Gossom v. Donaldson*, 18 B. Mon. (Ky.) 230; 68 Am. Dec. 723.

In *Nevada*, where the plaintiff was the purchaser, the fact that owing to mistake in computation on the appeal, seventy dollars was deducted from the judgment was held to be no ground for setting aside the sale. *Martin v. Victor Mill, etc., Co.*, 19 Nev. 197.

1. *McJilton v. Love*, 13 Ill. 486; 54 Am. Dec. 449; *Reynolds v. Hosmer*, 45 Cal. 630. The assignee is presumed to know what his document suggests. *Reynolds v. Harris*, 14 Cal. 667.

In *California*, the defendant may on reversal, affirm the sale, and recover of the plaintiff consequent damages. *Johnson v. Lamping*, 34 Cal. 293.

2. *Hays v. Cassell*, 70 Ill. 669; *Twogood v. Franklin*, 27 Iowa 239; *Stroud v. Casey*, 25 Tex. 754; 78 Am. Dec. 556; *Simonds v. Catlin*, 2 Cal. (N. Y.) 61.

In *Missouri*, no suit would be required to set aside the deed to the attorney. *Hannibal, etc., R. Co. v. Brown*, 43 Mo. 294.

3. *McAusland v. Pundt*, 1 Neb. 211; 93 Am. Dec. 358.

The defendant must look to the plaintiff for redress. *Guiteau v. Wisely*, 47 Ill. 433.

4. *Ognell's Case*, Cro. Eliz. 210; *Sympson v. Juxon*, Cro. Jac. 699; *Diano v. Wilde*, 11 Gray (Mass.) 17; 71 Am. Dec. 687; *Bryant v. Fairfield*, 51 Me. 154.

So held in *New Hampshire*, where the plaintiff had conveyed his title to his attorney who had conducted the case. *Mullin v. Atherton*, 61 N. H. 20.

In *Virginia*, the creditor stands as if he had taken a lease for years in satisfaction of his debt, and his rights may be adjudicated in the court of appeals as a controversy concerning the title to land. *Lyons v. McGuire*, 22 Gratt. (Va.) 202.

to a part of the proceeds, if the property sells for more than enough to satisfy all prior liens. It seems that on his purchasing he will hold the property notwithstanding reversal, if the proceeds were distributed among the other lienholders.¹

d. RESTITUTION.—On reversal of the judgment, it is the plaintiff's duty to restore all he has acquired thereunder; and, without demand, an action would lie for continued withholding.² Where he has received the proceeds, the defendant may recover them in an action for money had and received.³ Where the record does not show such receiving, redress may, in some States, be obtained by the old writ of *sci. fa. quare rest. non*.⁴

It is questioned whether upon a reversal of the judgment and order for restitution, the plaintiff should be compelled to account with the defendant for the real value of the property sold, or for the sum which it brought at the sheriff's sale. The latter view is supported by the weight of authority.⁵

9. Shares in Corporations.—A corporation is only a creature of statute.⁶ The franchise, being in derogation of the common law, must be strictly construed.⁷ Only when it is authorized by statute can certificates of stock be transferred under execution, they being as choses in action.⁸ In most of

1. McBride v. Longworth, 14 Ohio St. 349; 84 Am. Dec. 383.

But he must make restitution if he received the chief benefit of the proceeds. Walpole v. Ink, 9 Ohio 143.

2. Zimmerman v. National Bank, 56 Iowa 133.

3. Maghee v. Kellogg, 24 Wend. (N. Y.) 32. But not after the plaintiff had paid the money to a third person, though it be his attorney. Langley v. Warner, 3 N. Y. 327.

4. Eubank v. Ralls, 4 Leigh (Va.) 308. But if the record shows to a certainty what has been lost, a writ of restitution may issue without a *sci. fa.* Bank of U. S. v. Bank of Washington, 6 Pet. (U. S.) 8.

In some States, the plaintiff may exonerate himself by reimbursing the price of the sale with interest therefrom. Bryant v. Fairfield, 51 Me. 154; McGuire v. Ely, Wright (Ohio) 520.

Trespass will not lie to recover the difference between the amount and the value. Gay v. Smith, 38 N. H. 171.

In California, the defendant can recover damages. Reynolds v. Hosmer, 45 Cal. 616.

5. McGuire v. Ely, Wright (Ohio) 520; Gay v. Smith, 38 N. H. 171; Bryant v. Fairfield, 51 Me. 154; Eames v. Stevens, 26 N. H. 117; Backhurst v. Mayo, Dyer 363; Trow v. Messer, 32

N. H. 361. But in California, an action for damages will, it seems, be sustained. Reynolds v. Hosmer, 45 Cal. 616. In that case the court, by Belcher, J., said: "If the plaintiff in the judgment be himself the purchaser, the former owner, after reversal, may, at his election, either have the sale set aside and be restored to the possession, or have his action for damages."

6. Its ordinary property may be transferred under execution like that of a private person. Angell & A. on Corp. (11th ed.), § 640.

7. Michigan Annot. Stat. 1882, § 4872, provides for a sale to such person as will satisfy the execution and fees, take the franchise, and collect the toll for the shortest period of time. James v. Pontiac, etc., Plank Road Co., 8 Mich. 91. The sale of the franchise and property does not transfer or destroy its corporate existence. State v. Bank of Md., 6 Gill & J. (Md.) 205; 26 Am. Dec. 561.

8. Angell & A. Corp. (11th ed.), § 588; Denton v. Livingston, 9 Johns. (N. Y.) 96; 6 Am. Dec. 264; Howe v. Starkweather, 17 Mass. 240.

But in Connecticut, shares of a turnpike company have been held to be real estate. Welles v. Cowles, 2 Conn. 567.

the States, methods of levy and sale of stock have been prescribed:¹

The purchaser takes thereunder subject to all transfers and liens known to him, whether on the books or not.² But from transfers not registered nor known he is protected.³

10. Bona Fides—*a.* IN GENERAL.—One who, whether upon a voluntary or an involuntary sale in good faith, purchases the legal title to property, and pays therefor a valuable consideration, will be protected against equities whereof he had no actual or constructive notice. One's honest motive or good faith is determinable from his doings and the circumstances. Thus the fact that the consideration was greatly inadequate may justify inference that an ordinarily prudent buyer would be so put on guard as to inquire into and ascertain a defect in the seller's title.⁴

1. Angell & A. Corp. (11th ed.), § 589.

In *Connecticut*, the sheriff must make a conveyance of the stock; his return alone is not sufficient. *Morgan v. Thames Bank*, 14 Conn. 99. As to the appointment of a receiver, etc., in case of a turnpike or toll-bridge company, see *Connecticut Gen. Stat.*, 1888, §§ 1172, *et seq.* As to a levy and sale of one railroad company's interest in another, see § 1178 thereof.

In *Rhode Island*, as to the practice in levying and selling shares of stock, see *Rhode Island Pub. Stat.*, 1882, p. 616, §§ 20, *et seq.*

In *Maine*, see *Maine Rev. Stat.*, 1883, p. 722, §§ 12, *et seq.* In case of a toll-bridge, as to execution sale for the shortest period, etc., see page 723 thereof, § 17.

In *New York*, on application of a sheriff holding a warrant of attachment, the president, secretary, or managing agent must furnish him a certificate specifying the number of shares of the defendant in the stock of the corporation with all dividends declared or incumbrances thereon. *B.'s New York Rev. Stat.*, 1809, p. 136, § 15. As to the execution sale thereof, see *New York Rev. Stat.*, 1889, p. 146, § 69.

In *Pennsylvania*, a marshal's sale of railroad stock does not carry with it a collateral agreement made between the owners and the corporation. *Pittsburgh, etc., R. Co. v. Allegheny Co.*, 63 Pa. St. 126.

In *Tennessee* the sheriff shall deliver to the purchaser an assignment of shares of turnpike and railroad stock, and the proper officer must transfer on pre-

sentation. *Tennessee Code*, 1884, § 3765.

As to the practice in *Upper Canada*, see *Rev. Stat. P. Ontario*, 1887, p. 733, §§ 9, *et seq.*

2. *Blakeman v. Puget Sound Iron Co.*, 72 Cal. 321. The corporation may, against the purchaser, enforce a lien on the stock existing under its by-laws. *West Branch Bank v. Armstrong*, 40 Pa. St. 278; *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513; 100 Am. Dec. 388.

3. *Blanchard v. Denham Gas Light Co.*, 12 Gray. (Mass.) 213; *Maglee v. Pacific Wharf Co.*, 20 Cal. 529; *California Code Civil Proc.* 1885, §§ 542, 688.

Upon his presentation of the sheriff's certificate of purchase, it is the duty of the officers to make the corresponding transfer on their books. *Bailey v. Strohecker*, 38 Ga. 259; 95 Am. Dec. 88.

In *Illinois*, the officer of the corporation who keeps a record of the shares, must give the sheriff a certificate of the number and amount of the interest held by the judgment debtor. *Illinois Rev. Stat.* 1887, p. 872, § 55.

4. See JUDICIAL SALES, vol. 12, p. 223; 1 Story Eq. Jur. (13th ed.), § 64c; *Sergeant v. Ingersoll*, 7 Pa. St. 343; *Davis v. Michener*, 106 Pa. St. 395.

In *Wisconsin*, so held, where land worth over \$2,000 was bought for \$100, while the original owner was residing thereon. *Hoppin v. Doty*, 25 Wis. 573.

In *New York*, also, where stock shares were bought below value from

The adequacy of the consideration is not measured entirely by the amount of money or property paid. A resultant release of some valuable security or a deprivation of some advantage may enter into or become a valid consideration.¹ By the preponderance of decisions the purchaser, at an ordinary sale, may pay with a pre-existing debt, or the execution plaintiff may purchase, crediting the amount of his bid upon the writ.²

b. SECRET VITIATIONS IN OWNER'S TITLE.—The title of the purchaser is not impaired by any fraud wherein he did not participate, nor by any irregularity whereof he was not cognizant.³

c. CONSTRUCTIVE NOTICE.—Notice may consist of actual knowledge of any record or instrument whereunder the title is deraigned, or of any information thereon, whether derived from parties interested or from any other credible source. The rule of constructive notice is this: the purchaser is chargeable with a knowledge of all facts, which an inquiry, suggested by whatever facts he is already informed of, prosecuted with due diligence would have disclosed to him.⁴

a lad sixteen years old. *Anderson v. Nicholas*, 28 N. Y. 600.

In *West Virginia*, the purchaser is bound to take notice of all errors in the proceedings apparent on the record. *Hall v. Hall*, 30 W. Va. 779. Compare *Durling v. Hammar*, 20 N. J. Eq. 220.

In *Missouri*, a plaintiff purchasing under his judgment against an individual partner, is affected with notice received after its rendition that the property was held only in trust for the firm. *Crow v. Drace*, 61 Mo. 225.

In *Minnesota*, it has been held that the conditions announced at the opening of the sale affect a purchaser arriving afterwards. *Cable v. Byrne*, 38 Minn. 629.

A purchaser of an outstanding legal title is, in legal effect, a purchaser with notice of every pre-existing equity. *Elstner v. Fife*, 32 Ohio St. 373; *Stout v. Hyatt*, 13 Kan. 244.

Tacking.—As to equities upon tacking, see *Story's Eq. Jur.* (13th ed.), §§ 412, *et seq.*; **TACKING.**

In *Georgia*, tacking of mortgages is prohibited. *Georgia Code*, 1882, § 1962.

1. *Weaver v. Barden*, 49 N. Y. 292.

2. Compare *Woodruff v. Hill*, 116 Mass. 310; *Maitland v. Citizens' Nat. Bank*, 40 Md. 540; 17 Am. Rep. 620; *Bank of Charleston v. Chambers*, 11 Rich. (S. Car.) 657; *Gower v. Doheney*, 33 Iowa 36.

Otherwise in *Pennsylvania*, in case

of the holder of an accommodation note pledged as collateral security for an antecedent debt. *Cummings v. Boyd*, 83 Pa. St. 372. And in *New York*, in the case of a time draft that had been fraudulently diverted from the object for which it was made and accepted, *Moore v. Ryder*, 65 N. Y. 438. And in *North Carolina*, in the case of one taking an assignment of property to secure his debt, and neither advancing money nor releasing his debt. *Harris v. Horner*, 1 Dev. & B. Eq. (N. Car.) 455; 30 Am. Dec. 182.

In *Missouri*, the plaintiff's payment of costs is not sufficient to constitute him a *bona fide* purchaser. *Christian v. Newberry*, 61 Mo. 446.

3. *Freeman Ex.* (2d ed.), § 343.

A purchaser having reason to believe that the execution defendant only held the estate in trust, obtains no right as against the *cestui*. *Princeton Min. Co. v. First Nat. Bank*, 7 Mont. 530.

4. See **JUDICIAL SALES**, vol. 12, p. 224; **NOTICE**, vol. 16, p. 832. Also notes upon *Bassett v. Nosworthy*, White & T., L. C. Eq., pt. 1 (H. & W. ed.), 1.

In *Converse v. Blumrich*, 14 Mich. 120, 90 Am. Dec. 230, the court, by Cooley, J., added this restriction: "But he cannot be bound to do more than to apply to the party in interest for information, and will not be responsible for not pushing his inquiries further, unless the answer which he receives corroborates the prior statements, or reveals the existence of other sour-

ces of information." See *Holmes v. Stout*, 10 N. J. Eq. 419; *Lodge v. Simonton*, 3 P. & W. (Pa.) 439; 23 Am. Dec. 36. Also *Kennedy v. Green*, 3 M. & K. 720, the case of a solicitor's fraud (in drawing a deed purporting to be an assignment of a mortgage) that would have excited the suspicion of a professional man.

In *Williamson v. Brown*, 15 N. Y. 354, the court, by Seldon, J., said: "The presumption that he inquired and ascertained the prior right may be rebutted by proof that he exercised due diligence and failed to discover it."

Chancellor Kent says the doctrine of notice rests on the question: "What evidence is necessary to infer fraud?" Whatever puts a party upon inquiry amounts to notice, provided that inquiry became a duty, and would lead to knowledge of the requisite facts by the exercise of ordinary diligence and understanding. The inference of a fraudulent intent affecting the conscience must be founded on clear and strong circumstances in absence of actual notice. 4 Kent's Com. (13th ed.) 172.

In *Pennsylvania*, an execution plaintiff, seeing no other bystanders present at the sale is put on inquiry whether the *Pennsylvania* statute (requiring the sheriff to give notice "during at least six days by no fewer than six handbills") has been complied with; and his purchase would be fraudulent and void. *Michael v. McDermott*, 17 Pa. St. 353; 55 Am. Dec. 560.

Bidders would be put on inquiry by a declaration made to them by the defendant's wife that she held the title; and this, though she omitted to say that she claimed not through a certain deed made in fraud of creditors, but through a valid resulting trust under an earlier deed. *Hay v. Martin* (Pa.), 14 Atl. Rep. 333.

Tender, by a leaseholder or other third party, of the debt, interest, and costs with demand for assignment of the writ, would not, if the plaintiff had refused the same, affect the *bona fides* or rights of the purchaser. *Forest Oil Co.'s Appeal*, 118 Pa. St. 138.

In *North Carolina*, if the execution recites the date the judgment was docketed, the purchaser is affected with notice of expiration of the judgment lien. *Lyon v. Russ*, 84 N. Car. 588; also with notice that the defendant only holds as agent of another. *Richardson v. Wicker*, 74 N. Car. 278.

In *South Carolina*, the purchaser is not affected by the fact that the execution plaintiff had notice of an unrecorded mortgage. *Miles v. King*, 5 S. Car. 146. As to a bond payable in installments and reciting that one has been paid, see *Cox v. Edwards*, 8 S. Car. 1.

In *Alabama*, it is held that a purchaser is not protected against an unrecorded deed, whereunder tenants of defendant's vendee are in possession of the land at the time of the sale; he being put on inquiry by the defendant's want of possession. *Tutwiler v. Montgomery*, 73 Ala. 263.

In *Duke v. Clark*, 58 Miss. 476, the court—in deciding that the execution purchaser is, to the same extent as any other purchaser, entitled to the benefit of the registry acts—by Campbell, J., remarked: "Good faith is so highly esteemed that its existence with the vendor or vendee will protect the title."

In *Texas*, the levy fixing the lien, the purchaser is not affected by notice of an unrecorded deed derived after the levy and before the sale. *Borden v. McRae*, 46 Tex. 396. Otherwise in *Arkansas*. *Apperson v. Burgett*, 33 Ark. 328.

Where land, a supposed deed of which from A to B, misstated the township and range, was levied on by a creditor of A, but not sold until he had executed a corrective deed to B, it was held that a purchaser with notice of the correction acquired no title. *Howell v. Rye*, 35 Ark. 470. So also as to a correction inserting "south" before "west quarter." *Williams v. McIlroy*, 34 Ark. 85.

In *Indiana*, where a foreclosure judgment directed sale of part of the land to meet installments due, but the sheriff sold the whole, and the mortgagee became the purchaser, it was held that he was not a *bona fide* purchaser without notice of the mistake, and that the court might confirm his title to the portion directed to be sold, and adjudge the rest to the defendant. *Bole v. Newberger*, 81 Ind. 274.

A executed to B a mortgage of bridge shares, which, not being sworn to or recorded, as prescribed by statute, was invalid as against attaching creditors without notice. C, a creditor of A, without notice of the mortgage, began levy of execution thereon, and the sheriff sold them "subject to all legal claims on said bridge," to D, who then had notice of the mortgage. It was held

XIV. THE PURCHASER'S RIGHTS—1. In General.—As a general rule, the maxim *caveat emptor* applies to the sale; the purchaser acquires only the defendant's title without warranty.¹

that D took them unincumbered by the mortgage. *Piper v. Hilliard*, 52 N. H. 209. Compare *Henderson v. Downing*, 24 Miss. 106. Notice to the attorney is notice to the client. *Jennings v. Carter*, 53 Ark. 242.

1. See *supra*, this title, *The Purchaser's Title—Restriction to Defendant's Interest*; also JUDICIAL SALES, vol. 12, p. 229.

In *Wood v. Moorhouse*, 1 Lans. (N. Y.) 405, a case where the sheriff's posting was briefer than prescribed, and where the defendant died between the levy and the sale, the court, by Mullen, J. (protecting the purchaser, though the plaintiff), said: "A *bona fide* purchaser is one who purchases for an honest, legitimate purpose, as contradistinguished from one who purchases for some fraudulent or improper purpose; hence every person buying at a sheriff's sale for the purpose of satisfying an honest debt is a *bona fide* purchaser.

The presumption of title from adverse possession, etc., is not merely that of due performance of official duty; it is this together with the presumption of loss of evidence by death, destruction of papers, and other casualties." Compare *Love v. Cherry*, 24 Iowa 204.

In *Parler v. Johnson*, 81 Ga. 251 (*sub. nom.*, *Porter v. Johnson* (Ga. 1888)), 7 S. E. Rep. 317, the court, by Bleckley, C. J., said that the sheriff's entry and deed pursuant thereto were, after lapse of over twenty years, better evidence as to what property was sold than parol testimony of a witness. It was immaterial that, after the land was bid off and before deed executed or money paid, the purchaser consented that another person take his place, make the payment, and receive the deed; the latter would thereupon succeed to all his rights.

And where the sale has been made after regular proceedings, the deed cannot on mere motion be canceled for alleged fraudulent collusion between the sheriff and the purchaser. *Harrell v. Wood*, 54 Ga. 649.

In *Vanscoyoc v. Kimler*, 77 Ill. 151—where the execution plaintiff, on bid of his attorney, who was deceived by the sheriff's misrepresentation, became the purchaser of land that had been

turned out by the defendant, but was, in fact incumbered in excess of its value—on refusing to set aside the sale, the court, by Breese, J., said that the defendant, having made no representations of any kind as to the title, was under no legal or moral obligation to redeem.

In *New York*, where the execution plaintiffs, through their attorney, became the purchasers of a farm, it was held that the fact that he, through recent illness, failed to recollect that there were two incumbrances thereon, was not a ground for setting aside the sale. *Benedict v. Jones*, 18 Hun (N. Y.) 527.

In *New Jersey*, an attorney of the judgment creditor may, after purchasing at the execution sale, maintain an action to compel delivery of the sheriff's deed, without liability for champerty. *Whitney v. Kirtland*, 27 N. J. Eq. 333.

In *Pennsylvania*, it has been held, that a levy on property which has been sold to a *bona fide* purchaser, is not inconsistent with an attachment against the proceeds of the sale of the property in the hands of a fraudulent grantee holding as trustee *ex maleficio*, of the grantor's creditors. *Heath v. Page*, 63 Pa. St. 108. An application to avoid the sale by cross-complaint, in ejectment brought by a successor of the purchaser over three years after the sale, was held to come too late. *Vigoureux v. Murphy*, 54 Cal. 346.

Appellee bought land sold under execution upon replevin bond, which was the property of one of the principals on the bond, without inquiry as to liens upon the land. Held—that he bid, in the absence of fraud, at his own risk, and cannot recover the loss incurred by his bid from appellant, the surety on the replevin bond. *Anderson v. West*, 80 Ky. 171.

Under the *Louisiana* Code, § 2621, an evicted purchaser may have recourse against the judgment debtor, and on return *nulla bona*, take out execution against the creditor (both being called in warranty under § 714); and this, though the purchaser knew at the time of sale, that the title was not in the judgment debtor. But he can by stipulation be precluded therefrom. *Citizens' Bank v. Freitag*, 37 La. Ann. 271.

2. **Intervening Legislation.**—The inhibition against the impairment of the obligation of contracts demands that the substantial rights of the purchaser be determined by the law in force at the creation of the contract.¹ But this does not extend to laws conferring remedies, and, though the debtor may not be deprived of all remedy, yet a statute making changes in the law giving the remedy may apply to antecedent obligations.² "Hence, as a general rule, a sale must be conducted, and the rights of the purchaser and others must be determined, by the law in force at the time the sale is made, and not by the law in force when the obligation to be enforced by the sale was created."³ The time to redeem may be changed.⁴ Statutes tending to prevent a sacrifice of the property may be retroactive.⁵

A purchaser claiming the fruits of the sale, is precluded from questioning the validity of the decree ordering the immovables by destination to be sold with the mortgaged property. *Howe v. Whited*, 21 La. Ann. 495.

1. Freeman on Executions, § 294; citing *Burton v. Emerson*, 4 Greene (Iowa) 393; *Coriell v. Ham*, 4 Greene (Iowa) 455; 61 Am. Dec. 134; *Lancaster Sav. Inst. v. Reigert*, 2 Pa. L. J. 238. See also CONSTITUTIONAL LAW, vol. 3, p. 741 *et seq.*

2. Freeman on Executions, § 294. See also CONSTITUTIONAL LAW, vol. 3, p. 753.

3. 2 Freeman, § 294; *Holland v. Dickerson*, 41 Iowa 367; *Fonda v. Clark*, 43 Iowa 300; *Garland v. Brown*, 23 Gratt. (Va.) 173; *Allen v. Parish*, 3 Ohio 187.

Thus, a sale made after the Iowa code took effect, on a debt contracted theretofore, must be conducted in accordance with the code. *Babcock v. Gurney*, 42 Iowa 154.

The appraisalment required by the Indiana act of 1843 was necessary to the validity of an execution sale under a judgment rendered in 1844, whatever might have been the date of the contract whereon it was recovered. *Morss v. Doe*, 2 Ind. 65.

The Massachusetts statute of 1834, allowing a writ to be amended by striking out some of the defendants' names, was held remedial and applicable to actions pending. *Knight v. Dorr*, 19 Pick. (Mass.) 48.

The Wisconsin "Mortgage Stay Law" of 1856 was held applicable to judgments previously rendered. *Starkweather v. Hawes*, 10 Wis. 125.

The Maine statute of 1848, requiring

that a special promise of a discharged bankrupt to pay the debt be in writing, signed, etc., was held to be remedial and constitutional. *Kingley v. Cousins*, 47 Me. 91.

Mr. Freeman well adverts to the difficulty of determining the precise point "beyond which the power of the legislature to prejudice antecedent obligations, while assuming only to alter the remedies for their enforcement, cannot be maintained." Ex. (2d ed.), § 294.

And in *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515—in deciding that the California redemption act of 1859 applied to execution sales theretofore made on judgments rendered theretofore, and overruling two prior California decisions—the court, by Baldwin, J., remarked: that cases hereon in the U. S. Supreme Court, have given rise to much discussion; doubtless referring to *Bronson v. Kinzie*, 1 How. (U. S.) 311—wherein the opinion of Taney, C. J., was dissented from by McLean, J.—and *McCracken v. Hayward*, 2 How. (U. S.) 608.

4. *Tuolumne Co. v. Sedgwick*, 15 Cal. 515; *Moore v. Martin*, 38 Cal. 428; *Heyward v. Judd*, 4 Minn. 483; *Freeborn v. Pettibone*, 5 Minn. 277; *Moor v. Seaton*, 31 Ind. 11. Compare *Hillebert v. Porter*, 28 Minn. 496; *O'Brien v. Krenz*, 36 Minn. 138; *Carroll v. Rossiter*, 10 Minn. 174; *Pomeroy v. Bridge*, 1 Neb. 462.

The Ohio act of 1824, avoiding the judgment lien unless execution issued within one year, was upheld in *Bank of U. S. v. Longworth*, 1 McLean (U. S.) 35.

5. The Virginia act of 1870, requiring the officer selling personal prop-

3. Rents and Profits—*a*. IN GENERAL.—In absence of statutory provision otherwise, rent is an incident to the reversion, and passes therewith.¹ Some State statutes give to the purchaser the rents and profits from the date of an execution sale of the land.²

erty for a debt contracted before April 10, 1865, when requested by the debtor, to sell on a year's credit, was held to be constitutional. *Garland v. Brown*, 23 Gratt. (Va.) 173.

So also the *Pennsylvania* act of 1842, suspending for a year a sale on execution for less than two-thirds the appraised value. *Chadwick v. Moore*, 8 W. & S. (Pa.) 49; 42 Am. Dec. 267.

In *Alabama*, it was held that an attachment, etc., lay against a foreign corporation on a cause of action arising before the *Alabama* act of 1854, giving an additional remedy. *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120.

The *New York* act of 1820, allowing lien creditors to redeem in fifteen months, etc., was upheld in the supreme court's response to the sheriff of Albany for advice. *Van Rensselaer v. Sheriff*, 1 Cow. (N. Y.) 501.

1. *Butt v. Ellett*, 19 Wall. (U. S.) 544.

In *Tennessee*, the purchaser at a chancery sale is entitled to rent only from the time when the right of possession attaches; and this may be postponed by the decree of confirmation. *Latta v. Pierce*, 11 Lea (Tenn.) 267.

2. See B's Purdon's Dig. *Pennsylvania* Laws, 1885, p. 824, § 13; 828, § 36. If the rent is yet becoming due out of a term that is not completed when the execution sale is made, it is rent "thereafter accruing," within the *Pennsylvania* execution act of 1836, and passes thereby. *Borrell v. De-wart*, 37 Pa. St. 134.

A sheriff's purchaser who has notified the tenant to quit, may claim for the use and occupation from acknowledgment of the deed to date of removal. *Stockton's Appeal*, 3 Brewst. (Pa.) 320.

In *Delaware*, the purchaser has the rents from the day of the execution sale. *Delaware* Laws, 1874, p. 680, § 28.

By *Massachusetts* Pub. Stat. 1882, p. 1010, § 18, the lessee must pay rent to the execution creditor from the time of levy on the reversion.

In *Vermont*, the debtor is responsible for the rents, profits and improvements for the time he remains in possession without redeeming. Their value is appraised at his expense, and a tender of the sum certified bars an action therefor. In default of payment the creditor may recover in an action on the case. *Vermont* Rev. Laws 1880, §§ 1579, *et. seq.*

In *Maine* "when the estate cannot be described as provided in section three, the execution may be levied on its rents and profits, and the officer may give seisin thereof to the creditor, and cause a person in possession to become tenant to him; or on his refusal, may turn him out and give possession to the creditor." *Maine* Rev. Stat. 1883, p. 615, § 9.

As to the *Rhode Island* practice in tax sale of rents and profits, see *Rhode Island* Pub. Stat. 1882, p. 128, § 6.

In *Connecticut*, appraisers set off to the creditor sufficient land to satisfy the execution. *Connecticut* Gen. Stat. 1882, § 1182. By § 1191, a leasehold interest may be sold.

In *Kentucky*, "courts of equity shall have the control of all incumbered property sold under execution, and the power to make all needful orders for the preservation and forthcoming of the property and its issues and profits to satisfy the incumbrance, and to secure the rights of others." *Kentucky* Gen. Stat. 1887, p. 580, § 5.

Under *California* Code Civil Proc. 1885, § 707, the purchaser, from the time of sale until a redemption, is entitled to receive from the tenant in possession the rent, or the value of the use and occupation. And if the tenant in possession pay the rent in advance to the execution defendant after the sale, he is still liable to pay it to the purchaser. The right begins at the time of purchase and continues until a redemption is made, or if there be no redemption, until the redemption period has expired. *Walker v. McCusker*, 71 Cal. 594. Compare *McDevitt v. Sullivan*, 8 Cal. 592.

The execution purchaser of a possessory claim of a settler was held to be

b. WASTE AND LOSSES.—In many States, the purchaser is protected by statute against waste during the redemption period.¹

entitled to the rents and profits for so long as the settler occupied the land intermediate the sheriff's deed and homestead entry. *Emerson v. Sansome*, 41 Cal. 552.

A tenant in possession may be compelled to pay rent to the purchaser whenever it falls due. The sale acts for the time as an assignment of the lease. *Raynolds v. Lathrop*, 7 Cal. 43.

The *California* provision (§ 707, *supra*) does not apply to tax sales. *Mayo v. Woods*, 31 Cal. 269.

In *Indiana*, "The estate or interest of the judgment debtor in any real estate shall not be sold on execution until the rents and profits for a term not exceeding seven years shall have been first offered for sale at public auction; but if the same shall not sell for a sum sufficient to satisfy the execution, then the estate or interest of the judgment debtor shall be sold by virtue of the execution." *Indiana* Rev. Stat. 1881, § 753. And by § 539, the sale must be for the least lease term that will satisfy the execution. Under section 767, allowing the judgment debtor the possession, neither he nor his grantee is liable to the purchaser for the rents during the year succeeding the sale. *Wilson v. Powers*, 66 Ind. 75.

The perfected title relates back to date of the sheriff's sale. A statutory assignment by the debtor creates no right in the assignee or the creditors for whom he is trustee that can exclude equitable claims of others, in origin antedating the assignment. The purchaser can recover the rents and profits from an assignee who has collected them for the year after the sale. *Davis v. Newcomb*, 72 Ind. 413.

The sheriff cannot limit a sale of the land levied on by announcing that the rent of the current year is reserved. *Frost v. Render*, 65 Ga. 15.

In *Arkansas*, an execution purchaser of the equity of redemption under a deed of trust does not acquire such an interest in the land as entitles him to maintain an action for the rents. And his tender of the debt will stop accrual of interest from date thereof. *Turner v. Watkins*, 31 Ark. 429.

The provision of the *Tennessee* Code, § 2135, that the debtor permitted to remain "shall not be liable for rent from the date of the sale to the time of re-

demption," applies only to cases of actual redemption. An execution debtor remaining for the two years without redeeming is liable to the purchaser for rent; and this although the sheriff's deed was not delivered until the two years expired. *Wright v. Williams*, 7 Lea (Tenn.) 700. In the case of the execution sale of the leasehold of the Olympic Park race-track, it was held that a purchaser to avoid liability for rent, must disclaim all interest in the lease, improvements, etc. *Snowden v. Memphis Park Assoc.*, 7 Lea (Tenn.) 235.

1. In general, *Stimson* Am. Stat. Law, § 1882; writ of *estrepement*, etc., §§ 1343, 1931; against waste by a dowress, § 3231; by tenant by *curtesy*, § 3408.

In *New York*, during the redemption period, fifteen months, the court may restrain waste. But it is not waste to continue to use the property as previously, or in the ordinary course of husbandry, or to make necessary repairs, cutting timber therefor, or wood for fences and fuel. *B.'s New York* Rev. Stat. 1889, p. 1079, § 82. By § 83, the purchaser may have an order therefor. He has a remedy in the nature of *trover*, or an action on the case for waste; but not *replevin* in the *capit.* *Rich v. Baker*, 3 Den. (N. Y.) 79.

The *California* statute (*California* Code. Civ. Proc. 1885, § 706) provides for restraining waste during the redemption period, six months, as does that of *New York*. And the purchaser is allowed an action therefor under section 745. This is available at any time during six months. *Duprey v. Moran*, 4 Cal. 196.

Under *Michigan* Annot. Stat. 1882, § 6138—allowing the purchaser, as if absolute owner, to sue the execution defendant or a third person for waste or injury to "buildings, fences, or other fixtures"—he may recover for timber wrongfully severed from the freehold. *Marquette, etc., R. Co. v. Atkinson*, 44 Mich. 166.

In *New Jersey*, if a judgment debtor has committed waste of premises held by him and another person as tenants in common thereof, the purchaser at the sale of his interest in the property under execution must in equity accept the position of the debtor in respect to

4. **Products and Growing Crops**—*a. IN GENERAL.*—Ordinarily, growing crops pass to the execution purchaser thereof as personalty, with a right to enter on the land and gather them.¹ This constructively operates a severance.² If there be no severance, the execution purchaser of the land is entitled to the crops growing thereon.³ Sometimes the rights of the pur-

the partition. *Rolhemus v. Empson*, 27 N. J. Eq. 190.

In *Minnesota*, the execution purchaser may, after the redemption period, maintain trover against the debtor's vendee of timber cut and removed after the execution sale. *Whitney v. Huntington*, 34 Minn. 458; 57 Am. Rep. 68.

In *Arkansas*, the execution purchaser of the interest of the equitable owner of an undivided half interest in land, may have a decree vesting in him the title and half the proceeds of a sale of timber cut from the land. *Thorn v. Weatherly* (Ark. 1889), 12 S. W. Rep. 159.

In *Alabama*, rails and brick do not become fixtures until annexed to the realty either actually or constructively. *Thweat v. Stamps*, 67 Ala. 96.

In *Illinois*, rails, once of a fence, when temporarily severed but still remaining on the land, are part of the realty. *McLanglin v. Johnson*, 46 Ill. 163.

In *Pennsylvania*, fragments of a building blown down by a tempest, pass with the freehold. *Rogers v. Gillingen*, 30 Pa. St. 185; 72 Am. Dec. 694.

Otherwise in *England*, both as to such fragments and to dottards when blown down. *Herlakenden's Case*, 2 Coke, pt. 4, fol. 62 a.

See *supra*, this title, *Fixtures*. See also *FIXTURES*, vol. 8, p. 55.

1. See *EXECUTION*, vol. 7, p. 127; *Freeman Ex.* (2d ed.), §§ 113, 263.

In *Davidson v. Waldron*, 31 Ill. 130; 83 Am. Dec. 206, the court, by Breese, J., said: "It would be prudential in the officer to call some one or more of the neighborhood to witness he had taken it in execution, and he should indorse the fact on the writ."

2. Where, after a *fi. fa.* in favor of A had been levied on the land and returned, wheat was sown on it, and after the wheat had been levied on and sold under a *fi. fa.* in favor of B, the land was sold on A's *vend. exp.*, it was held that B could hold the proceeds of the wheat. *Stambaugh v. Yeates*, 2 Rawle (Pa.) 161.

3. See *CROPS*, vol. 4, p. 892. As to when growing crops are of the realty and when not, see 1 Washburn on Real Prop. (5th ed.) 411.

In *Alabama*, no execution or other legal process must be levied upon a growing or ungathered crop, except for the purpose of enforcing liens thereon for rent advances, or labor as prescribed by law. *Alabama Code*, 1886, § 2893. Such crop passes as part of the realty to the execution purchaser of the land. *Thweat v. Stamps*, 67 Ala. 96.

In *Thomas v. Noel*, 81 Ind. 382, the court, by Woods, J., said: "While the general rule adopted for the promotion of agriculture and husbandry is that the one who sows shall reap, it is equally well settled that the tenant who sows, knowing that he cannot reap before the expiration of his tenancy and right of possession, does it at his peril. The position of one whose land has been sold on execution, and whose right of possession must expire at the end of a year from the sale, unless he redeems, cannot be better."

In *Georgia*, "No sheriff, or other officer shall levy on any growing crop . . . nor sell the same until such crop shall be matured and fit to be gathered" . . . (except in case of an absconding debtor). *Georgia Code*, 1882, § 3642. An execution sale of the land carries with it the crop growing thereon. The sheriff cannot by an *ex parte* announcement change the rule. *Frost v. Render*, 65 Ga. 15.

In *Pennsylvania*, the execution purchaser of the land takes the unsevered growing crops; otherwise as to the severed ones. *Hershey v. Metzgar*, 90 Pa. St. 217. And it is held that a purchaser entering upon the defendant's abandonment of the premises (after sale and before deed) and erecting tanks is entitled to the flow of oil. In *Hardenburg v. Beecher*, 104 Pa. St. 20, the court, by Clark, J., said: "If the deed be subsequently acknowledged, the vendee has such inceptive title by his mere purchase as will be bound by the lien of a judgment, whilst

chaser have been made to depend on condition of the crop.¹ If a statute provides that the land shall bring a specified proportion—*e. g.* two-thirds of its appraised value—the growing crops being excluded from the appraisalment will not pass upon the sale.²

the debtor has no such title remedy as will support a lien. If, however, the acknowledgment be refused, the vendee's contract is rescinded, and the debtor's title remains as if no sale had been made. The debtor is, however, entitled to the possession until the acknowledgment; the purchaser has by his mere purchase acquired no title to the present enjoyment. This right of possession carries with it its attendant advantages, the right to the growing crops as they may mature, the right to an ordinary use of a mine, or to the flow from an oil well. . . . But he loses these if he voluntarily abandons the possession."

In *Kentucky* "no crop of any description shall be levied on or sold under execution unless it shall have been severed from the ground, until after the first day of October in each year. But if the estate of the defendant in land is liable to be sold, the title to the growing crop may pass by such sale." *Kentucky Gen. Stat.* 1887, p. 570, § 5.

In *Minnesota*, "A levy may be made upon grain or grass while growing, and upon any other unharvested crops; but no sale thereof shall be made under such levy until the same is ripe, or fit to be harvested." *Minnesota Stat.* 1891, § 4929.

As to the *Oregon* practice thereon, see *Cartwright v. Savage*, 5 *Oregon* 397.

In *New Mexico*, on redemption by the defendant, "the purchaser shall have the growing crops, and shall not be responsible for the rents and profits, but he shall account for wastes." *New Mexico Comp. Laws*, 1884, § 2178.

1. In *Iowa*, it has been held that, as against a foreclosure purchaser, a tenant of the mortgagor is entitled to such of his crops as were matured at the time the sheriff's deed was executed, though still unsevered. *Hecht v. Dettman*, 56 *Iowa* 679. Thereon were cited 1 *Schouler* on Pers. Prop. 125; and *Bingham* on Real Prop. 180.

Subsequently, it was also held, that, as immature crops belong to the land, a purchaser of the land from the judg-

ment debtor would hold them against one who had purchased them at execution sale as personal property. *Ellithorpe v. Reidesil*, 71 *Iowa* 315.

In *North Carolina*, since the act of 1844, not allowing growing crops to be subject to levy till matured, the execution purchaser of the land acquires no title to them. Accordingly, where, at the time of levy and sale of A's land, his tenant, B, had a crop growing thereon, and A, as agent for C, the original owner, collected from B the net proceeds of the rent from the crop, and, under agreement with C, kept it for his services as agent, it was held that the title to the growing crop was in B and did not pass to the execution purchaser. *Kesler v. Cornelison*, 98 *N. Car.* 383.

In *New York*, where a sheriff, in December, levied on wheat in the ground, and in the next August cut and carried it away and sold it, but while it was in the sheaf and unmoved, an execution was issued, it was held that the first levy was not dormant or fraudulent. *Whipple v. Foot*, 2 *Johns.* (N. Y.) 418.

A growing crop of rye, sown by a mortgagor while in default, was, on his death, held to pass to a purchaser at his administrator's sale, and not to a foreclosure purchaser with notice. *Sherman v. Willett*, 42 *N. Y.* 146.

In *New Jersey*, on an execution sale of land, it was held that one whose tenancy expired at the end of the agricultural year, had no right to a return for spring crops (as oats), unless sown by consent of his landlord. *Howell v. Schenck*, 24 *N. J. L.* 89.

2. So in *Ohio*, on foreclosure sale the lessee's emblements do not pass. *Cassidy v. Rhodes*, 12 *Ohio*, 88. Or on partition sale. *Houts v. Showalter*, 10 *Ohio St.* 144. So also does not pass against a landlord his share of a crop put in by a tenant. *Albin v. Riegel*, 40 *Ohio St.* 339. But in *Kansas* (where also is the restriction to two thirds value), in *Smith v. Hague*, 25 *Kan.* 246—in deciding that a vendor repurchasing at an execution sale upon a judgment against the vendee for the pur-

b. FORECLOSURE SALES.—Ordinarily a foreclosure purchaser of land, on completion of his title and right of possession, may remove the crops then growing thereon.¹ But in those States where the mortgage confers only a lien, and not the estate, the mortgagor or his tenant may hold the crops he hath sown that are growing at the foreclosure time.²

*5. Getting Possession—*a.* IN GENERAL.*—On the expiration of the statutory period for redemption,³ the purchaser succeeds to whatever right of possession the execution defendant had. If practicable, the purchaser may enter peaceably;⁴ but he cannot take forcible possession without due process of law.⁵

chase money, was entitled to the crops—the court by Horton, C. J., declined fully to assent to the decision in *Cassidy v. Rhodes*, 12 Ohio 88.

So also now in *Indiana* where is the like restriction. *Heavilon v. Farmers' Bank*, 81 Ind. 249; *overruling Jones v. Thomas*, 8 Blackf. (Ind.) 428.

In *Pennsylvania*, where land is let upon shares an execution sale of the landlord's share of the growing grain before actual severance does not, of itself, work such an implied severance as will pass his title to the purchaser, as against a subsequent purchaser of the land at sheriff's sale, who obtains his deed before the rent falls due. *Long v. Seavers*, 103 Pa. St. 517.

In *Texas*, the execution purchaser of a growing cotton crop, made by a tenant who, besides the landlord's lien, had mortgaged the crop, was held to take the crop with right to gather and market it, and appropriate the surplus proceeds after satisfying such liens. *Davis v. Goldberg*, 75 Tex. 48.

In *Louisiana*, where a lessee of a cotton plantation under a lease made in January, 1867, mortgaged that year's crop to secure the rent, it was held that although the seed of that crop had not yet been sown, an execution purchaser of the land could charge, as trustee of it for him, a person to whom the tenant transferred the crop, after it was gathered, with notice of the landlord's mortgage. The sheriff's deed conveyed the reversion, and the rent followed as an incident; and the mortgage became a lien to secure the rent when the crop was grown. *Butt v. Ellett*, 19 Wall. (U. S.) 544.

In *Massachusetts* the execution purchaser of an equity of redemption, by making open and peaceable entry under his deed, becomes seized and possessed of the land as against the former owners, and is entitled to the growing

crops. His replevin of hay thereafter cut by them and stored in barns would not be defeated merely by proof that after it was cut the plaintiff brought writs of entry under which he obtained judgment for possession with nominal damages for mesne profits. *Nichols v. Dewey*, 4 Allen (Mass.) 386.

1. *Perley v. Chase*, 79 Me. 519; *Anderson v. Strauss*, 98 Ill. 485; *Montgomery v. Merrill*, 65 Cal. 432.

In *New York*, a mortgagor removing crops during suspension of a foreclosure sale by injunction, must on its dissolution, pay therefor as part of the injunction damages. *Aldrich v. Reynolds*, 1 Barb. (N. Y.) Ch. 613.

The foreclosure purchaser may have an injunction to restrain the mortgagor and those claiming under him from meddling with the crops; confirmation relating back to the sale, and entitling him to the crops if no equities nor express reservations prevent, and due notice be given to interested parties. *Ruggles v. First Nat. Bank*, 43 Mich. 192; *Mutual L. Ins. Co. v. Bigler*, 79 N. Y. 568.

2. *Heavilon v. Farmers' Bank*, 81 Ind. 249; *Allen v. Elderkin*, 62 Wis. 627. So also as to ice stored on the premises, in case of the mortgagor's lease of a pond and ice-houses. *Gregory v. Rosenkrans*, 72 Wis. 220.

3. See REDEMPTION.

4. *Leidy v. Proctor*, 97 Pa. St. 486. *Orser v. Storms*, 9 Cow. (N. Y.) 687.

5. *People v. Nelson*, 13 Johns. (N. Y.) 340.

In *Indiana*, the owner is expressly entitled to possession for one year from date of the sale. *Indiana Rev. Stat.* 1881, § 767. Under section 722 an execution purchaser of mortgaged chattels is "entitled to possession on complying with the conditions of the mortgage," and not otherwise. *State v. Milligan*, 106 Ind. 109. An execution

b. EJECTMENT.—Ordinarily, the purchaser's means of obtaining possession forcibly withheld, is by ejectment or by an equivalent remedy substituted by code.¹

In order to maintain ejectment, he must show the judgment,² the execution, the sheriff's deed, and the defendant's possession.³

purchaser, who redeems a prior mortgage, is not entitled to possession of the land, after redemption from the execution sale by the debtor, but has a lien. *Rice v. Puett*, 81 Ind. 230.

If pending the execution defendant's application under *Georgia* Code, § 2013, to have a homestead assigned to him, the sheriff sells the land, equity will enjoin eviction until the parties can be heard and their rights adjudicated. *Kilgore v. Beck*, 40 Ga. 293.

In *Alabama*, in case of an execution purchaser's voluntary conveyance, the rule has been applied, that a conveyance of lands which are at the time in the adverse possession of a third person, under claim of ownership, though without color of title, is void as against the adverse holder, and the grantee cannot recover against him in ejectment. *Bernstein v. Humes*, 60 Ala. 582; 31 Am. Dec. 52.

Under *Alabama* Code, 1886, § 1880, requiring, in case of a levy on an undivided interest, that the execution defendant deliver the land to the purchaser within ten days, the purchaser is not entitled to sole possession. *Hanna v. Steele*, 84 Ala. 305.

In *Georgia*, the execution purchaser of an estate in remainder is not entitled to possession till after the death of the tenant for life. Hence if the defendant had an estate not in remainder, but in fee simple, and if only a remainder was levied on and sold, he cannot be turned out of possession so long as the person named in the levy as tenant for life (though not such in fact) is in existence. *Bledsoe v. Willingham*, 62 Ga. 550.

In *Texas*, an execution purchaser of mortgaged chattels may, with the debtor, be made a party defendant to a sequestration suit by the mortgagee, to determine possessory rights, etc. *Sparks v. Pace*, 60 Tex. 298.

As to property in *custodia legis*, see EXECUTIONS, vol. 7, p. 129.

1. *Morton v. Sanders*, 2 J. J. Marsh. (Ky.) 192; 19 Am. Dec. 128.

In *Upper Canada*, in *Moran v. Patton*, 10 U. C. Q. B. 640, the court, by Robinson, C. J., said: "The rule is

laid down without any qualification as to whether the debtor was in actual, visible occupation at the time of the sale or otherwise, that in an action of ejectment upon *elegit*, or a sheriff's sale under a *fi. fa.*, which may take place in *England*, in the case of a term for years, if the action be against the debtor in the *fi. fa.* no evidence need be given of the title."

In *Lower Canada*, the purchaser may obtain an order for the sheriff to dispossess the debtor with recourse for damages from the debtor's refusal. *Rev. Stat. P. Quebec*, 1888, § 5945.

2. See *infra*, this title, *Purchaser's Rights—Proof of the Judgment*. As to requisites of the evidence in ejectment generally see 2 Greenleaf on Ev. (14th ed.) § 304.

3. In *Georgia*, formerly, proof of these four facts cast the *onus probandi* upon the opposite party. *Whatley v. Newsom*, 10 Ga. 74. Now, it is the duty of the sheriff to put the purchaser in possession; but he must "not turn out any other person than the defendant, his heirs, or their tenants or assigns since the judgment." *Georgia* Code, 1882, § 3651. He cannot turn out a purchaser from the execution defendant whose title is anterior to the date of the judgment, although for some reason it was a lien previous to its date, so he gets a good title. *Seymour v. Morgan*, 45 Ga. 201.

In case of a sale under a levy on one's life-interest only, she cannot as tenant in common in fee simple, retain the possession by setting up such misdescription of her interest in answer to the purchaser's rule, upon the sheriff to have the possession delivered. *Bledsoe v. Willingham*, 62 Ga. 550.

An execution plaintiff purchasing under a mortgage *fi. fa.* may maintain ejectment for the land, although no deed has been made by the sheriff to him. *Skinner v. Willis*, 54 Ga. 192.

In *Florida*, the purchaser may either prove title in the execution defendant, or possession since the rendition of the judgment. *Hartley v. Ferrell*, 9 Fla. 374. And he may recover in ejectment against the execution defendant's ten-

c. SUMMARY PROCEEDINGS.—In some States the purchaser may get possession through proceedings instituted in the suit in which the execution issued.¹

d. HABERE FACIAS POSSESSIONEM.—In some States, as in England, the purchaser may have the writ of *habere facias possessionem*.²

ant, at the end of his term. *Donald v. McKinnon*, 17 Fla. 746.

In Iowa, if these four facts be established, an innocent purchaser is not affected by other irregularities. *Shaffer v. Bolander*, 4 Greene (Iowa) 201.

In North Carolina, he need not show the levy. *McEntire v. Durham*, 7 Ired. (N. Car.) 151. In case of return of a justice's judgment, execution and levy into county court, the purchaser need only show the judgment of the county court, the execution sale, and the sheriff's deed. *Davis v. Baker*, 67 N. Car. 288. The defendant's wife may intervene and set up title in herself through a prior sale under a senior judgment. *Young v. Greenlee*, 82 N. Car. 346. As to sale of vested remainder in a slave, see *dicta* of the court, by Gaston, J., in *Knight v. Leak*, 2 Dev. & B. (N. Car.) 133.

In Indiana, the plaintiff himself the purchaser, without notice of an agreement between the execution defendant and a third person, cannot be required to make a demand before bringing suit for the possession. *Hays v. Wilstach*, 82 Ind. 13.

In South Carolina, the purchaser's complaint need not allege a return *nulla bona*. And it may both assail for fraud a prior conveyance by the judgment debtor, and pray that the prior deed be set aside. *Burch v. Brantley*, 20 S. Car. 503.

In case of a judgment rendered in a summary process, he need only produce the original docket entry and the execution. *Bull v. Rowe*, 13 S. Car. 355.

In Louisiana, the purchaser cannot maintain a petitory action to recover the property, where it has not been actually taken possession of by the sheriff in making the seizure. *Cronan v. Cochran*, 27 La. Ann. 120.

1. As to the Georgia practice see *Bledsoe v. Willingham*, 62 Ga. 550; stated *supra*, this title, note 5, p. 659.

The Pennsylvania act of 1836 (B. P. Pennsylvania Dig. 1885, p. 768, §§ 143, *et seq.*) providing for a proceeding before two justices on three months'

notice, etc., is in addition to the right to take peaceable possession or bring ejectment. And one who has given the notice and entered within the three months, without violence, but without consent of the former owner who remained in possession, is not liable to him in trespass. *Leidy v. Proctor*, 97 Pa. St. 486. A person in possession claiming under a third party is entitled to the three months' notice. *Com. v. McClintock*, 13 Phila. (Pa.) 326.

One purchasing under a *levari fa.*, issued on a judgment to enforce a mechanic's lien, may avail himself of this provision of 1836. *Walbridge's Appeal*, 95 Pa. St. 466.

Under the Pennsylvania act of 1879 (B. P. Pennsylvania Dig. 1885, p. 641, § 27), a claimant in possession may rule the purchaser to bring ejectment within ninety days, and on default thereof may obtain judgment in bar of further proceedings. But after the rule is made absolute he must proceed to judgment; otherwise the purchaser may bring ejectment after the ninety days. *Letchford v. Dewees*, 14 Phila. (Pa.) 108.

A plaintiff's prior mortgage sale of the land would not operate as an estoppel, if the execution sale be with notice thereof. *Green v. Watrous*, 17 S. & R. (Pa.) 393.

In Delaware, the purchaser will not be put in possession, if, at the time of the sale, the title of the execution defendant was in dispute, and he was out of possession. *Wright v. Rodney*, 5 Del. 573.

In Kentucky, the purchaser may, after deed and on ten days' written notice to the defendant, enter a motion on the docket judgment, and after the hearing a writ of possession may issue. *Kentucky Gen. Stat.* 1881, p. 429, § 9. An act passed in 1882, gives the form of the notice. No further particularity is necessary than as thereby prescribed. *McGhee v. Sutherland*, 84 Ky. 198.

2. In Maryland, this must issue within not less than fifteen nor more

e. WRIT OF ENTRY.—Some statutes allow the purchaser to get possession through a writ of entry.¹

f. PROOF OF THE JUDGMENT.—By the preponderance of decisions, the purchaser must prove the judgment on which the execution issued.² The defendant may have believed the judgment to be so absolutely void as to justify his inattention to the levy and sale. But where the action is against the execution defendant, it has, in not a few cases, been held that the production of the judgment may be dispensed with.³

g. DEFENSES.—It is a valid defense against giving possession to the purchaser under the sale, that the execution defendant had no leviable interest in the property,⁴ or that he held posses-

than thirty days. *Maryland* Pub. Gen. Laws, 1888, p. 1138, § 88. The writ may issue although an ejectment suit involving the title is pending in a Federal court. So, also, although the execution defendant's title is an equitable one only, provided he was entitled to the possession. *Deakins v. Rex*, 60 Md. 593.

Further, as to the *Maryland* practice, see *McMechen v. Marman*, 8 Gill & J. (Md.) 57; *Dorsey v. Campbell*, 1 Bland (Md.) 356.

In *Kentucky*, the sheriff "in execution of a writ of *habere facias possessionem*, or writ of seisin, may break open either the outer or inner door of a dwelling during the daytime." *Kentucky* Gen. Stat. 1881, p. 784, § 29.

1. As to some English writs of entry superseded in American practice, see *Roscoe's Ac. Real Prop.*, p. 3.

In *Massachusetts*, the demandant can maintain a real action only on showing a right of entry. *Massachusetts* Pub. Stat. 1882, p. 1018, § 3. Such right is given to the execution plaintiff by the proceedings in extent. *Blood v. Wood*, 1 Met. (Mass.) 534.

On execution sale against A, if the legal title is fraudulently in B, and the purchaser conveys the land to C, without having taken possession, C cannot, in his own name, maintain a writ of entry to recover possession. *Hunt v. Mann*, 132 Mass. 53.

Although A's general attachment of land fraudulently conveyed by the defendant to B, is not valid against C, who makes a subsequent special attachment, yet where the land is sold on an execution obtained by A, and the proceeds are applied first in satisfaction of his judgment and then in satisfaction of C's with his consent, and both judgments are fully satisfied, the *Massachu-*

setts statute thereon is no defense to a writ of entry brought by the purchaser to recover possession. *Owen v. Neveau*, 128 Mass. 427.

A's wife bringing a libel for divorce, attached his land, and at the execution sale became the purchaser. Before A's redemption year expired, he sold his interest to B, who brought a suit in equity against the wife to redeem, and obtained a decree. Pending the suit, the wife on a decree for further alimony, levied an execution against A's right to redeem, and again became the purchaser. Held, that she could not maintain a writ of entry against B, even though the conveyance to him was in fraud of creditors. *Sewall v. Sewall*, 139 Mass. 157.

As to objection not seasonably taken to a levy on lots in different counties, etc., see *Bell v. Walsh*, 130 Mass. 163.

2. *Carbine v. Morris*, 92 Ill. 555; *Fischer v. Eslaman*, 68 Ill. 78; *Hihn v. Peck*, 30 Cal. 288; *Lanning v. London*, 4 Wash. (U. S.) 513; *Sharpe v. Roe*, 13 Bush (Ky.) 461; *Etheridge v. Edwards*, 1 Swan (Tenn.) 426; *Gillespie v. Badgett*, 2 Lea (Tenn.) 652; *Criswell v. Ragsdale*, 18 Tex. 443; *Den v. Despreaux*, 12 N. J. L. 182; *Carlisle v. Longworth*, 5 Ohio 368.

"The consequences of asserting the doctrine that a sheriff by his recital could deduce a power to sell lands, would be highly mischievous." *Wilson v. McVeagh*, 2 Yeates (Pa.) 86.

3. *Hardin v. Cheek*, 3 Jones (N. Car.) 135; 64 Am. Dec. 600; *Douglass v. Bradford*, 3 U. C. C. P. 449; 2 *Greenleaf*, Ev. (4th ed.), § 316; citing *Doe v. Murless*, 6 M. & S. 110; *Cooper v. Galbraith*, 3 Wash. (U. S.) 546.

4. *Cook v. Webb*, 18 Ala. 810; *Harris v. Murray*, 28 N. Y. 574; 86 Am. Dec. 268.

sion under a title not by the State statutes made subject to execution, being either a merely equitable one,¹ or as tenant at will, or by sufferance,² or that the whole property was exempt, being a homestead, and the wife not included in the decree of sale;³ or that either the judgment execution or proceedings were so defective as to avoid the sale.⁴

Ordinarily, he cannot deny his own title in order to defeat the purchaser's action for possession.⁵ Otherwise, as to a public land occupant, who, since the sale, has acquired a homestead under the General Government; its power over the public domain must not be so interfered with.⁶

h. WRIT OF ASSISTANCE.—A purchaser under a decree in chancery may generally get possession through a writ of assistance.⁷ But, of course, all the parties to be affected by the writ, as also the subject-matter, must be fully within the jurisdiction of the court;⁸ if there be a stranger in adverse possession without collusion of any of the parties the purchaser must resort to some other remedy.⁹

6. Ratification.—Ordinarily, the execution defendant's ratification cannot confirm a void estate.¹⁰ But on the principle that where one of two innocent persons must suffer, it shall be he who caused the injury; he may become estopped to deny the validity of the sale.¹¹ His acceptance of the surplus proceeds is an irrevocable confirmation thereof.¹²

1. *Elmore v. Harris*, 13 Ala. 360; *Bradham v. Cox*, 11 Ired. (N. Car.) 456.

2. *Clements v. Pearce*, 63 Ala. 284; *Dickinson v. Smith*, 25 Barb. (N. Y.) 102.

3. *Pardee v. Lindley*, 31 Ill. 174; 83 Am. Dec. 219; *Hughes v. Watt*, 26 Ark. 228; *Williams v. Young*, 17 Cal. 403. Compare *Haynes v. Meek*, 14 Iowa 320.

4. See *infra*, this title, *Grounds for Vacating*.

In *Pennsylvania*, parol evidence is held inadmissible to show that an indorsement on the *fi. fa.* waiving inquiry was a forgery. *Zuver v. Clark*, 104 Pa. St. 222.

5. *Gould v. Hendrickson*, 96 Ill. 599; *Turner v. First Nat. Bank*, 78 Ind. 19; *Wade v. Saunders*, 70 N. Car. 277; *Stuckey v. Crosswell*, 12 Rich. (S. Car.) 273; *Matney v. Graham*, 59 Mo. 190; *Dunlap v. Cook*, 18 Pa. St. 454; *Jackson v. Graham*, 3 Cal. (N. Y.) 188; *McDonald v. Badger*, 23 Cal. 393; 83 Am. Dec. 123.

6. *Montgomery v. Whiting*, 40 Cal. 294; *Emerson v. Sansome*, 41 Cal. 552.

7. See *Freeman Ex.* (2d ed.), § 37d.

As to this writ in the Code practice, see *People v. Doe*, 31 Cal. 220.

8. *Applegarth v. Russell*, 25 Md. 317; *Gorton v. Paine*, 18 Fla. 117; *Jackson v. Warren*, 32 Ill. 331.

The rule is applied in *Arkansas*, where the person in possession does not claim to hold by title paramount to that of the parties to the decree of foreclosure. *Bright v. Pennyait*, 21 Ark. 130.

9. *Trammel v. Simmons*, 8 Ala. 271.

Otherwise as to party entering *pendente lite* under, or by covin of, the defendant. *Creighton v. Paine*, 2 Ala. 158.

Grounds for opposing the writ must be urged in apt time. *Le Conte v. Irwin*, 23 S. Car. 106.

10. *Co. Litt.* 295.

11. *Bigelow on Estop.* (5th ed.) 685.

In *Van Rensselaer v. Kearney*, 11 How. (U. S.) 297, 326, the court, by Nelson, J., remarked that though not unfrequently characterized as odious, the doctrine "concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when in conscience and honesty he should not be allowed to speak."

12. The doctrine applies "as well

XV. THE PURCHASER'S REMEDIES—1. Failure of Title.—Ordinarily, where the execution defendant had no title divestible by regular proceedings, the plaintiff, if purchaser, can vacate the apparent satisfaction and get a new execution.¹ If his title fails through the sheriff's misdoings, he can recover against him in an action on the case.² And, this, though it was the fault of the deputy.³

2. Recourse on the Plaintiff.—In some States, a stranger purchasing under void proceedings, has been allowed to recover from the execution plaintiff.⁴

where the proceeds received arise from a sale by authority of law as where they spring from the act of the party." *Com. v. Shuman*, 18 Pa. St. 346.

In *Smith v. Warden*, 19 Pa. St. 430, the court, by Lewis, J., said: "The application of this principle does not depend upon any supposed distinction between a void and a voidable sale. The receipt of the money, with the knowledge that the purchaser is paying it upon an understanding that he is purchasing a good title, touches the conscience, and therefore binds the right of the party in one case as well as the other."

So was held estopped an execution defendant who received the surplus on a sale made upon a defective notice. *Huffman v. Gaines*, 47 Ark. 226.

So also one receiving a surplus of the proceeds of an execution sale of slaves. *Sittig v. Morgan*, 5 La. Ann. 574. So also upon a foreclosure sale. *Southard v. Perry*, 21 Iowa, 488; 89 Am. Dec. 587.

A trustee may be so estopped by his *cestui's* receipt of proceeds of an irregular sheriff's sale. *Crowell v. Meconkey*, 5 Pa. St. 168. So also a guardian who received the proceeds of a partition sale. *Merritt v. Horne*, 5 Ohio St. 307; 67 Am. Dec. 298. So also minors who received the proceeds of a guardian's irregular sale. *Deford v. Mercer*, 24 Iowa 118.

See application of the same general doctrine to a sale made by an assignee in insolvency without full compliance with the statute. *Tuite v. Stevens*, 98 Mass. 305. Against the heirs of a widow, after she had inadvertently thrown her son off his guard by encouraging him to purchase, and to expend money upon certain devised land. *Maple v. Kussart*, 53 Pa. St. 348; 91 Am. Dec. 214. Against devisees in case of a sale of a homestead. *Johnson v. Cooper*, 56 Miss. 608. Against a widower's claim of curtesy; he having shared in the proceeds of a sale of

the wife's land wherein he had not joined. *Johnson v. Fritz*, 44 Pa. St. 449.

1. So held, in case of seizure of exempt property. *Piper v. Elwood*, 4 Den. (N. Y.) 165. Also in case of an execution against a fraudulent vendee. *Sargent v. Sturm*, 23 Cal. 359; 83 Am. Dec. 118. Also in case of sale of an unleviable right of redemption. *Watson v. Reissig*, 24 Ill. 281; 76 Am. Dec. 746. Also where the real owner had recovered the value in a joint action against plaintiff and sheriff. *Adams v. Smith*, 5 Cow. (N. Y.) 280.

2. So where the grantee of an equity of redemption, in order to strengthen his title, caused the equity to be sold on an execution which he held against the grantor became the purchaser, took deed, and paid the sheriff his fees and expenses, but through the sheriff's failure to post the statutory notices the sale was ineffectual, yet his title valid independently thereof, it was held that he could recover his expenses with interest. *Sexton v. Nevers*, 20 Pick. (Mass.) 451; 32 Am. Dec. 225.

3. *Draper v. Arnold*, 12 Mass. 449.

4. *E. g.*, upon a sale under a judgment for a foreclosure deficiency, void for want of notice to the mortgagor. *Schwinger v. Hickok*, 53 N. Y. 280. The court, by Andrews, J., put the decision on the ground of total failure of consideration, quoting Lord Mansfield's words in *Moses v. Macpherlan*, 2 Burr. 1005, "Undue advantage taken of a party's situation," etc. But if the maxim *caveat emptor* applies, it is not easy to define an "undue" advantage. See also the opinion of the court, by Catron, J., in the complicated case of *Henderson v. Overton*, 2 Yerg. (Tenn.) 394; 24 Am. Dec. 492.

In *Louisiana*, a seizing creditor is liable as warrantor to a purchaser evicted from the property unless the eviction be at the suit of a creditor holding a legal or judicial mortgage, and the

3. **Recourse on the Defendant.**—In some States, the purchaser getting no title, yet having contributed by his payment to satisfy the judgment, is treated as a trustee, and will not be compelled to surrender until reimbursed by the defendant.¹

4. **Recourse on the Sheriff.**—In some States, to avoid circuity of actions, the purchaser may in certain cases, sue the sheriff directly.²

5. **In Equity.**—In case of fraud, and in absence of adequate remedy at law, equity will relieve the purchaser.³ Equity will also relieve against mistake, where there is no adequate remedy at law by amendment or otherwise.⁴

property sold belonged to another than him in whose hands it was seized. *Citizens' Bank v. Freitag*, 37 La. Ann. 271.

1. *McLaughlin v. Daniel*, 8 Dana (Ky.) 182; *McLean v. Martin*, 45 Mo. 393; *Warner v. Helm*, 6 Ill. 220; *Hawkins v. Miller*, 26 Ind. 173; *Julian v. Beal*, 26 Ind. 220; 89 Am. Dec. 460.

In *Texas*, the elaborate opinion of the court, by Hemphill, J., in *Howard v. North*, 5 Tex. 316, has been approved in *Johnson v. Caldwell*, 38 Tex. 218.

In *North Carolina*, a damnified bona fide purchaser may maintain an action against the execution defendant to recover the sum paid. *North Carolina Code*, 1883, § 468.

In *Iowa*, where the sale has been set aside because the land was a homestead, a fact not known to the purchaser, he has no right to have the judgment assigned to him, although, under *Iowa Code*, § 3090, he is entitled to recover the amount paid on his purchase. *Jones v. Blumenstein*, 77 Iowa 361.

2. Under the *Kentucky* statutes, the execution purchaser of personal property may sue either upon the indemnifying bond, or upon the sheriff's official bond, if the latter has failed to take good security. *Chisholm v. Gooch*, 79 Ky. 468. The execution purchaser of a chattel was held entitled to recover of the sheriff who took no indemnifying bond and failed to inform him of the real owner's adverse claim. *Harrison v. Shanks*, 13 Bush (Ky.) 620.

3. See EQUITY, vol. 6, p. 717.

A, an administrator, who, on B's withdrawal of B's senior *fi. fa.* against C from the sheriff's hands, became the purchaser at the sale under A's junior *fi. fa.*, which was void, was held not to be entitled to maintain a bill in equity against B, C and the sheriff for the

proceeds of such void sale, charging collusion and fraud in the withdrawal. *Edenfield v. McLeod*, 66 Ga. 11.

Where a money recovery was had in trover against the execution purchaser of exempt cattle, it was held that he had no equity to insist that the money should be invested for the beneficiaries who were entitled to their possession. *Harrell v. Harrell*, 77 Ga. 130.

4. See EQUITY, vol. 6, p. 717. See also, *infra*, this title, *The Deed—Reforming or Renewing*.

In *Alabama*, where the plaintiff is the purchaser, his crediting the amount of his bid is, *pro tanto*, a satisfaction of his judgment, and a court of equity will not vacate the sale on the ground that the execution defendant had no title. *Goodbar v. Daniel*, 88 Ala. 583.

In *South Carolina*, the plaintiff purchasing for less than the amount of his execution may have the price credited thereon, and though not receiving a deed, may set up his equitable title in an action brought for the partition of the land in which he is a defendant. *Small v. Small*, 16 S. Car. 64.

In *Pennsylvania*, the remedy in ejectment is considered adequate. *Small's Appeal* (Pa. 1887), 9 Atl. Rep. 337.

In *Missouri*, where the sheriff described the northwest quarter of section thirty-five as the "northeast quarter of section twenty-five," and the defendant surrendered the possession of this land to the purchaser, who moved thereon and made improvements, but the defendant discovering the misdescription, regained possession, it was held that the purchaser could maintain an action to recover the purchase money. *McLean v. Martin*, 45 Mo. 393. So, also, where he had not

6. **Amendment.**—In some States the purchaser may, as if an original party, remedy a defect in his title through an amendment of the process or of the record.¹

7. **Subrogation.**—Some statutes provide that the execution purchaser of an invalid title may be subrogated to the plaintiff's rights against the defendant.²

made improvements, but the sheriff had paid over the money to the plaintiff. *Wilchinsky v. Cavender*, 72 Mo. 192.

1. In *Maine*, the purchaser may get the execution amended; e. g., a clerical error, real estate "of" instead of "situated in," etc. *Caldwell v. Blake*, 69 Me. 458.

So also, in *Tennessee*, a clerical error in the *teste* and signature of the *vend. exp.* *Perkins v. Woodfolk*, 8 Baxt. (Tenn.) 480.

So also in other States, may the purchaser get an amendment, provided no complications have arisen to necessitate a resort to equity to adjust any intervening rights of third parties. See AMENDMENT, vol. 1, pp. 552, 553.

2. In *Louisiana*, as to "conventional" and "legal" payors, etc., see *Louisiana Rev. Code*, 1889, p. 400, §§ 2159, *et seq.* Only the original purchaser can bring an action against the recorder for an erroneous certificate of mortgages. *Morans v. Shaw*, 23 La. Ann. 379.

In *Indiana*, "if, upon the sale of property, real or personal, the title of the purchaser is invalid as to all or any part thereof, by reason of any defect in the proceedings or want of title, the purchaser may be subrogated to the rights of the creditor against the debtor, to the extent of the money paid and applied to the debtor's benefit; and where the judgment is entered satisfied in whole or in part, by reason of such sale, such purchaser, upon notice to the parties to the proceeding, and upon motion, may have such satisfaction of the judgment vacated in whole or in part. Such purchaser, when the proceedings are defective, or the description of the property sold is imperfect, shall also have a lien to the same extent on the property sold as against all persons except *bona fide* purchasers without notice; but this section shall not be construed to require the creditor to refund the purchase money by reason of the invalidity of any such sale." *Indiana Rev. Stat.* 1881, § 765.

This statute being remedial, must be liberally construed. *Short v. Sears*, 93 Ind. 505. The *Indiana* courts had previously restricted subrogation to sureties, etc. *Richmond v. Marston*, 15 Ind. 134—decided in 1866.

Though the sale be void for want of notice, the deed gives color of title, and the purchaser's grantee is entitled to be subrogated to all the rights of the judgment creditor. *Ray v. Detchon*, 79 Ind. 56.

Such, also, is the *Ohio* statute. *Ohio Rev. Stat.* 1890, §§ 5410, 5412.

Before this enactment, it has been held in a "Western Reserve Case" that the purchaser at an administrator's sale, assumed to be made under an order of a Connecticut probate court and invalid, could not recover of the heirs; that when they came into equity to disincumber their title, they must merely reimburse the taxes paid, with interest and expenses. *Nowler v. Coit*, 1 Ohio 523; 13 Am. Dec. 640—decided in 1824.

In *California*, as to the purchaser's remedy by notice and motion, see *California Code Civil Proc.*, § 708.

In *Iowa*, also, by notice and motion, see McClain's *Iowa Code*, 1888, § 4319; Miller's *Iowa Code*, 1888, § 3090.

In *North Carolina*, by action against the execution defendant, see *North Carolina Code*, 1883, § 468.

In *Alabama*: "When any interest less than the absolute title is sold, the purchaser is subrogated to all the rights of the defendant, and subject to all his disabilities." *Alabama Code*, 1886, § 2892. He may impeach a deed by the defendant, for fraud, in any case where the plaintiff in execution could have done so. *McCoy v. Watson*, 51 Ala. 466.

In *Texas*, where the sale was invalid through the sheriff's misdescription of the land, the purchaser was subrogated to the judgment lien. *Jones v. Smith*, 55 Tex. 383. Compare *French v. Grenet*, 57 Tex. 273.

In *Georgia*, the purchaser may contend against the debtor's claim of homestead

As a part of the practice under this principle the courts in the States recognizing this remedy will protect the purchaser in his possession until he has been reimbursed his payment.¹

XVI. THE PURCHASER'S LIABILITIES—1. In General.—Ordinarily, the law governing the liabilities or the exemptions therefrom of purchasers in general, applies to a sheriff's vendee. He buys² subject to the liens against the execution defendant, and with whatever immunities the statutes afford him.³ He is liable in replevin or trover, if the property be personalty exempt from execution,⁴ or the title and right of possession be in another than the execution defendant.⁵

on the same grounds that the execution creditor could have urged—*e. g.*, a waiver by contract with him. *Tappan v. Hunt*, 74 Ga. 545.

In *Missouri*, in *Lionberger v. Baker*, 88 Mo. 456, the court, by Black, J., said: "Where a debtor conveys his land in fraud of creditors, the creditor may institute his suit to set aside the fraudulent deed and subject the land to the payment of the debt by thus first ascertaining the interest of the debtor therein, or he may sell the land under execution before ascertainment of the debtor's interest, and then set aside the fraudulent deed. The purchaser at the execution sale will occupy the same position as if he were the creditor. It is to be regretted that the former course is not more frequently pursued; thereby avoiding the sacrifice of property and the speculation attending such execution sales, of which this case is no exception; but the right of the creditor to pursue either course is well established in this State." Compare *Morgan v. Bouse*, 53 Mo. 219; *Ryland v. Callison*, 54 Mo. 513; *Rinehart v. Lang*, 95 Mo. 396.

In *Illinois*, the maxim *caveat emptor* has been applied against subrogation, save in favor of sureties, guarantors, insurer's and junior lienholders compelled in self-protection to remove a senior lien. *Bishop v. O'Conner*, 69 Ill. 431. Compare the case of an equitable assignee, *Smith v. Dinsmoor*, 119 Ill. 665. Also a case defining a mere volunteer. *Suppiger v. Garrels*, 20 Ill. App. 625.

1. In *Louisiana*, see *Davis v. Gaines*, 104 U. S. 406, one of the cases in the famous "Myra Clark litigation."

In *Mississippi*, a recovery in ejectment against a purchaser has been enjoined until he be reimbursed his purchase-money. *McGee v. Wallace*, 57 Miss. 638; 34 Am. Rep. 484.

So, also, in *Alabama* is one precluded from asserting his legal title to the prejudice of an innocent purchaser. *Robertson v. Bradford*, 73 Ala. 116.

As to the like *South Carolina* rule thereon, see *Cathcart v. Sugenhimer*, 18 S. Car. 123.

In *New Jersey*, the court, in ordering a reconveyance, will allow a fair compensation for the purchaser's time, trouble and expenses. *Combs v. Little*, 4 N. J. Eq. 310; 40 Am. Dec. 207.

2. See JUDICIAL SALES, vol. 12, p. 233.

3. *E. g.*, in *California*: "No one, merely by reason of having acquired an estate subject to a covenant running with the land, is liable for a breach of the covenant before he acquired the estate, or after he has parted with it." *California Civil Code*, 1885, § 1466.

In *Rhode Island*, the purchaser's failure to hear the terms of sale, or his ignorance of the law as to his buying only the defendant's interest, will not relieve him from liability. *Upham v. Hamill*, 11 R. I. 565; 23 Am. Rep. 525.

4. *Johnson v. Babcock*, 8 Allen (Mass.) 583; *Buckley v. Wheeler*, 52 Mich. 1.

5. *Coombs v. Gorden*, 59 Me. 111; *Buffum v. Deane*, 8 Cush. (Mass.) 41.

In *Pennsylvania*, tender by a leaseholder or other third party of debt, interest and costs, with demand for assignment of the writ, does not affect the purchaser, if the plaintiff refused it. *Forest Oil Co.'s Appeal*, 118 Pa. St. 138.

The purchaser is not liable in covenant for the ground rent becoming due after the sale, and before acknowledgment of the deed. *Thomas v. Connell*, 1 Pa. L. J. 319.

As to the purchaser's liability to account for mortgaged property sold, see *Milmine v. Bass*, 29 Fed. Rep. 632.

2. As Trustee.—He may, by written or oral agreement, have rendered himself liable as a trustee of the execution plaintiff,¹ or of the defendant.²

3. Covin and Fraud.—By the preponderance of decisions, the title obtained through the purchaser's trickery and fraud is, while in his hands, resistible both at law and in equity.³

If a *bona fide* purchaser he may avail himself of the rule of trover exempting one from surrender until demand. *Rowley v. Brown*, 18 Hun (N. Y.) 456.

A *mala fide* purchaser is liable for the revenues of the property while in his possession. And he is not entitled to a tender of the price before suit to recover the property. *Germaine v. Mallerich*, 31 La. Ann. 371.

As to replevin in such case under the Upper Canada Insolvent act of 1869, see *Burke v. McWhirter*, 35 U. C. Q. B. 1.

As to the English practice, see *Shaw v. Tunbridge*, 2 W. Bl. (2d ed.) 1064, note.

As to attachment by the owner, see *Sanborn v. Kittredge*, 20 Vt. 632; 1 Am. Rep. 58.

In *Illinois*, the purchaser is chargeable with notice of the value of the property and of its situation, and of the legal rules bearing upon the transaction. *Morris v. Robey*, 73 Ill. 462.

In *Connecticut*, while the money paid by A, the purchaser, for a horse mortgaged in another State, was in the sheriff's hands, it was held that A could recover of the sheriff in an action for money had and received. *Bartholomew v. Warner*, 32 Conn. 98; 85 Am. Dec. 251.

1. If he bids under an agreement with A, the plaintiff, that the purchase shall be for A, he holds the title in trust for A, though the deed be made in his own name. *Byrnes v. Morris*, 53 Tex. 213.

2. In absence of fraud on creditors, the courts will enforce one's agreement with the execution defendant to bid off and hold the land for him under the sheriff's deed until repaid the purchase money. *Peebles v. Pate*, 90 N. Car. 348.

Where A had become involved in certain domestic and financial embarrassments, and arranged with his cousin B that certain property going under execution be bid off by B and held for A till A could get extricated, the court enforced the trust in a suit brought after a lapse of fifteen years.

Williams v. Williams, 8 Bush (Ky.) 241.

The court will recognize the correlative obligation of the defendant to repay such trustee. *Cook v. Cook*, 69 Pa. St. 443.

3. In an ejectment suit, *Abbey v. Dewey*, 25 Pa. St. 416, the court, by Black, J., said: "A purchaser at sheriff's sale who practices any deceit or imposture, or who is guilty of any trick or device, the object of which is to get the property at an undervalue, thereby renders the title so acquired utterly void and worthless in his hands. But it must be shown also that he did actually get it for less than it was worth, or less than what it would have sold for at a fair sale." His title might be defeated on a subsequent sale under another's execution. But an agreement not to bid is not presumptively fraudulent. *Barton v. Hunter*, 101 Pa. St. 406.

So, also, as to one's combination with bystanders to prevent competition. *Flemming v. Hutchinson*, 36 Iowa 523.

Collusion with the sheriff would render the sale absolutely void; but if the plaintiff himself alone suppress notice, etc., and become the purchaser, his title is good until set aside in equity. The act of his attorney, in placing a senior execution in the sheriff's hands on the eve of a sale advertised under junior ones, thus having the sale by virtue of all, in order to render a second sale unnecessary, has been held not to be improper. *Burton v. Spiers*, 92 N. Car. 503.

An agreement of parties that only one person shall bid is not necessarily adjudged to be covinous, though tending prejudicially against strangers or other creditors. Where the equity of redemption of property of a corporation was levied on, and under agreement bid in by A as trustee for the plaintiff creditors at a stated price, nothing to be paid except the costs, the defendant to have a specified time to redeem, it was held that other creditors could not maintain a bill in

4. **Non-payment.**—Ordinarily, a purchaser failing to complete the sale, becomes liable to the sheriff for the deficiency upon a resale.¹ In some States, the purchaser's liability for non-payment is defined by statute.²

A purchaser who has not offered to comply with his bid acquires no interest in the property or right of proceeding in regard thereto.³

equity against A to compel payment of the bid. *Cureton v. Wright*, 73 Ga. 8.

1. See *supra*, this title, *Resale; Sheriff's Action for Deficiency*.

2. In *Iowa*, if he fails to pay, "the plaintiff or his attorney may elect to proceed against him for the amount; otherwise the sheriff may treat the sale as a nullity and resell." McClain's *Iowa Stat.* 1888, § 3089; Miller's *Iowa Stat.*, § 4318; *Swortzell v. Martin*, 16 *Iowa* 519.

Under the *Kansas Code* (not requiring joinder of the person for whose benefit the action is prosecuted), the sheriff may recover of the purchaser refusing to pay the amount bid; and this, though the execution be returned and the notice of sale defective, provided the execution debtor and creditor have approved the sale. *Walker v. Braden*, 34 *Kan.* 660.

In *Indiana*, he is "liable, on motion to be made by the sheriff or the execution plaintiff or defendant, in the proper court, five days' notice being given, to a judgment for the amount of the purchase money, and damages not exceeding ten per cent. and interest, with costs; and no stay of execution shall be allowed upon the judgment." *Indiana Rev. Stat.*, 1881, § 760.

After the sheriff's deed, payment will be presumed. *Meikel v. Meikel*, 119 *Ind.* 421.

In *Missouri*, the sheriff may recover the resale deficiency by motion. *Missouri Rev. Stat.* 1889, § 4946.

Where A, on the morning following his purchase, informed the sheriff that he bought as the agent of B, and the sheriff entered B's name on the sale-book as purchaser, with a memorandum of the facts, it was held that this completed the contract of sale, and A was liable for the purchase money. *Gray v. Case*, 51 *Mo.* 463.

A purchased land by the execution defendant held under a bond for title from B, but for which he had not paid. C under an agreement with A to pay the sheriff A's bid, paid the purchase

money to B, and obtained the legal title, but refused to pay the sheriff, and judgment was obtained against A for the amount of his bid. *Held*, that A, on paying the amount paid by C to B, was entitled to be decreed investiture of the legal title. *Bibb v. Means*, 61 *Mo.* 284.

In *Georgia*, on the purchaser's default, a conveyance to another by transfer of his bid several days afterwards without readvertisement, passes the title. *Williams v. Barlow*, 49 *Ga.* 530.

In *Illinois*, a purchaser who refuses to complete the sale is not liable for the loss on a resale unless he had notice of the resale, and that he would be held liable. *Maulding v. Steele*, 105 *Ill.* 644.

In *North Carolina*, in absence of any order from the court, the sheriff may refuse to credit on the execution a bid made by the execution creditor in lieu of cash. *Isler v. Andrews*, 66 *N. Car.* 552.

If, on the purchaser's default, the sheriff does not elect to rescind, he may, on tender of deed, and even before making the return, maintain an action for the amount of the bid. *McKee v. Lineberger*, 69 *N. Car.* 217.

In *Kentucky*, the sheriff may sell on credit, on the purchaser's giving bond as prescribed in *Kentucky Stat.* 1881, § 424, art. 10, § 1.

If, after payment of the bid, a return has been recorded by the clerk, the sheriff has no power to withdraw the sale bond and accept others in lieu thereof. Such bonds cannot support an execution. *Spradlin v. Pieratt*, 12 *Bush (Kv.)* 496.

3. *Askew v. Ebbarts*, 22 *Cal.* 263; *Leach v. Koenig*, 55 *Mo.* 451; *Hardesty v. Wilson*, 2 *Gill (Md.)* 481; 41 *Am. Dec.* 439.

In *Mississippi*, the sheriff is not bound to make a deed until the whole purchase money is paid. *Davis v. Pryor*, 6 *Smed. & M. (Miss.)* 114.

XVII VACATING SALES—1. By Motion to Quash—*a.* **WHEN TO BE MADE.**—The court that issued the writ may, on motion seasonably made, set aside a sale thereunder for any essential irregularity therein or in the sheriff's proceedings in execution thereof.¹ Ordinarily the motion comes too late if made after the redemption period has expired.²

b. **BY WHOM MADE.**—The motion must be made by some person injuriously affected, whether the plaintiff, the defendant, his wife, his assignee, the purchaser, a junior lienholder, a real owner or a wronged bidder.³

1. In *Kentucky*, "sales made under execution by fraud, covin, or collusion, may be set aside on motion of any person aggrieved, or by petition in equity. If by motion, it must be within one year of the sale." *Kentucky Gen. Stat.*, p. 581, § 1.

A court of law is the tribunal to set aside an execution sale. *Cassiday v. McDaniel*, 8 B. Mon. (Ky.) 519. In equity the remedy is by appeal to the court in which decree was made. *Brown v. Frost*, 10 Paige (N. Y.) 243.

In *New York*, rights acquired under a levy partly made may be divested by the action of the court in setting aside the judgment and execution and whether upon motion to strike out or upon appeal. *May v. Cooper*, 24 Hun (N. Y.) 7.

In *Missouri*, the court can set aside the sale on the return day when, by an oversight of the officer, it has resulted injuriously. *McKee v. Logan*, 82 Mo. 524.

In *Dakota*, judgment on a motion to set aside is not a final order, or appealable; until the order of confirmation, the legality of the sale is controvertible. *Bond v. Charleen*, 1 Dak. Ter. 224.

In *Kansas*, before confirmation of the sale, a motion may be entertained to set aside the judgment for want of service of summons. *Johnson v. Lindsay*, 27 Kan. 514.

2. *Love v. Cherry*, 24 Iowa, 210; *Raymond v. Holborn*, 23 Wis. 57; 99 Am. Dec. 105; *Fahinger v. Fahinger*, 14 Phila. (Pa.) 622. As to estoppel by acquiescence and delay, see *JUDICIAL SALES*, vol. 12, p. 237.

In *Illinois*, on reversal, the sale may be vacated on motion, even after the year to redeem has expired, provided the deed has not been executed, and the execution defendant be still in possession. *Hays v. Cassell*, 70 Ill. 669.

So, also, in *Alabama*. *Abercrombie v. Connor*, 10 Ala. 293. In *Cowan v. Sapp*, 81 Ala. 526, the court by Clifton, J., said: "Ordinarily, proceedings should be instituted before the purchaser obtains possession, or improvements are made, or third parties have acquired rights, or any change in the situation of the parties rendering it difficult to put the purchaser *in statu quo*. . . . In all cases, reasonable promptness, diligence and good faith will be exacted to be determined on the particular circumstances of each case—whether they are such as to have induced inaction, or ought to have quickened vigilance." Compare *Aderholt v. Henry*, 82 Ala. 541.

In *Wisconsin*, a delay of twenty months after the sale, without excuse, is, on appeal, ground for reversing the order granting the motion to set aside. *Foster v. Hall*, 44 Wis. 568.

3. *Galbreath v. Drought*, 29 Kan. 711; *Harrison v. Andrews*, 18 Kan. 535; *Cravens v. Wilson*, 48 Tex. 324; *Smith v. Fletcher* (Ark. 1889), 11 S. W. Rep. 824; *Beckwith v. King's Mountain Min. Co.*, 87 N. Car. 155.

In *New York*, so, also, was sustained in foreclosure, after a sale ill timed and whereat the sheriff used a diagram erroneously locating buildings, a motion by a creditor of the mortgagor. *Gould v. Mortimer*, 26 How. Pr. (N. Y.) 167. Also one by a junior judgment creditor without notice of a foreclosure sale that had been made at an inadequate price. *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 259.

So also was sustained a motion by one whose bid the officer fraudulently refused to recognize. *U. S. v. Vestal*, 4 Hughes (U. S.) 467.

The defendant cannot maintain the motion after his assignment in bankruptcy. *Laird v. Laird*, 4 Pa. L. J. 474; *Gridley v. Duncan*, 8 Smed. & M. (Miss.) 456.

c. NOTICE.—Rules of court usually require that all parties directly interested be notified of the motion and permitted to be

It has been held that one claiming adversely to the defendant should not be heard to object to the sale. *Glassell v. Wilson*, 4 Wash. (U.S.) 59; *McLaughlin v. Bradford*, 82 Ala. 431; *Bachle v. Webb*, 11 Neb. 423. So also a mere mortgagee must contest otherwise. *Frink v. Morrison*, 13 Abb. Pr. (N. Y.) 80.

In *Georgia*, if a partner's individual property be levied upon for a firm debt, he may alone, by affidavit and *certiorari*, contest the legality of the proceeding. *Smith v. Bryan*, 60 Ga. 628.

In *Kansas*, where, before the sale, the wife of the execution defendant had claimed the property as a homestead, but received none of the purchase money, it was set aside after it had been, on his motion, confirmed; but this, without taxing any costs against him. *Adams v. Devalley*, 40 Kan. 486. And the plaintiff was required to pay the costs accruing since issuance of execution, the sale being set aside as contrary to statute upon his motion. *Jenkins v. Green*, 24 Kan. 493. Wherein the motion does not operate as a waiver, see *De Jarnette v. Verner* (Kan.), 19 Pac. 256.

In *Texas* the defendant's children, to whom he had assigned his interest after the judgment, being interested in any surplus, may have the sale set aside for fraud or irregularity. *Flanagan v. Pearson*, 50 Tex. 383.

A defendant's vendee cannot have the sale set aside as to himself and affirmed in part. *Puterbaugh v. Moss* (Ill. 1887), 11 N. E. Rep. 197.

In *Louisiana*, the decision of a motion for injunction and to set aside the sale, rests in the discretion of the court, and is not conclusive on the ultimate rights of the parties. *Drouet v. Lacroix*, 28 La. Ann. 126. The party moving must have used due diligence to prevent the injury. *Jouet v. Mortimer*, 29 La. Ann. 206.

In *Pennsylvania*, after the sheriff's deed has been acknowledged the sale will not be set aside for mere inadequacy of price. *Cooper v. Wilson*, 96 Pa. St. 409. But compare *Shakespeare v. Fisher*, 11 Phila. (Pa.) 251, where the application was entertained though the deed had been acknowledged but not recorded.

After delivery of the deed and possession taken thereunder, one alleging fraud cannot have a rule to show cause; the title can only be divested in ejectment or by bill in equity. *Evans v. Maury*, 112 Pa. St. 300.

After the sale, the plaintiff cannot countermand it, because of irregularities in it or in the original attachment. *Thomas v. Bogert*, 33 Hun (N. Y.) 11.

In *Indiana*, the sale will be set aside for fraud and gross inadequacy of price, even after the year allowed for redemption, the execution defendant being ignorant of essential facts, and the purchaser knowing this and not seasonably putting him on his guard. *Fletcher v. McGill*, 110 Ind. 395.

In *Kentucky*, a sale made four years after a judgment entry foreclosing a lien was held not to import such laches as would destroy the lien, there having been an order for filing away, "subject to being redocketed," etc. *Pittman v. Wakefield* (Ky. 1890), 13 S. W. Rep. 525. Compare *Black v. Steele* (Ky. 1887), 6 S. W. Rep. 23.

Ordinarily, the application is considered as addressed to the power of the court to correct its own records. After the property has been successfully replevied by the real owner, the execution plaintiff may have the levy, sale and satisfaction vacated and a new execution awarded. *Zeigler v. McCormick*, 13 Neb. 25. But compare *Thomas v. Bogert*, 33 Hun (N. Y.) 11.

On application for inadequacy of price the affidavit must state the value and the price; an averment that the lands "sold for greatly less than their value" is insufficient. *Holly v. Bass*, 68 Ala. 206.

A caused a levy to be made on property of B then worth but little more than the amount of A's judgment (which was about \$800, including costs). C became the purchaser at \$300. On increase of the value to nearly \$1,600, A and C moved to be allowed to increase C's bid to the amount of the judgment, and to have the sale confirmed. B, who before this had tendered the amount, now moved to set aside the sale. *Held*, that his motion came too late. *McGeorge v. Sease*, 32 Kan. 387.

heard.¹ The motion should be accompanied by a tender of whatever fruits of the sale have been received.² In some States the statutes prescribe the proceedings upon such motion.³

2. By Suit to Set Aside—*a.* JURISDICTION.—Where the ground for annulling the sale is any matter not apparent from the record, and the circumstances admit no speedy and adequate remedy at law, the proper method is by suit in equity.⁴

1. This includes the plaintiff. *Good v. Coombs*, 28 Tex. 34. Also the defendant. *Chambers v. Hays*, 6 B. Mon. (Ky.) 115. Also the purchaser. *Wilkie v. Ingham Co. Circuit Judge*, 52 Mich. 641. Compare *Baker v. Hall*, 29 Kan. 617.

If the purchaser be out of the State, the ordinary practice in constructive service of notice is proper. *Eckstein v. Calderwood*, 34 Cal. 658; *Lyster v. Brewer*, 13 Iowa 461. In case of two defendants, one must have notice of the other's motion to vacate. *Stark v. Mitchel*, 2 A. K. Marsh. (Ky.) 16; *Beach v. Dennis*, 47 Ala. 262.

The sheriff need not be notified unless directly interested. *McKee v. Logan*, 82 Mo. 524; *Mobile Cotton Press, etc., Co. v. Moore*, 9 Port. (Ala.) 579.

See, also, JUDICIAL SALES, vol. 12, p. 239.

2. *Johnson v. Caldwell*, 38 Tex. 217.

In *Louisiana*, an execution defendant who seeks to vacate a sale made to an innocent stranger, must tender the consideration paid. *Tarleton v. Kennedy*, 21 La. Ann. 500. Otherwise, where he seeks to restrain the sheriff and a pretended purchaser from consummating the sale. *Drouet v. Lacroix*, 28 La. Ann. 126.

3. In *Pennsylvania*, on affidavit of irregularity, the court may set aside a sale of personal property, after directing an issue for trial of questions of fact whenever the circumstances require, and order meanwhile a sale of all perishable property. B. P. Dig. Law, *Pennsylvania*, 1885, p. 750, § 55.

In *Massachusetts*, if the levy proves to be invalid, the creditor may have a *sci. fa.* for a new execution. *Massachusetts* Pub. Stat. 1882, p. 1015, § 53.

In *Vermont*, where the title after the extent on real estate is rendered doubtful, owing to some irregularity, the court may, on petition of either party, vacate the extent, "and issue execution anew; but no such petition shall be sustained unless the same, with a certified copy of the judgment, execution

and extent, is filed in such court within two years from the time such extent was returned, and notice thereof given to the adverse party." *Vermont* Rev. Laws, 1880, § 1596.

As to necessity of notice within two years to prevent the statute from running, see opinions in *Phelps v. Laird*, 51 Vt. 285. The remedy does not apply to avoid levy; *e. g.*, where the execution has not been recorded in the town clerk's office or returned within sixty days. *Parker v. Parker*, 54 Vt. 341.

In *Kentucky*, the purchaser may, before redemption, docket a motion for possession, and if, on trial, it appears that the defendant had no title to the land, "the court shall have power to set aside and quash the return of the officer, as if no sale had been made." *Kentucky* Gen. Stat. 1887, p. 566, § 10. And this, too, when the plaintiff was the purchaser. *Bent v. Maupin*, 86 Ky. 271.

In *Iowa*, a sale assumed to be under a second execution before a return of the first, will be set aside; the *Iowa* Code, § 3025, allowing but one to exist at the same time. *Merritt v. Grover*, 57 Iowa 493.

4. In *Day v. Graham*, 6 Ill. 435, the court, by Scates, J., said: "Where the plaintiff in the execution is the purchaser, and before he conveys to another, the court would set aside the sale upon a motion. But after he conveys to a third person, who becomes a purchaser, the court will not determine in this summary way questions which may affect the rights of others not before the court, and without opportunity of explaining away those circumstances which might destroy his title. Although the purchaser here was the attorney, and will be chargeable with notice of all irregularities, if any, yet he is a third person, and did not purchase as an attorney, but in his own right." This decision was approved in *Jenkins v. Merriweather*, 109 Ill. 647.

The remedy is in equity where one

In cases of fraud, accident or mistake, the remedies at law and in equity are concurrent.¹

b. LACHES.—Under the maxim of public policy that the law favors the vigilant, the party damnified by the sale must not so delay to assert his rights as to import acquiescence, and render its annulment an injustice to innocent third parties.²

c. PARTIES.—Ordinarily, all persons having any legal or beneficial interest in the sale of property should be made parties plaintiff or defendant.³

seeks to have the sale set aside on the ground that the purchaser agreed to convey to him. *Hausling v. Hausman*, 73 Cal. 276. Or on the ground of inadequacy of price, not by cross-complaint in ejectment three years afterwards. *Vigoureux v. Murphy*, 54 Cal. 346.

1. See JURISDICTION, vol. 12, p. 293. See, also, a threefold classification by States: EQUITY, vol. 6, p. 697.

As to concurrent remedies by summary application in equity, of a party injuriously affected by the sale, see *Jackson v. Roberts*, 7 Wend. (N. Y.) 83.

In *Louisiana*, an action to annul the sale need not be brought in the same court that granted the order of seizure and sale. *Stapleton v. Butterfield*, 34 La. Ann. 822. So also where the judgment was void by reason of a defective citation. *Bledsoe v. Erwin*, 33 La. Ann. 615.

2. See LACHES, vol. 12, pp. 540, 600.

In *Minnesota*, in a suit brought after the redemption period, to set aside the sale, the complaint must set forth a good excuse for the delay. *Abbott v. Peck*, 35 Minn. 499.

In *Alabama*, a delay of three years was held to be sufficiently explained by the circumstances that a settlement had been agreed to in ignorance of existing facts; that the judgment was paid to the plaintiff in *Tennessee* on the day of the sale in *Alabama*, and the plaintiff as purchaser made no effort to take possession till six months before proceedings to vacate. *Cowan v. Sapp*, 74 Ala. 44; 81 Ala. 525. The defendant may by delay lose the right to object to a sale to the sheriff's wife. *Dexter v. Strobach*, 56 Ala. 233.

One holding land under an oral gift and unrecorded tax-deed filed, but did not prosecute, a bill to enjoin the sale, on the ground that his title was merely equitable. Ten years afterwards, the

donor gave him a deed, and two years thereafter he sued to set aside the sale. This was held to be laches fatal. *Richards v. Mackall*, 124 U. S. 183.

3. See EQUITY PLEADINGS, vol. 6, pp. 731, 738.

In *Texas*, a creditor interested in a junior execution may maintain a suit to set aside a sale made under an execution that was a prior lien, when, through the sheriff's fault, the property brought considerably less than if at a fair sale. *Crarens v. Wilson*, 48 Tex. 324.

In *Iowa*, a mortgagee cannot, after the mortgage has been declared to be fraudulent, maintain an action to set aside an execution sale. *McDonald v. Johnson*, 48 Iowa 72.

In *Illinois*, after death of the judgment debtor, the suit may be brought by his executor and legatee, and a creditor, if it appears that his personal estate is insufficient to pay his debts. *Cohen v. Menard* (Ill. 1890), 24 N. E. Rep. 604.

On a bill to set aside a sale of property acquired by a defendant after his discharge in bankruptcy, it was held that notice must be served on his co-defendant; otherwise a *sci. fa.* to revive the judgment as to him could not be sustained. *Lackey v. Steere*, 121 Ill. 598.

In *Kentucky*, where A was surety for a debt, whereon B obtained judgment, it was held that equity would not entertain a bill by A to set aside B's execution sale and allow A's lien on the property sold equal with B, and setting out an agreement between them that executions should simultaneously issue on the two judgments. *Robbins v. Lebus* (Ky. 1887), 2 S. W. Rep. 898.

In *Maryland*, a sale subject to taxes, at which their amount was made known, cannot be set aside by the defaulting taxpayer. *Hall v. Claggett*, 63 Md. 57.

d. PREREQUISITES.—In such suit, the fundamental maxims of equity govern—*e. g.*, “He who seeks equity must do equity.”¹

e. PROCEEDINGS.—In such suit, even in those States where the practice is defined by code, the principles govern that have been determined by established precedents.²

f. RELIEF.—As to the relief afforded, the forms prescribed both by the codes and the older equity rules “are flexible and may be suited to the different postures of cases.” The court “may vary, qualify, restrain, and model the remedy so as to suit it to mutual and adverse claims, controlling equities and the real and substantial rights of all the parties.”³

In *New Jersey*, it has been held that a sale to A, a creditor under an execution issued on a judgment confessed by B, should not be set aside in favor of C, a creditor who, before such judgment, had begun suit against B, in absence of evidence that A participated in B's design, by giving him the preference, to defeat C. *Goodwin v. Hamill*, 26 N. J. Eq. 24.

1. See collation of these maxims, *EQUITY*, vol. 6, pp. 704, *et seq.*

A party may, by his contribution to the injury, be estopped to insist that the sale be set aside; *e. g.*, improperly objecting to the sale. *Atcheson v. Hutchison*, 51 Tex. 234.

The execution defendant must show that he used due diligence to prevent a damnifying sale. So held where one failed to notify the sheriff of an agreement that it should be stopped. *Carden v. Lane*, 48 Ark. 216.

A judgment debtor who, without objection, has allowed his merely equitable interest to be levied on and sold, and afterwards rents the land of the execution creditor who had become the purchaser, cannot in another suit brought long afterwards have the levy and sale set aside, except on condition of satisfying the judgment. *Blackburn v. Clarke*, 85 Tenn. 506.

In setting aside an execution sale of land that belonged to the defendant's grantee, the satisfaction of the judgment should be canceled. *Keith v. Proctor*, 8 Baxt. (Tenn.) 189.

In *Louisiana*, a claimant of the property sold under a null judgment must first proceed by a direct action. *Gillis v. Carter*, 29 La. Ann. 698.

In *Nebraska*, one may sue to set aside the sale, notwithstanding the overruling of a motion made by him five years before to vacate the order confirming it. *Wills v. Chandler*, 1 McCrary (U. S.) 276.

2. See *EQUITY PLEADINGS*, vol. 6, p. 726.

In *Indiana*, the burden of proof is on the applicant. *Maynes v. Moore*, 16 Ind. 116; *Ferrier v. Deutchman*, 81 Ind. 390. In a suit to set aside a sale of exempt property, the complainant may adduce the execution, advertisement and appraisal, but not a mere copy of the sheriff's certificate, though on failure to produce on proper notice, parol evidence of the contents would be admissible. *Barkley v. Mahon*, 95 Ind. 101. He must allege and show that the statutory schedule was filed. *Guerin v. Kraner*, 97 Ind. 533.

In *South Carolina*, one seeking to recover land sold on execution against him may dispute the validity of the judgment and sale; but he cannot assert title in a trustee, and deny the existence of an interest subject to levy. *Crenshaw v. Julian*, 26 S. Car. 283.

In *Louisiana*, an order of seizure and sale must be supported exclusively by authentic evidence; not by matters *in pais*. *Van Raalte v. Mission Congregation*, 39 La. Ann. 617.

3. 1 Story Eq. Jur. (13th ed.), § 28. See *JUDICIAL SALES*, vol. 12, p. 235.

Equity will set aside a sale of a corporation share, made under a void execution. *Seligman v. St. Louis, etc., R. Co.*, 22 Fed. Rep. 39.

Equity will relieve where the purchaser has procured the sheriff to give him a deed in fee of property sold subject to the homestead exemption. *New England Mort. Sec. Co. v. Robson*, 79 Ga. 757.

In *Illinois*, in setting aside a sale made *en masse* of land that was parcelable, equity will protect the purchaser against intervening liens. *McHany v. Schenk*, 88 Ill. 357.

Where, after A had paid his half of the judgment against A and B, B pro-

3. **Grounds for Vacating**—*a.* IN GENERAL.—The grounds for setting aside the sale are, in general, such irregularities as would invalidate it where cognizable, by summary application in the same action,¹ and such graver misdoings as are remediable in an independent suit.²

cured the sheriff to levy on A's land, and, at the sale, procured C to bid the land in for B, equity decreed surrender of the certificate of purchase, and ordered that C's payment be credited on the amount due from B. *Goldsborough v. Darst*, 9 Ill. App. 205.

Where, on foreclosure of a mortgage of 100 acres upon an order to sell 60 acres to satisfy unpaid installments, the plaintiff purchased the whole 100 acres, the court confirmed his title to 60 acres, and adjudged the rest to the defendant. *Bole v. Newberger*, 8 Ind. 274.

In *Tennessee*, where a massed sale of land has been declared void, the effect of setting aside the entry of satisfaction of the judgment is to revive the judgment, but not the levy. Pendency of the creditor's bill to set aside such entry, and to subject the same land by the decree, gives him a lien superior to that of a subsequent judgment creditor, although the land may have been previously sold and conveyed under the execution of a third creditor. *Mays v. Wherry*, 3 Tenn. Ch. 80.

1. *Supra*, this title, *Motion to Quash*.

2. *Supra*, this title, *Suit to Set Aside; Conducting the Sale*.

A sale otherwise regular will not be set aside because there were no bidders present other than the execution plaintiff. *Learned v. Geer*, 139 Mass. 31. "The competition may be as active and spirited between two or three as a dozen." *Hudgins v. Lanier*, 23 Gratt. (Va.) 506. Otherwise where attendance is prevented by extreme inclemency of the weather. *Roberts v. Roberts*, 13 Gratt. (Va.) 639; *Johnson v. Crawl*, 55 Tex. 571.

In the *Monte Allegre*, 9 Wheat. (U. S.) 616, 648—a case of a marshal's sale of a bad lot of tobacco by sample seroons that were undamaged, the whole being accessible—the court, by Thompson, J., said: "The rule *caveat emptor* must necessarily apply, from the nature of the transaction; there being no one to whom recourse can be had for indemnity against any loss which may be sustained."

Otherwise, as to a sale by mistake in

the numbers of lots of land as timbered which were mere sandbanks on the Missouri river. *Frasher v. Ingham*, 4 Neb. 531.

A foreclosure sale was set aside, where the plaintiff had written to a reliable agent, used due diligence, was unable to attend, and the price was inadequate. *Hoppock v. Conklin*, 4 Sandf. Ch. (N. Y.) 582. So, also, where one was mistaken as to discharge of a lien. *Cummings' Appeal*, 23 Pa. St. 509. So, also, where a return had not been indorsed, and the plaintiff was not informed of the sale. *Allen v. Clark*, 36 Wis. 101. So, also, as to a misapprehension of the terms of sale. *Hey v. Schooley*, 7 Ohio 48. So, also, as to a mistaken representation of the quality of the land sold: *Lowndes case*; so, also, as to ignoring a bid. *Roper's case*. [These two unreported cases are cited in *Gordon v. Saunders*, 2 McCord Eq. (S. Car.) 159.]

In *Iowa*, a sale of real estate will be set aside if, at the time of the levy, the judgment was not a lien, and this fact was unknown to the purchaser. *Iowa Rev. Stat.* 1888, § 4319.

There, an execution must be regarded as existing until it is returned. A sale, assumed to be made under a second execution before a return of the first, will be set aside. *Merritt v. Grover*, 57 Iowa 493.

In *Pennsylvania*, where a purchaser had been misled by a judgment index entry to suppose the purchase necessary to protect his interests as incumbrancer, the court, on his motion, set aside the sale, canceled the deed, and struck out the erroneous entry. *Shakespeare v. Delany*, 86 Pa. St. 108.

In *Illinois*, where, without any misrepresentation as to the title or condition, the defendant turned out land incumbered in excess of its real value and the plaintiff's attorneys bid it off in satisfaction of the execution, it was held that *caveat emptor* applied, and it was error on the plaintiffs to set aside the sale. *Vancoyoc v. Kimler*, 77 Ill. 151. Compare *Finley v. Thayer*, 42 Ill. 350.

b. MISCONDUCT OF THE SHERIFF.—The sale will be set aside for the sheriff's disobedience of a mandatory statute, or for any damnifying consequences of his disobedience of a directory statute in absence of the defendant's waiver thereof.¹

Ordinarily, a sale to a stranger will not be set aside for an irregularity whereof he had not actual notice. *Sheppard v. Bland*, 87 N. Car. 163.

The fact that the execution was made returnable in more than the prescribed number of days does not invalidate a sale made within the statutory time. *Youngblood v. Cunningham*, 38 Ark. 571.

Nor the fact that the judgment was for more than the amount declared for. *Buice v. Lowman Gold, etc., M. Co.*, 64 Ga. 769.

Nor a variance between the execution and the judgment as to the sum due. *Hinton v. Roach*, 95 N. Car. 106.

Nor the fact that in the judgment and execution, the defendant's name was misspelled; *e. g.*, "Kuhn" misspelled "Coons." *Kuhn v. Kilmer*, 16 Neb. 699.

Nor an incorrect naming of a defendant corporation—*e. g.*, "Algona College" instead of "Trustees of Algona College." *Wilson v. Baker*, 52 Iowa 423. But in *Texas* a sale under execution issued against "William V." on a judgment rendered against H. W. V., levied on the property of H. W. V., whose Christian name was Hiram Watkins, was held to be absolutely void. *Morris v. Balkham*, 75 Tex. 111.

Nor an announcement by one believing himself to have an equitable interest, tending to chill the biddings. *Reagan v. Bishop*, 25 S. Car. 585.

Nor the fact of an atmospheric obstruction of a telegram from the plaintiff to the sheriff. So held where five months elapsed before action to set the sale aside. *Central Pac. R. Co. v. Creed*, 70 Cal. 497.

In *Texas*, a purchase, at an execution sale for costs, by a stranger who conveyed to the defendant and his wife solely as a compromise of a claim of title, was held to be properly left undisturbed. *Jones v. Pratt*, 77 Tex. 210.

In *Indiana*, a purchaser's want of actual knowledge of a prior judgment, levy, and sale was held to afford no ground of relief. *Taylor v. Morgan*, 86 Ind. 295; *Caley v. Morgan*, 114

Ind. 350. So, also, the mere fact that an *alias* execution was issued without the plaintiff's written *præcipe* required by *Indiana* Rev. Stat. 1881, § 678. *Johnson v. Murray*, 112 Ind. 154.

So also as to a sale of land that had been sold by the defendant; the vendee having failed to ask for the order that other property be first exhausted. *Sansberry v. Lord*, 82 Ind. 521.

1. *E. g.*, selling under a decree before issuance of an order of sale. *Rhonemus v. Corwin*, 9 Ohio St. 366.

Selling after being notified of a stay. *Baasen v. Eilers*, 11 Wis. 277.

Refusing to give the defendant the privilege under the *Illinois* statute of electing what portion shall be sold. *Evans v. Landon*, 6 Ill. 307. Omitting to call on the defendant to point out personal property. So held where the plaintiff became the purchaser of land worth \$500 for \$10, he being presumed to know of the irregularity in the levy. *Pearson v. Hudson*, 52 Tex. 352.

Selling exempt property. *Supra*, this title, *Reservations*.

Selling contrary to the appraisement laws. *Supra*, this title, *Preliminaries—The Appraisement*.

Selling without giving the notice to an owner in actual possession, required by *Iowa* Rev. 1860, § 3318; *Miller v. Iowa* Rev. Code, 1888, § 3087; *Jensen v. Woodbury*, 16 Iowa 515.

Selling on insufficient notice. *Supra*, this title, *The Notice*.

A sale without notice to the creditors, at which the property was bid in by one of the judgment debtors at a grossly inadequate price, was set aside. *Weir v. Travelers' Ins. Co.*, 32 Kan. 325.

Departing from the notice of a decretal sale as to massing or parceling. *Jarbo v. Colvin*, 4 Bush (Ky.) 70.

Selling at an improper time. *Supra*, this title, *The Time of Sale*.

Selling personal property not within view. *Supra*, this title, *The Place for Selling*. Also in bulk. *Welch v. Woodruff*, 51 Hun (N. Y.) 637. Or real estate not as prescribed. *Supra*, this title, *The Place for Selling—Realty*.

Ordinarily, the sale will not be set aside unless the sheriff has abused the discretion vested in him to the substantial injury of the execution defendant.¹

c. MISCONDUCT OF PLAINTIFF OR ATTORNEY.—An execution plaintiff and his attorney must be considered to know of any infirmities in the proceedings.² "Full and free competition implies that all parties have equal knowledge of the state of the title;" any device that tends to defeat fair competition invalidates the sale.³

Selling by an improper officer. *Supra*, this title, *By Whom*.

Selling to a person incompetent to purchase. *Supra*, this title, *To Whom—Inability to Contract*.

Selling contrary to decree and at a sacrifice. *Vanbussum v. Maloney*, 2 Metc. (Ky.) 550.

Prejudicially remarking that the purchaser will buy at his own hazard. *Marsh v. Ridgeway*, 18 Abb. Pr. (N. Y.) 262.

Misrepresenting as to the redemption. *Seller v. Lingerman*, 24 Ind. 264. Or other material fact in the terms of sale. *Anwerter v. Mathiot*, 9 S. & R. (Pa.) 397.

Fraudulently combining with the purchaser. *Garrett v. Moss*, 20 Ill. 549.

His crier's refusal to receive a bid. *Parker v. Pratt*, 8 N. J. Eq. 104. His auctioneer's injection of sham bids. *Veazie v. Williams*, 8 How. (U. S.) 134.

Abuse of discretion in parceling what would sell better *en masse*. *McLean Co. Bank v. Flagg*, 31 Ill. 290; 83 Am. Dec. 224.

And, conversely, *Meacham v. Sunderland*, 10 Ill. App. 123; *Morris v. Robey*, 73 Ill. 462.

Oppressively selling the center of a farm. *Hamilton v. Burch*, 28 Ind. 233.

Fraudulently misleading and concealing the fact of sale from the defendant. *Briscoe v. York*, 53 Ill. 484.

Needlessly selling more than enough to satisfy the execution. *Zylestra v. Keith*, 2 Desaus. Eq. (S. Car.) 140; *Groff v. Jones*, 6 Wend. (N. Y.) 522; 22 Am. Dec. 545; *Hicks v. Perry*, 7 Mo. 346; *Fletcher v. McGill*, 110 Ind. 395.

Levying, under an execution of \$109, on a steamboat worth \$40,000, while sufficient furniture thereof was available. *Silver v. McNeil*, 52 Mo. 518.

Erasing a return, etc., and fraudulently selling lands worth \$10,000 for

\$16.35, the amount of the fees and costs. *Sioux City, etc., Land Co. v. Walker*, 78 Iowa 476.

1. *Nix v. Williams*, 110 Ind. 234.

In *Louisiana*, neither mere informalities nor grounds for pursuing the sheriff to fulfillment of his duty are necessarily causes for setting aside the sale. *Gusman v. Le Blanc*, 27 La. Ann. 280.

The sale should not be set aside merely for his failure to deliver a certificate of sale required by the *New York Code*. *O'Brien v. Hashagen*, 20 Hun (N. Y.) 564. Nor for his neglect to levy until more than 120 days after issuance of the execution. *McIntyre v. Sanford*, 9 Daly (N. Y.) 21.

Nor for his indorsing the levy with an impossible date—*e. g.*, a year before the issuance. *White v. Farley*, 81 Ala. 563.

Nor for his selling while holding the proceeds of a void sale. *Runge v. Brown*, 29 Neb. 116.

2. *Winston v. Otley*, 25 Miss. 451; *Hays v. Cassell*, 70 Ill. 669; *Keeling v. Heard*, 3 Head (Tenn.) 592.

This presumption of notice extends to a bidder simply and secretly the plaintiff's agent. *Barber v. Reynolds*, 44 Cal. 519.

A purchase by the plaintiff's attorney from a grantee of a purchaser who had not paid the full amount of the bid was set aside. *O'Brien v. Harrison*, 59 Iowa 686.

A statute aiming to inspire confidence in purchasers was held not to extend to the plaintiff. *Pettingill v. Moss*, 3 Minn. 222; 74 Am. Dec. 747.

3. Opinion of the court, by Cooley, J., in *Messmore v. Huggard*, 46 Mich. 563, upon setting aside a sale of an equity of redemption bid off by the execution plaintiff, without informing other bidders that the mortgage was in fraud of creditors, and that he intended to contest it.

In *Kansas*, it was held to be ground for vacating the sale, that the plaintiff's

attorney misled one who wished to purchase, by telling him an incorrect date for the sale; and, moreover, that the sheriff failed to deposit a copy of the appraisal in the office of the clerk of the district court. *Jones v. Carr*, 41 Kan. 329.

If the plaintiff releases a levy made on land sufficient to satisfy a small part only of the writ, and causes a levy and sale of other land, the sale will not be deemed void; but it may be set aside, if necessary, in order to do equity between all parties concerned. *Milmine v. Bass*, 29 Fed. Rep. 632.

A collusive agreement between A, the execution plaintiff, and B, the defendant, that if B would not hinder the partition sale, A would pay him, was held to constitute a fraud upon other creditors of B; but not to affect the title of the purchaser, the proceeds being in the hands of the court. *Horsely v. Beveridge*, 4 Mackey (D. C.) 291.

Where the plaintiff had promised to notify A, who was interested in the property, of the time and place of the sale, and forgot to do so, and A not being present, property worth \$900 went for \$160, the sale was set aside. *Pell v. Vreeland*, 35 N. J. Eq. 22.

But in *Missouri* the court refused to set aside a sale for the plaintiff's failure to keep a promise to notify the defendant, where both resided in the county, and the promise was a mere gratuity, supported by no consideration; the evidence being conflicting as to the defendant's having said he would, if so notified, make the tract bring the amount of the judgment. *Bailey v. Smock*, 61 Mo. 220.

Where the plaintiff's attorney promised B, the defendant, not to proceed without notice to B or to B's attorneys, but afterwards, without notice, had an execution issued and levied on B's land worth \$10,000, and the plaintiff became the purchaser at \$103, and after fifteen months obtained the sheriff's deed without the knowledge of B, then absent in Europe, it was held that the sale should be set aside, and B be allowed to redeem. *Mathison v. Prescott*, 86 Ill. 493.

In *North Carolina*, a sale was set aside where the execution plaintiff caused a temporary suspension thereof and meanwhile deceived the defendant's attorney, and became the purchaser at

an inconsiderable sum. *Currie v. Clark*, 90 N. Car. 355.

In *New York*, a purchase by the execution plaintiff's agent, who was a receiver appointed by the court, charged with the duty of applying the defendant's property to the payment of the debts, made at a price less than he was instructed to bid, and for his individual benefit, was set aside. *Sheldon v. Saenz*, 59 How. Pr. (N. Y.) 377.

At a sale under A's execution of \$260, against B, by a conspiracy between C who was A's attorney, D, who was the sheriff's clerk, and E, land of B, worth \$1,000, was bid off by D, without competition, for \$47, and his bid transferred to E. The value was concealed from the sheriff. Upon a bill in equity by B against A, C and E, it was held that the sale should be set aside, leaving both A and B where they were before the levy. *Massey v. Young*, 73 Mo. 260.

After A's execution against B had been returned unsatisfied, he assigned the judgment to C, his attorney, to secure costs due him. A died. Nearly seventeen years after the rendition of the judgment, C, without application to the court, took out a second execution, indorsed it as plaintiff's attorney, and caused certain land to be levied on and sold that B, shortly before its issuance, had sold to D. Held, that D was entitled to have the execution sale set aside; and this, without considering whether B's conveyance to D was made to defraud B's creditors. *Duryee v. Botsford*, 24 Hun (N. Y.) 317.

A agreed with B's judgment creditors to purchase at execution sale B's property if not going beyond \$13,000, and if the sum bid be not sufficient to pay off all the judgments, then to pay them off and take an assignment thereof. A bid off the property worth over \$60,000 for \$4,605. At the suit of B and his other creditors, the sale was set aside. *Barrett v. Bath Paper Co.*, 13 S. Car. 128.

A sale of the defendant's homestead, during his absence, after publication in a remote newspaper of small circulation, and posting of notices in obscure places, was set aside. *Jennings v. Carter*, 53 Ark. 242. Compare the execution plaintiff's rascality in *Fletcher v. McGill*, 110 Ind. 395.

In *West Virginia*, the plaintiff's omission to give the statutory bond in case of a foreign attachment caused the sale to be set aside. *Hall v. Lowther*, 22 W. Va. 570.

In *Kentucky*, a sale to the plaintiff

The execution defendant may, by inaction, lose the right to have a sale to the plaintiff set aside. The tendency of the recent decisions in order to promote confidence in the titles derived from such sales is to abridge the time in which the party attacking the sale must act.¹

d. MISCONDUCT OF THE DEFENDANT.—The execution defendant is precluded from having the sale set aside for inadequacy of price consequent upon his own wrong sayings or doings.² But

was set aside because a credit to which the defendant was entitled was not indorsed on the writ. *Davie v. Long*, 4 Bush (Ky.) 574.

In *Kansas*, a sale at an inadequate price was set aside, where the execution plaintiff's attorney misled one by telling him an incorrect date of sale. *Jones v. Carr*, 41 Kan. 329.

1. See *supra*, this title, *The Purchaser's Liabilities; Laches*.

Where the execution defendant, on learning that the plaintiff's attorney had broken an agreement to postpone the sale, made no attempt to be present at the sale to an innocent purchaser, the sale, although at a grossly inadequate price, was left undisturbed. *Carden v. Lane*, 48 Ark. 216.

A, a senior judgment creditor of B, agreed with B that A should bid a certain sum at the execution sale, and B have the privilege of selling the land, paying the amount of the judgment, and retaining the balance. To keep C, a junior judgment creditor, from bidding, A and B each gave him \$100. A bid in the land, and eighteen months afterwards, B having done nothing, A ordered him off. *Held*, that B could not maintain ejectment, not having tendered the amount of A's judgment. *Phillips v. Hull*, 101 Pa. St. 567.

An execution defendant seeking to quiet title against A, a purchaser for value from the purchaser at the sheriff's sale, on the ground of collusion and bad faith of attorneys, must show guilty knowledge on the part of A. *Lavender v. Holmes*, 23 Neb. 345.

In *Texas*, in the purchaser's title suit against the execution defendant, it was held that the latter could set up the misconduct of the execution plaintiff inducing the sheriff to forego levying on personal property, as required by the *Texas Code*, before touching improved real estate. *Stone v. Day*, 69 Tex. 13.

In *Nebraska*, where, five months before the judgment was recovered, the

plaintiff published in a newspaper a statement that the defendant's title was fraudulent, and cautioned the public against purchasing from him, this was held to be no ground for setting the sale aside, it not appearing that such publication was made for the purpose of preventing competition. *Runge v. Brown*, 29 Neb. 116.

See *supra*, this title, *The Purchaser's Liabilities—Relief*.

2. *Weaver v. Nugent*, 72 Tex. 272. Deceiving the plaintiff and the officer as to the locality of the land, thus getting an excessive bid. *Mulks v. Allen*, 12 Wend. (N. Y.) 253.

Where the defendant was present and forbade the sale, proclaiming that the lot was his wife's separate property, and exempt as a homestead, and threatening to sue any purchaser, it was held that the sale should not be set aside for consequent inadequacy of price obtained. *Blum v. Rogers*, 71 Tex. 668.

A verbally agreed with B to exchange certain mortgaged land for land owned by B, who assumed payment of the mortgage. B took possession, improved the land, and paid the mortgage. A judgment afterwards rendered against A as principal, and C as surety, was made a lien on B's land. B then conveyed to A, and A, at B's request conveyed to D, who purchased from B. The land was sold to C on an execution against A and C, C knowing D's title and B's possession. *Held*, that D was entitled to have the sale set aside. *Armstrong v. Fearnaw*, 67 Ind. 429.

In *Mississippi*, where the plaintiff had not ordered the execution to be issued nor the levy to be made, pending a trust sale, a sale of land worth \$6,000 for \$2 to the defendant's brother as agent for the defendant's wife was set aside. *Taylor v. Eckford*, 11 Smed. & M. (Miss.) 21.

In *Alabama*, an application of the execution defendant and his wife to have the sale set aside, on the ground

in absence of any showing of fraud upon his creditors, arrangements made in his interest will not be disturbed.¹

e. MISCONDUCT OF THE PURCHASER.—The fact that the purchaser, whether party or stranger, procured by confederation or otherwise, a sale oppressive to the defendant or unjust to creditors, is a ground for annulling it.²

f. INADEQUACY OF PRICE.—As a general rule, inadequacy of price, however gross, is no ground for setting aside the sale, if accompanied by no circumstance of unfairness, fraud, chicanery, misapprehension, indiscretion, or abuse of trust.³

that at a prior sale of the same land under execution, she had become the purchaser, was refused. *Sheffey v. Davis*, 60 Ala. 548.

1. *E. g.*, his agreement for the purchaser to hold the property for him until repaid the purchase money. *Peebles v. Pate*, 90 N. Car. 348. Compare *Pentz v. Clark*, 100 Pa. St. 446.

The facts that a debtor, desiring to prefer one of two judgment creditors, failed to make a defense to which he was entitled, and brought certain goods within reach of the execution just before the sale, and very soon thereafter, a petition in bankruptcy was filed, were held not to invalidate the sale. *Louchheim v. Henzey*, 86 Pa. St. 350; 18 Bankr. Reg. 173.

Where, after A's execution against B and C is returned satisfied, A assigns the judgment to B, a sale of C's property under a second execution issued at B's instance, is void. *French v. Edwards*, 5 Sawy. (U. S.) 266.

A sale of A's property under an execution against A and B will not be set aside merely because B became the purchaser thereof and subsequently became the assignee of the unsatisfied portion of the judgment. *Windle v. Brandt*, 55 Iowa 221.

An agreement of the plaintiff to enforce the execution only against certain property, in consideration of the defendant's agreement to be defaulted, and not to set up a discharge in insolvency, was held valid. *Whitney v. Haverhill Mut. F. Ins. Co.*, 9 Allen (Mass.) 35.

2. See *supra*, this title, *To Whom—The Highest Bidder. Combinations to Depress; The Purchaser's Title—Bona Fides; The Purchaser's Liabilities*, etc.

It must be shown that the property was thereby obtained at less than its value. So held on setting aside a sale, even after the statutory period of re-

demption, by reason of the purchaser's preventing competition, through false representations as to incumbrances. *Lynch v. Reese*, 97 Ind. 360.

So, also, through procuring the sheriff to violate the statutory requirement to levy on personal property before seizing improved real estate. *Stone v. Day*, 69 Tex. 13.

So, also, through combining with the assignor of the judgment to circulate a false rumor that another owned the judgment and was determined to bid in the land for himself. The assignor is obligated to do no act inconsistent with his changed relation to the judgment. Where once a fraud has been committed, not only the perpetrator but also everybody else is precluded from deriving any benefit therefrom, unless one has innocently acquired a subsequent interest. *Hudson v. Morriss*, 55 Tex. 595. So, also, where a deputy clerk improperly issued an execution on a judgment for costs (for less than \$3, after deducting illegal fees) and combined with the deputy recorder to purchase 240 acres of land worth \$2,400 at less than seven cents an acre. *Beedle v. Mead*, 81 Mo. 297.

So, also, where one combined with a sheriff and an executor to have sold *en masse*, under a judgment against the testator, parcelable land worth \$60,000 for \$600. *Kinney v. Knoebel*, 51 Ill. 112.

So also, where the purchaser knew that competition was prevented by a purchaser in possession under a tax deed, representing himself to hold under a deed from the owner. *Taylor v. Courtney*, 15 Neb. 190.

3. This principle of public policy has become embodied in some statutes.—*e. g.*, in *Georgia*: "Inadequacy of price is no ground for rescission of a contract of sale, unless it is so gross as, combined with other circumstances, to amount to a fraud." *Georgia Code*,

And thus in the absence of statute it is held that a sheriff's sale shall not be set aside for inadequacy of price "unless so gross as to amount to a fraud."¹

1882, § 2647. Accordingly fraud must be alleged and proved before a sheriff's sale will be set aside for gross inadequacy of price. *Gunn v. Slaughter*, 83 Ga. 124.

In *Irby v. Irby*, 11 Lea (Tenn.) 165, the court, by Cooper, J., said: "It is no ground of exception to a sale *in invitum* that the price obtained was inadequate; the only test of value is what the property will bring." Compare *Beckwith v. King's M. Min. Co.*, 87 N. Car. 155; *Allen v. Pierson*, 60 Tex. 604; *Sigerson v. Sigerson*, 71 Iowa 476; *Coolbaugh v. Roemer*, 32 Minn. 445; *Kerr v. Haverstick*, 94 Ind. 178; *Craig v. Garnett*, 9 Bush (Ky.) 97; *Clement v. Reid*, 9 Smed. & M. (Miss.) 535; *Watt v. McGalliard*, 67 Ill. 513; *O'Callaghan v. O'Callaghan*, 91 Ill. 228; *Tripp v. Cook*, 26 Wend. (N. Y.) 143; *Campau v. Godfrey*, 18 Mich. 27; 100 Am. Dec. 133; *Cushwa v. Cushwa*, 5 Md. 55; *Cloeman v. Bank of Hamburg*, 2 Strobh. Eq. (S. Car.) 285; 49 Am. Dec. 671.

1. A sale *en masse* of two Chicago lots worth \$8,000 for \$65.38, was set aside therefor. *Berry v. Lovi*, 107 Ill. 612. But whereupon an offer of land worth \$2,000 *en masse* the highest bid was \$1,200, and on being offered in parcels brought in the aggregate \$1,900, the court refused to set the sale aside. *Duncan v. Sanders*, 50 Ill. 475.

The sale cannot be collaterally avoided for the inadequacy. *Elston v. Castor*, 101 Ind. 426; 51 Am. Rep. 754.

The fact that the sale was for less than the value of the goods, and that they were allowed to remain in the defendant's possession was held not to establish fraud. *Boyce v. Cannon*, 5 Del. 409.

The rule that mere inadequacy of price is not sufficient ground for setting aside a sale was applied in a suit for title to the possession of certain land alleged to be worth \$30,000 purchased for \$1,200. *Assoc. v. Brewster*, 51 Tex. 257.

In *Cummins v. Little*, 16 N. J. Eq. 51, the court by Green, Ch., said: "If mere inadequacy of price were a ground of relief, the principle would operate as a stay law." . . . "While this is not of itself a ground of relief, it is always a circumstance which quickens the diligence of the court in in-

vestigating the conduct of the officer, and calls into prompt and vigorous exercise its protecting agency against abuse of power."

After citing, with approval, the opinion of the court, by Kent, Ch., in *Tiernan v. Wilson*, 6 Johns. Ch. (N. Y.) 413, Chancellor Green proceeded: "An entire farm of 165 acres, worth \$9,000, incumbered for less than half its value, is put up to satisfy a claim of \$81.41, including debt, interest, costs, and sheriff's fees. Any five acres would have sold for enough to satisfy the demand. The fact that the whole farm was offered for sale to pay so paltry a sum was in itself calculated to excite distrust. No honest purchaser would have bid with an expectation of buying. He must have believed either that the property was incumbered, or that there was a defect of title, or the plaintiff being a sister of the defendant and the principal bidder his brother-in-law, that it was a mere formality by way of cover or perfecting a title. Not only so, but the sheriff announces to the bidders that if \$80.41 are bid, he will strike the property off; if not, the sale will be adjourned. That was the instruction he had received from the attorney."

The comment of Chancellor Kent was equally forcible: "Such a sale carries an abuse on the very face of it, and leads to the most oppressive speculation." In a previous case, *Howell v. Baker*, 4 Johns. Ch. (N. Y.) 122, a sale on a stormy day at a grossly inadequate price, to the only person present other than the officer, he said: "The most reasonable conclusion, and the only one honorable to the defendant, is, that the purchase was intentionally made at the time in trust for the respective interests of the parties to the execution."

In *Pennsylvania*, at an execution sale of a portable steam sawmill worth \$1,400, the deputy marshal being present, his crier was the only bidder, and after a week's adjournment, his bid of \$20 was accepted. In holding them not guilty of trespass, the court, by Woodward, J., said: "Property lawfully exposed to public sale must take its chances. Courts having control of writs of execution, do some-

Inadequacy of price justifies the court, in exercise of its discretion, to lay hold of any irregularity however slight and technical.¹ Sometimes a sale has been set aside for nothing else than

times treat gross inadequacy of price as a reason for setting aside sales of real estate, but personal property fairly advertised, fairly cried, and fairly knocked down, must go for what it will fetch. Assuredly the only bidder is not to be accounted guilty of a fraud because others were not venturous enough to outbid him." *Swires v. Brotherline*, 41 Pa. St. 140.

In *Warfield v. Ross*, 38 Md. 85, in declining to vacate a sale of property in Baltimore county, worth \$8,000, for \$4,450, after "both the attorney and the purchaser had manifested an anxious and laudable readiness to relinquish the purchase and restore the property to the mortgagors, the court, by Bowie, J., said: "Standing alone, inadequacy of price is insufficient to authorize interference with a sale, unless it is so inordinate as to indicate some mistake or unfairness, for which the purchaser is responsible, or misconduct or fraud in the trustee, to whom the management of the sale has been committed."

In *New York*, it has been held that the inadequacy may be so gross as, while not rendering the sale void, to justify relief on that ground alone, where no rights of third parties have intervened—*e. g.*, where land worth \$30,000 was sold for \$190. *Chapman v. Boetcher*, 27 Hun (N. Y.) 606.

1. *E. g.*, omission of the sheriff to file a duplicate certificate of the sale in the proper register's office was deemed sufficient occasion to vacate a sale of property worth \$1,100 for \$186; this, on terms of paying the amount bid and costs. *Grede v. Dannenfelser*, 42 Wis. 78. Similarly an omission of the sheriff's report to show sale during session of court. *Cubbage v. Franklin*, 62 Mo. 364. So, also, the clerk's issuance of an order of sale without the plaintiff's knowledge, the price being about one-fortieth of the value. *Hughes v. Duncan*, 60 Tex. 72.

Omission of demand and notice, in case of a defendant having available personal property, was deemed occasion to vacate a sale of a block of real estate worth \$350,000 for \$17.25, amount of judgment, interest and costs. *Davis v. Chicago Dock Co.*, 129 Ill. 180.

In another *Illinois* case, even after

the redemption period, omission of personal notice was deemed occasion to vacate a sale of land for the amount of the judgment, one-twentieth of the value, under execution issued on the transcript of a justice's judgment filed in the circuit court. *Hobson v. McCambridge*, 130 Ill. 367.

Omission to make demand on sureties, caused to be vacated a sale of land worth \$7,000 for \$10. *Weaver v. Nugent*, 72 Tex. 272.

In *California* a sale *en masse* of property worth \$20,000 for \$1,755, the sheriff and the purchaser not knowing that it was parcelable. *Smith v. Randall*, 6 Cal. 47; 65 Am. Dec. 475.

In *Kloepking v. Stellmacher*, 21 N. J. Eq. 328, the court set aside a chancery sale of land worth \$1,500 for \$52, of defendant's "ignorant, stupid, perverse and poor," "though the information was given and understood." In *Graffam v. Burgess*, 117 U. S. 192, on setting aside a sale of real estate worth \$10,000 for \$81.21, on a claim of \$200 against a defendant who had sufficient available personal property, the court, by Bradley, J., said: "From the cases here cited, we may draw the general conclusion, that if the inadequacy of price is so gross as to shock the conscience, or if in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property or party interested in it has been for any other reason misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold. Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud." Compare *Hunt v. Fisher*, 29 Fed. Rep. 801; *Schilling v. Lintner*, 43 N. J. Eq. 444; *Teele v. Yancey*, 23 Gratt. (Va.) 691; *Sinnett v. Cralle*, 4 W. Va. 600.

In *Delaware*, an execution sale of land worth \$25,000 for \$17,500 was set aside for the fact that a bystander would have bid \$25,000, had he not been prevented by deafness from hearing the biddings, and had his agent obeyed his instructions. *Broomall v. Reybold*, 5 Del. 435.

"shocking inadequacy of price."¹ The statutes of some States fix a minimum limit of price, a prescribed ratio of the valuation, generally two-thirds thereof.²

Inadequacy of price is never *per se* a ground for granting the defendant's prayer to have the sale annulled, if the right of redemption exists, and he gives no good excuse for not having exercised it.³ So, also, may he be precluded by laches importing acquiescence.⁴ So, also, may he be estopped by his own direct agency in the result.⁵

XVIII. THE RETURN—1. Requisites.⁶

2. **Between Whom Conclusive.**—Between the parties to the suit, and "those claiming under them as privies, and all others whose rights and liabilities are dependent upon the suit as bail and indorsers, the return of the sheriff of matters material to be

1. In *Henderson v. Sublett*, 21 Ala. 630, the court, by Ligon, J., said: "When the inadequacy is so glaring and gross as at once to shock the understanding and conscience of an honest and just man, it will of itself authorize the court to set aside the sale. For instance, if, as in the case under consideration, a tract of land of the value of \$1,800 is sold for \$5, the court out of which the execution issued should not hesitate to set aside the sale for this cause alone."

In another *Alabama* case, of land of A worth \$1,800, mortgaged to B for \$400, the equity of redemption was sold to B for \$200, the amount of the execution debt, twenty times the sum bid by him shortly before, at another execution sale against A, for an adjoining tract of the same size and of nearly the same value and unincumbered, the two constituting an entire plantation. The court set aside both sales. *Ray v. Womble*, 56 Ala. 32. Compare *Lankford v. Jackson*, 21 Ala. 650, where was vacated a sale of land worth \$1,000, at \$600.

2. *Ohio* Rev. Stat. 1890, § 5391; *Indiana* Rev. Stat. 1881, § 732; *Kansas* Gen. Stat. 1889, § 4553; *Nebraska* Comp. Stat. 1889, p. 920, § 491d; *Oklahoma* Stat. 1891, § 4754; *New Mexico* Comp. Laws, 1884, § 2171.

In *Kentucky*, the defendant has the right to redeem, if the land brings less than two-thirds of its valuation. *Kentucky* Gen. Stat. 1887, p. 563, § 4.

Where many lots of land were sold to the agent of all the judgment creditors, and few bids made except by him, and eight lots went at less than

two-thirds their appraised value, some at only one-fourth, the sale was set aside, except as to lots transferred to innocent purchasers for value. *Capital Bank v. Huntoon*, 35 Kan. 577.

3. *Mixer v. Sibley*, 53 Ill. 61; *Peterson v. Little*, 74 Iowa 223; *Black v. Steele* (Ky. 1887), 6 S. W. Rep. 23.

In *Louisiana*, he cannot attack the sale on the ground that the price does not exceed a prior conventional incumbrance, where the holders have filed a third opposition claiming to be paid out of the proceeds. *Lane v. Cameron*, 36 La. Ann. 773.

4. *Supra*, this title, *Vacating Sales—Laches*.

Where the assignee of a mortgage debt unlawfully caused the mortgaged property to be sold to satisfy the same debt, it was held that after four years' acquiescence of the owner, an innocent purchaser from the execution purchaser should not be disturbed. *Waller v. Tate*, 4 B. Mon. (Ky.) 529.

5. *Supra*, this title, *Vacating Sales—Misconduct of the Defendant*.

So held where he caused the land to bring less than one-tenth of its value. *Atcheson v. Hutchison*, 51 Tex. 223; So, also, where land alleged to be worth \$4,000 was sold *en masse* for \$77.60. *Pearson v. Flanagan*, 52 Tex. 266.

So, also, are estopped both he and one to whom he had conveyed the property in fraud of creditors. *Miller v. Koertge*, 70 Tex. 162. *McCanless v. Flinchum*, 98 N. Car. 358.

6. See EXECUTIONS, vol. 7, p. 155.

As to the effect of the time of the return upon the validity of the sale, see *supra*, this title, *The Time, etc.*—*If After Return Day*.

returned is so far conclusive evidence, that it cannot be contradicted for the purpose of invalidating the sheriff's proceedings, or defeating any right acquired under them. But such return is not conclusive as to third persons whose interests are not connected with the suit, but may be affected by the proceedings of the sheriff, or matters not necessary or proper to be returned."¹

In most of the *New England States*, under an extent on real estate, a correct return is an indispensable muniment of the plaintiff's title.²

3. Practice.—The practice as to traversing the return depends, of course, on the system of pleading peculiar to each State.³ So also as to amendments and relation back.⁴ Ordinarily, parties and privies may controvert the return only in an action against

1. *Brown v. Davis*, 9 N. H. 81. Compare *Angier v. Ash*, 26 N. H. 99; *Butler v. State*, 20 Ind. 169; *Witherill v. Goss*, 26 Vt. 748; *Phillips v. Elwell*, 14 Ohio St. 240; 84 Am. Dec. 373; *Bruce v. Holden*, 21 Pick. (Mass.) 187; *Cozine v. Walter*, 55 N. Y. 304; *Tullis v. Brawley*, 3 Minn. 277; *Knowlton v. Ray*, 4 Wis. 288.

The purchaser is not bound by the return. *Moore v. Martin*, 38 Cal. 428; *Wyatt v. Stewart*, 34 Ala. 716.

The purchaser, having no control over the sheriff, is not to be prejudiced by any incorrectness or want of return; his title does not depend thereon. *Brooks v. Rooney*, 11 Ga. 423; 56 Am. Dec. 430; *Forrest v. Camp*, 16 Ala. 642.

A recital in the return may be proved by the sheriff to have been made inadvertently. *King v. Russell*, 40 Tex. 124. But in general the return cannot be varied or contradicted by his parol testimony. *Ayres v. Duprey*, 27 Tex. 593; 86 Am. Dec. 657.

In *Louisiana*, the recitals in the return are only *prima facie* evidence of the facts stated in it between the parties. *Grant v. Harris*, 16 La. Ann. 323.

In *Michigan*, where a purchaser of goods at an execution sale colluded with the sheriff to have the return falsely state the date of the levy, in order to defraud a mortgagee, it was held that the return might be contradicted by parol testimony. *Nall v. Granger*, 8 Mich. 450; 77 Am. Dec. 462.

In *Pennsylvania*, the sheriff may deny the truth of his return as against a person who fraudulently procured him to make it. *Evans v. Matson*, 51 Pa. St. 366; 88 Am. Dec. 584.

The fact that a return to a notice of inquisition did not fully show legal notice to the defendant, was held not to be fatal to the purchaser's title. *Atkinson v. Tomlinson*, 91 Pa. St. 284.

In *Mississippi*, where the plaintiff was the purchaser, and receipted for part of his bid as money, it was held that the sheriff might show that the sum stated in the return had not been actually received by himself. *Shotwell v. Hamblin*, 23 Miss. 156; 55 Am. Dec. 83.

As to control of the recitals in the return by those in the deed, see *infra*, this title, *Variance from The Return*.

2. In *Massachusetts*, as to its force, see opinion by Story, J., in *U. S. v. Slade*, 2 Mason (U. S.) 76.

In *Rhode Island*, an essential defect in the return cannot be remedied by evidence *aliunde*. *Wilcox v. Emerson*, 10 R. I. 270; 14 Am. Rep. 683.

In *Vermont*, one claiming title to personal property by virtue of an execution sale, may show that it was made in a different manner from that stated in the return. *Drake v. Mooney*, 31 Vt. 617; 76 Am. Dec. 145.

3. *Spring v. Frank*, 81 Ga. 162; *Egery v. Buchanan*, 5 Cal. 53.

In *Pennsylvania*, the sheriff cannot be compelled to alter his return as to a matter of fact. *Vastine v. Fury*, 2 S. & R. (Pa.) 426; *Boas v. Updegrove*, 5 Pa. St. 516; 47 Am. Dec. 425.

4. *Brandon v. Snow*, 2 Stew. (Ala.) 255; *Wilton Mfg. Co. v. Butler*, 34 Me. 431; *Welsh v. Joy*, 13 Pick. (Mass.) 477; *Cogswell v. Mason*, 9 N. H. 48; *Bullitt v. Winston*, 1 Munf. (Va.) 269; *Wilson v. Bucknam*, 71 Me. 554.

the sheriff for a false return.¹ Proceedings upon the return, are generally prescribed by statute.²

XIX. CONFIRMATION—1. At Law—*a*. NECESSITY AND EFFECT.—A few States have statutes prescribing a formal confirmation of the sale.³ Some statutes recognize it as a prerequisite of the deed, without formally directing it.⁴

In the absence of a contrary provision, the order has the force of a judgment.⁵ Whenever a statute requires the sale to be reported to and approved by the court, a conveyance without confirmation is void.⁶

1. *Bean v. Parker*, 17 Mass. 591; *Stewart v. Stringer*, 41 Mo. 400; 97 Am. Dec. 278; *Hallowell v. Paige*, 24 Mo. 590; *Clough v. Monroe*, 34 N. H. 381; *Witherell v. Goss*, 26 Vt. 748; *Castner v. Styer*, 23 N. J. L. 236; *Phillips v. Elwell*, 14 Ohio St. 240; 84 Am. Dec. 373; *Paxson's Appeal*, 49 Pa. St. 195.

As to remedies against the sheriff for a false return, see *infra*, this title, *Sheriff's Rights*, etc.—*Amercement*.

2. In *Alabama*, on return that goods levied on remain unsold, the clerk must issue a writ for their sale, in form prescribed by *Alabama Civil Code*, 1886, § 2915. See *supra*, this title, *Disposal of Proceeds*.

3. In *Ohio*, if it be found by the court "that the sale has been made in all respect in conformity to the provisions of this title, the clerk shall be directed to make an entry," etc. *Ohio Rev. Stat.*, 1890, § 5398.

The sheriff should keep the proceeds until the confirmation. *Stone v. Ruffin*, 2 Ohio 503.

In *Oregon*, "An order confirming a sale shall be a conclusive determination of the regularity of the proceedings concerning such sale, as to all persons, in any other action, suit, or proceeding whatever." *Oregon Annot. Laws*, 1887, § 296, p. 4.

The *Kansas* law is like that of *Ohio*. *Kansas Gen. Stat.*, 1889, § 4556.

An *ex parte* confirmation is not conclusive evidence, binding upon all parties that may possibly be affected by it, that the land ordered to be sold was that sold, or was legally sold. *Rice v. Poynter*, 15 Kan. 263.

4. *Delaware Laws*, 1874, p. 680, § 26.

The *Nebraska* statute is like that of *Kansas*. *Nebraska Comp. Stat.* 1889, p. 921, § 498.

In absence of any showing of fraud, the confirmation gives a good title,

notwithstanding failure to publish notice thirty days before the sale. *Wyant v. Tuthill*, 17 Neb. 495. But where the confirmation, after being entered, is at the same term set aside before a transfer of the property by the purchaser, his vendee acquires no title. *Young v. DePutron*, 37 Fed. Rep. 46.

The *Minnesota* foreclosure statute provides for a like entry of confirmation. *Minnesota Stat.*, 1891, § 5390. The confirmation raises a presumption that the statutory prerequisites were complied with. *Closen v. Whitney*, 39 Minn. 50.

The *Dakota* territorial statute was like that of *Ohio*. *Dakota Comp. Laws*, 1887, § 5149.

5. *Infra*, this title, *Confirmation—Proceedings*.

In *Louisiana*, ordinarily, a judgment in motion approving the sale, operates as a bar to any further proceedings touching its validity. *Willis v. Nicholson*, 24 La. Ann. 545. Compare the *Maryland* foreclosure practice. *Cockey v. Cole*, 28 Md. 276; 92 Am. Dec. 684.

6. *Curtis v. Norton*, 1 Ohio 278.

Reversal of the order of confirmation after execution of the sheriff's deed, divests any title thereby acquired. *McBain v. McBain*, 15 Ohio St. 337; 86 Am. Dec. 478.

It is error to confirm a sheriff's sale against objection of a defendant who has paid the decree or judgment in full. *Reed v. Radigan*, 42 Ohio St. 292.

Under the *Maryland* act of 1831, ch. 290, requiring confirmation of a constable's sale of realty by the county court, the justice's judgment cannot otherwise become a lien thereon. *Candler v. Fisher*, 11 Md. 332. If the judgment be void *ab initio*, the confirmation vests no title. *Koechlept v. Hook*, 10 Md. 173; 69 Am. Dec. 133.

b. PROCEEDINGS.—The sale may be confirmed on motion by any person interested, or by the court on its own motion.¹ The court cannot modify the terms of sale; it must either confirm or reject.²

c. GROUNDS FOR REFUSING.—Whatever would require that a sale be set aside, is, *a fortiori*, ground for refusing its confirmation.³ If the officer has failed to comply with the plain letter of a mandatory statute, the court will disaffirm the sale and order a new one.⁴ So, also, if, with apparently damnifying consequence, he has violated the spirit of the statute.⁵

2. In Chancery and Probate.—In decretal sales, the purchaser is ordinarily considered a mere preferred bidder.⁶ The court may refuse to accept his bid for many reasons which do not apply to a common execution sale.⁷ In those States, however, where a foreclosure sale is made by a special writ of execution, no report or confirmation is required.⁸

A decree authorizing a trustee, commissioner, or sheriff to sell, must also require a report and confirmation.⁹ After confirmation, a foreclosure sale "will not be set aside for inadequacy of price unless it be also shown that the sale was unfairly conducted, or there was fraud or surprise,¹⁰ or mistake, which prevented the

1. In *Kansas*, after the sheriff's return, even without his consent. *Ferguson v. Tutt*, 8 Kan. 370. But compare *Collins v. Ritchie*, 31 Kan. 371.

The purchaser is a party entitled to make the motion, or to proceed in order to reverse an order overruling it. *Cowdin v. Cowdin*, 31 Kan. 528.

2. *Ohio L. Ins. & T. Co. v. Goodin*, 10 Ohio St. 557.

So also as to the action of the *Maryland* court of appeals upon a confirmation, by the county court of a constable's sale of realty under a justice's execution. *Kinnear v. Lee*, 28 Md. 488.

If any objection properly available upon the hearing be not then interposed, or if then made be overruled, it can never be asserted collaterally; the order having the effect of an ordinary judgment. *Mayer v. Wick*, 15 Ohio St. 548. It seems that in *Ohio* the remedy would be by writ of error. *Reeves v. Skerrett*, 13 Ohio St. 574.

Such is the practice under the *Minnesota* foreclosure law. *Hotchkiss v. Cutting*, 14 Minn. 537.

In *Kansas*, the order is reviewable by petition in error. *Moore v. Pye*, 10 Kan. 246.

3. See *supra*, this title, *Grounds for Vacating*.

4. *Köhler v. Ball*, 2 Kan. 160; 83 Am. Dec. 451.

5. *E. g.*, inefficiently posting the no-

tices. *Roger v. Ocheltree*, 4 Houst. (Del.) 452. Publishing in a paper of small circulation. *Craig v. Fox*, 16 Ohio 563.

6. See JUDICIAL SALES, vol. 12, pp. 209, 219; *Busey v. Hardin*, 2 B. Mon. (Ky.) 411.

7. *E. g.*, an agreement by the petitioning creditor to advance upon the bid. *Childress v. Hurt*, 2 Swan (Tenn.) 487. But compare *Kellogg v. Howell*, 62 Barb. (N. Y.) 280, and *King v. Platt*, 37 N. Y. 155. Surprise. *Mitchell v. Harris*, 43 Miss. 314; *Dale v. Shirley*, 5 B. Mon. (Ky.) 495; *Williamson v. Dale*, 3 Johns. Ch. (N. Y.) 290. A misunderstanding as to the scope of a party's authority. *Taylor v. Gilpin*, 3 Metc. (Ky.) 544.

8. *Jones, Mort.* (4th ed.), § 1637.

9. *Daniel's Ch. Pl. & Pr.* (5th ed.), § 1281; *Dula v. Seagle*, 98 N. Car. 458. Unless the rule be modified by some statutory provision. *Clark v. Reyburn*, 8 Wall. (U. S.) 318.

As to the practice in *Virginia* upon a supplementary report, see *Crockett v. Sexton*, 29 Gratt. (Va.) 46.

10. In *Tennessee*, after the confirmation and the court session thereof, the sale can only be set aside upon an original bill, setting up fraud or accident, etc.; but not on facts known before the sale. *Spence v. Armour*, 9 Heisk. (Tenn.) 167.

obtaining of any adequate price, or the party had no notice of the order of sale,¹ or of the confirmation thereof."²

The confirmation does not divest title nor dispense with the necessity of the officer's conveyance.³ As the title does not vest until after the confirmation, a defendant in possession may meanwhile remove whatever crops are in a condition to be cut "in the usual course of good farming."⁴

XX. REDEMPTION.⁵

XXI. THE DEED—1. Ministerial Necessity.—In *Canada*,⁶ and in most of the States, the purchaser's title to real estate is inchoate, until the sheriff has executed and delivered to him a formal conveyance.⁷ Indeed, in many States, until this, the title and right of possession are deemed to be in the execution defendant.⁸ In a few States the deed has been declared not to be a necessary ministerial act of title, its execution and delivery being merely a ministerial act of the sheriff.⁹ In the *New England* and other

1. *Nugent v. Nugent*, 54 Mich. 557.

2. *Jones on Mort.* (4th ed.), § 1670. [See in Mr. Jones' note an excellent collation of authorities by States.]

3. *Webster v. Hill*, 3 Sneed (Tenn.) 333.

So, also, in *Pennsylvania*, as to a sale by the orphans' court. *Erb v. Erb*, 9 W. & S. (Pa.) 147. The confirmation is not complete until the purchase money be paid and the deed delivered. *Leshey v. Gardner*, 3 W. & S. (Pa.) 314; 38 Am. Dec. 764.

4. *Allen v. Elderkin*, 62 Wis. 627. If the purchaser takes possession before the confirmation, he is a trespasser and liable for mesne profits. *Lupton v. Almy*, 4 Wis. 242.

Until the confirmation, the purchaser cannot be compelled to pay. *Daniel's Ch. Pl. & Pr.* (5th ed.), § 1279.

5. See REDEMPTION.

6. In *England*, on levy upon a leasehold, in *Doe v. Dnston*, 1 B. & Ald. 232, the court, by Ellenborough, C. J., said: "The execution of the conveyance requisite to give the vendee a good title was an act necessary for the sheriff's completion of the sale." This case was followed in *Canada* in *Doe v. Miller*, 10 U. C., Q. B. 65, 72, wherein the court, by Robinson, C. J., said: "All are agreed that without a conveyance by deed following a sale of real property by the sheriff, the title of the purchaser is not complete, even where a term only has been sold."

7. *Barclay v. Plant*, 50 Ala. 509; *People v. Mayhew*, 26 Cal. 655; *Curtis v. Millard*, 14 Iowa 128; 81 Am. Dec. 460; *Leger v. Doyle*, 11 Rich. (S.

Car.) 109; 70 Am. Dec. 240; *Holmes v. McMaster*, 1 Rich. Eq. (S. Car.) 340.

In *Missouri*, the deed does not cut out intervening rights of strangers. *Strain v. Murphy*, 49 Mo. 337.

If the deed be lost before its registration, he should execute a substitute. *McMillan v. Edwards*, 75 N. Car. 81.

8. *Smith v. Colvin*, 17 Barb. (N. Y.) 157; *Hayes v. New York Gold Min. Co.*, 2 Colo. 273; *Goss v. Meadors*, 78 Ind. 528.

In *Tennessee*, the sale without the deed conveys only an equitable title which will not support ejectment. *Edwards v. Miller*, 4 Heisk. (Tenn.) 314.

9. *Leland v. Wilson*, 34 Tex. 79; *Boring v. Lemmon*, 5 Har. & J. (Md.) 223; *Remington v. Linthicum*, 14 Pet. (U. S.) 84.

So, also, under the *Louisiana Code*, since making the adjudication and payment sufficient to transfer. *Jouet v. Mortimer*, 29 La. Ann. 213. But compare *Childress v. Allin*, 17 La. 37.

In *Kentucky*, where a mortgage vests the legal title in the mortgagee, if he purchases on foreclosure no deed is necessary. *Monroe v. Stephens*, 80 Ky. 155.

In *New York*, a foreclosure deed vests title unaffected by intervening acts of the mortgagor. *Rector, etc., v. Mack*, 93 N. Y. 488; *Mygatt v. Coe*, 44 Hun (N. Y.) 31.

In *Illinois*, after a foreclosure decree, the mortgagor has no such ownership as will support a mechanics' lien. *Davis v. Connecticut Mut. L. Ins. Co.*, 84 Ill. 508.

States where land is extended, as under an *elegit*, the setting off obviates the necessity of a deed.¹

In absence of statutory provision a decree in equity cannot, *per se*, divest the legal title; it can only compel the defendant to convey, or direct a commissioner so to do.²

2. Compelling Its Delivery.—In case the sheriff refuses to convey, the purchaser has three available remedies: he may move for a rule to show cause,³ or he may proceed in equity,⁴ or he may proceed by mandamus.⁵

3. When to be Made.—In those States in which the defendant has no right of redemption, the deed can be made upon the purchaser's paying the price; so, also, where, though such right exists, the conveyance is allowed immediately.⁶ A deed executed before expiration of the redemption period is absolutely void.⁷

In *New Jersey*, the purchaser's title is co-extensive with the mortgage description, the bill and the *fi. fa.* *McGee v. Smith*, 16 N. J. Eq. 462.

1. In *Rhode Island*, "if no person appear to redeem," etc., the sheriff shall sell sufficient to satisfy the judgment and the deed shall vest in the purchaser all the interest the debtor had at the time of the attachment or levy. *Rhode Island* Pub. Stat., 1882, p. 615, § 14.

In *Massachusetts*, if the creditor has elected to have the land sold, the sheriff must execute and deliver to the purchaser a deed, "which, being recorded within three months after the sale in the registry of deeds," etc., gives title. *Massachusetts* Pub. Stat., 1882, p. 1012, § 28. Compare *Maine* Rev. Stat., 1883, p. 620, § 42.

Delivering and recording the deed passes no title unless the officer makes a return on the execution. *Walsh v. Anderson*, 135 Mass. 65.

In *Vermont*, if it be not redeemed within six months, "the person to whom the same was appraised may enter and take possession thereof, without giving previous notice," etc. *Vermont* Rev. Laws, 1880, § 1578. In *Connecticut*, it is absolutely "set out to the creditor by metes and bounds." *Connecticut* Gen. Stat., 1888, § 1182. Compare *New Hampshire* Gen. Laws, 1878, p. 548, § 9.

As to the English practice on *elegit*, see 1 & 2 Vict. ch. 6, and ch. 110, § 11.

2. *Proctor v. Ferebee*, 1 Ired. Eq. (N. Car.) 143; 36 Am. Dec. 34; *Shepherd v. Ross Co.*, 7 Ohio 271; *Wallis v. Wilson*, 34 Miss. 357.

3. *People v. Haskins*, 7 Wend. (N. Y.) 463.

4. In Upper Canada, making the execution defendant also a party. *Witham v. Smith*, 5 Grant Ch. (U. C.) 203.

In *New Jersey*, after the sheriff has delivered the deed to the plaintiff's attorney and taken a receipt in full, he is not a necessary party to the purchaser's suit against the attorney to compel delivery. *Whitney v. Kirtland*, 27 N. J. Eq. 333.

5. *People v. Fleming*, 2 N. Y. 484; *People v. Irwin*, 14 Cal. 428.

In *Louisiana*, one of three purchasers in indivision, who had paid his share of the adjudicated price, was held to have a right to demand from the sheriff a deed of sale for his undivided portion; and no one of the co-proprietors was entitled to oppose on the ground that the taxes had not been paid. *Montross v. Jamison*, 30 La. Ann., pt. 1, 172.

6. In *Alabama*, the sheriff must execute and deliver the deed within five days after consummation of the sale. *Alabama* Civil Code, 1886, § 2917.

7. *Gorham v. Wing*, 10 Mich. 486; *Perham v. Kuper*, 61 Cal. 331. Such deed would not even constitute color of title. *Bernal v. Gleim*, 33 Cal. 668.

As to the reckoning of the period, see REDEMPTION; JUDICIAL SALES, vol. 12, p. 220. *Freeman Ex.* (2d ed.), § 316.

In case of disputed title, it seems that a court of equity may extend the period until determination of the issues. *Carroll v. McCullough*, 63 N. H. 95.

In case the bar of the Statute of

4. **By Whom.**—In absence of a statute to the contrary, the sheriff who made the sale is the proper person to convey, even after discontinuing in the office.¹ It being a mere ministerial act, the deputy may convey;² and this, though appointed by parol only.³ But a deed not signed in the name of his principal would be void.⁴

The deputy may convey after the principal is out of office, his authority being shown.⁵ Though the sale was made by a deputy, the principal may convey.⁶ Some statutes provide for execution of the deed by the successor, when the sheriff who made the sale is dead or disabled.⁷ Sometimes the court will appoint a person to execute the deed.⁸ Some statutes require it to be executed by the person in office when the certificate is returned.⁹

5. **To Whom.**—The deed can only be made to a purchaser,¹⁰ or to

Limitations has not intervened, nor the rights of any innocent purchaser for value, nor other circumstance to render it inequitable, equity will at the latest, grant the purchaser's application for a conveyance after the time of the judgment lien plus the redemption period. In *Illinois*, this would be eight years and three months. *Shrader v. Peach*, 77 Ill. 615.

The *Illinois* act of 1872, requiring the deed to issue within five years, does not apply to a bill filed prior thereto. *Hawley v. Simons* (Ill. 1887), 14 N. E. Rep. 7.

1. *Head v. Daniels*, 38 Kan. 1; *Anthony v. Wessel*, 9 Cal. 103; *Porter v. Mariner*, 50 Mo. 364; *Lemon v. Craddock*, Litt. Sel. Cas. (Ky.) 251; 12 Am. Dec. 301. In *South Carolina*, either he or the existing incumbent. *McElmurray v. Ardis*, 3 Strobb. (S. Car.) 212.

A statute empowering the successor to execute the deed is construed exclusively. *Wortham v. Cherry*, 3 Head (Tenn.) 468.

In *Clerk v. Withers*, 6 Mod. 295, the court, by Holt, C. J., said: "The sheriff out of office may sell without a *vend. exp.*; . . . a *distingas* does not give him authority to sell, but is compulsive upon him to sell."

2. *Carr v. Hunt*, 14 Iowa 206; *Gorham v. Gale*, 7 Cow. (N. Y.) 739; *Young v. Smith*, 10 B. Mon. (Ky.) 293; *Kellar v. Blanchard*, 2 La. Ann. 38.

3. *McGee v. Eastis*, 3 Stew. (Ala.) 307; *Jackson v. Davis*, 18 Johns. (N. Y.) 7.

4. *Parker v. Kett*, 1 Salk. 96; *Lewes v. Thompson*, 3 Cal. 266; *Evans v.*

Wilder, 7 Mo. 359; *Robinson v. Hall*, 33 Kan. 139.

In *Michigan*, however, there has been an attempt to distinguish an "undersheriff" (or general deputy) from a deputy in this regard, distinguishing the *New York* and *Michigan* statutes and *Simonds v. Catlin*, 2 Cal. (N. Y.) 61; *Calendar v. Olcott*, 1 Mich. 344.

A signature in the form, "A, marshal, by B, deputy," is unobjectionable. *Ansley v. Hart*, 77 Ga. 42.

5. *Cloud v. El Dorado Co.*, 12 Cal. 128; 73 Am. Dec. 526; *Robinson v. Hall*, 33 Kan. 139; *Tuttle v. Jackson*, 6 Wend. (N. Y.) 213; 21 Am. Dec. 306. Not, however, after the principal's death. *Anderson v. Brown*, 9 Ohio 151.

6. *Ogden v. Walters*, 12 Kan. 282.

7. *Mills v. Tukey*, 22 Cal. 373; 83 Am. Dec. 74. But a claimant under such deed must show compliance with the terms of the statute, existence of the contingency, etc. *Woods v. Lane*, 2 S. & R. (Pa.) 53; *Edwards v. Tipton*, 77 N. Car. 222; *Thornton v. Boyd*, 25 Miss. 598; *Phillips v. Jamison*, 14 B. Mon. (Ky.) 466; *Wortham v. Cherry*, 3 Head (Tenn.) 468.

8. *Sickles v. Hogeboom*, 10 Wend. (N. Y.) 562; *People v. Boring*, 8 Cal. 406.

In *Alabama*, a court of equity once assumed such right. *Stewart v. Stokes*, 33 Ala. 494.

9. *Moore v. Willamette Transp., etc., Co.*, 7 Oregon 359; *Fowble v. Rayberg*, 4 Ohio, 45; *Fretwell v. Morrow*, 7 Ga. 264; *Conger v. Converse*, 9 Iowa 554.

10. Not to one of several joint purchasers. *Rice v. Smith*, 18 N. H. 369.

his assignee,¹ or at his death to his heirs,² or devisees,³ or to his executors or administrators in trust therefor.⁴ In some States the sheriff's deed to the executor or administrator is expressly provided for by statute.⁵

6. Requisites—*a.* IN GENERAL.—The deed must comply with existing statutory conditions.⁶ The sheriff must have power to make it. The land conveyed must be within his jurisdictional territory.⁷ The judgment must be valid,⁸ also the execution,⁹ the levy and the sale unannulled.¹⁰ The period must have expired without redemption.¹¹

***b.* RECITALS—(1) Statutes Mandatory or Directory.**—In some States the statutes prescribe the essential recitals.¹² Ordinarily

Nor to a stranger to the record. *Johnson v. Adleman*, 35 Ill. 265; *Beasley v. People*, 89 Ill. 571; *Davis v. McVickers*, 11 Ill. 327. A purchaser accepting the money tendered may waive a defect in an attempted redemption and the payor be subrogated to his right to a deed. *In re Eleventh Ave.*, 81 N. Y. 436.

The deed may be made to a person substituted for the bidder by mutual consent. *Parler v. Johnson*, 81 Ga. 254; (*sub nom.* *Porter v. Johnson* (Ga. 1888), 7 S. E. Rep. 317); *Smith v. Kelly*, 3 Murph. (N. Car.) 507. But the deed must show that the purchaser authorized the substitution. *Morgan v. Hannah*, 11 Humph. (Tenn.) 122.

1. *Supra*, this title, *Certificate of Sale; Assignments*.

In *New York*, the sheriff may execute a deed to the assignee even of a certificate of sale that has not been acknowledged or filed. *Chautauqua Co. Bank v. Risley*, 4 Den. (N. Y.) 480.

The deed's recital of an assignment of the certificate is *prima facie* evidence thereof. *Messerschmidt v. Baker*, 22 Minn. 81; *Turner v. First Nat. Bank*, 78 Ind. 19. But compare *Carpenter v. Sherby*, 71 Ill. 427.

2. *Swink v. Thompson*, 31 Mo. 336.

3. Where twelve years after a purchaser's death, his devisee for life released to A, the remainderman, giving him an order on the sheriff to make title, it was held that a deed to A from the incumbent, successor of the sheriff who made the sale, was valid. *Sumner v. Palmer*, 10 Rich. (S. Car.) 38.

4. After a testatrix had obtained a foreclosure decree and before its execution, she died, and an *alias* execution was issued in her name. At the sale an executor was the purchaser, and took title in his own name, in

trust for the estate. *Held*, that a deed executed by himself, his wife and his co-executor would pass a good title. *Banta v. School Dist. No. 3*, 39 N. J. Eq. 123.

An officer appointed under the *Missouri* statute to execute and acknowledge a deed upon the sheriff's decease or removal has only the powers the late sheriff would have had. The court will not compel him to execute a deed to the grantees of a purchaser who has died; but will permit him to execute the deed to the purchaser's legal representatives without naming them. *In re Guenzler*, 70 Mo. 39.

5. *E. g.*, B's *New York Rev. Stat.* 1889, p. 1084, § 114.

6. See JUDICIAL SALES, vol. 12, p. 221. Some statutes prescribe the form—*e. g.*, *Rhode Island Pub. Stat.* 1882, p. 615; *Colorado Annot. Stat.* 1891, § 2553.

Failure to comply with a directory statute may not be fatal. So held as to the *Oregon* requirement that the approval of the court be indorsed on the writ. *Wright v. Young*, 6 Oregon 87.

In *Louisiana*, as to the requisites of a *proces verbal* to have the legal value of a formal deed, see *Strauss v. Soye*, 29 La. Ann. 270. Omission of the adjudicatee's signature is not fatal. *Carroll v. Scheen*, 34 La. Ann. 423; *Nesom v. Weis*, 34 La. Ann. 1009.

7. *Hanby v. Tucker*, 23 Ga. 132; 68 Am. Dec. 514.

8. *Leland v. Wilson*, 34 Tex. 79.

9. *Watson v. Tindal*, 24 Ga. 494; 71 Am. Dec. 142.

10. *Supra*, this title, *Grounds for Vacating*.

11. *Delahay v. McConnel*, 5 Ill. 156; *Gross v. Fowler*, 21 Cal. 392.

12. Also their effect. See *infra*, this title, *The Deed—Conclusiveness*, etc.

these are: the date and amount of the judgment; the name of the court and parties; the date of the execution and of its reception; the levy; the notice; the sale on the day designated; the name of the highest bidder; the prices, and the expiration of the period without redemption.¹ These provisions are generally deemed merely directory.²

Accordingly, in some States, non-compliance with the statute in minor formal or evidential matters, may not invalidate the deed, where the fact in question can be determined through reference to the records or files of the court from data furnished in the advertisement, and in the rest of the deed.³

"But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights generally would be injuriously affected, they are not directory but mandatory."⁴

1. Sometimes the entire form. See *supra*, this title, *Requisites—In General*. Hihn v. Peck, 30 Cal. 288; Wack v. Stevenson, 54 Mo. 485.

2. Perkins v. Dibble, 10 Ohio 433; 36 Am. Dec. 57; Jordan v. Bradshaw, 17 Ark. 106; 65 Am. Dec. 419; Clark v. Sawyer, 48 Cal. 133.

3. *Missouri* reports numerous illustrations:

Omission to state the original levy. Foulk v. Colburn, 48 Mo. 225. Or why the sale was not made at first term. Groner v. Smith, 49 Mo. 318. Omission to state the day of the month when the sale was made. Strain v. Murphy, 49 Mo. 337. Omission to say the county court granted an order of sale. Warner v. Sharp, 53 Mo. 598. Lumping recital of judgments without clearly designating the parties. Allen v. Sales, 56 Mo. 28. Omission to state return of a justice's execution *nulla bona*, before issuing the one upon the transcript. Perkins v. Quigley, 62 Mo. 498. Omission to repeat names. Gaines v. Fender, 82 Mo. 497. Omission to state the day of rendition of judgment. Lewis v. Morrow, 89 Mo. 174. Omission to state whether the newspaper was daily or weekly. Chandler v. Bailey, 89 Mo. 641. Omission to state that the posting was at the front door of the courthouse. Evans v. Robberson, 92 Mo. 192. Omission to state the city of the justice. Karnes v. Alexander, 92 Mo. 660.

A deed reciting a judgment against "Smith & Haliburton" was held not to be invalid, the record showing one against "Jacob Smith and Wesley Hal-

iburton." Union Bank v. McWharters, 52 Mo. 34.

But in *Illinois*, where a judgment was in favor of "Jacob Helbig," recital of it as in favor of "John Helbig" was held fatal, in absence of amendatory evidence. Johnson v. Adleman, 35 Ill. 265.

Where a statute—*e. g.*, *Missouri* Rev. Stat. 1889, § 4954—requires the deed to recite the names of the parties and the dates of judgment and execution, with such recital it may be shown by evidence *aliunde* that these were special and against the property sold. Hall v. Klepzig, 99 Mo. 83.

A deed conforming to the execution and otherwise regular, will pass title, though there be a variance between the judgment record and the execution, if not such as would avoid the execution. Davis v. Kline, 76 Mo. 310.

Where a deed recited a judgment against A, B and C, issuance of an execution thereon, another judgment against A and B, issuance of an *alias* execution thereon, and a levy and sale thereunder of the right, title and interest of A and B in certain land, but assumed to convey all the right, title and interest of A, B and C therein which the sheriff might sell by virtue of the execution, it was held that C's title thereto did not pass. Julian v. Boren, 55 Mo. 110.

4. The court by Field, J., in *French v. Edwards*, 13 Wall. (U. S.) 511. Herein it was held, that under the *California* statute, authorizing a tax sale for only the smallest quantity which any one would take and pay the judg-

(2) *Variance from the Judgment.*—The decisions are not uniform as to the effect of a discrepancy between a recital in the deed and the record of the judgment. Ordinarily a mere clerical mispision in the deed in this regard, is not fatal.¹

(3) *Variance from the Execution.*—The deed need recite only the material portions of the execution. Ordinarily a variance therefrom is not fatal.² Some States make statutory provision for this.³

ment and costs, a deed reciting a sale to the highest bidder was void on its face. But Miller, J., dissenting, did not deem the sale "open to all the rigid rules which apply to tax sales made *ex parte* and without the aid of such judgment.

. . . The law contemplated that if no one would take any less than the whole of the land and pay the judgment and costs, then that it should be sold to the highest bidder. If this were not so, the State could not collect the taxes in half the cases, because the right of redemption left no inducement to bidders for a smaller amount than the whole. It is, therefore, a fair presumption from the recital in the deed, that, although the sheriff sold the land to the highest bidder, it was because no one would take less than the whole and pay the taxes and costs. And the recital that is made, as well as that which is omitted, are neither of them necessary to the validity of a deed made in a judicial sale."

In *Grover v. Fox*, 36 Mich. 469, "where a deed misrecited a foreclosure sale of a farm as made in bulk, and, ten months later, a new deed representing the sale as made in parcels was antedated and filed, the court by Graves, J., said: "The complainant was entitled to have the files identify the very deed to be wholly or in part canceled in case of redemption, and to be recorded as a conveyance if not canceled by redemption. The law required this and did not contemplate extrinsic inquiries to settle such matters." The sale was set aside and the complainant allowed to redeem.

1. In *Missouri*, where a judgment was rendered against A alone, a deed reciting that the judgment was against A and B, and also misreciting the amount, was held to pass title. *Wilhite v. Wilhite*, 53 Mo. 71. This decision overrules *Crittenden v. Leitensdorfer*, 35 Mo. 239.

In *Michigan*, conversely, a deed was sustained using the word "person" in

reference to the two defendants. *Johnson v. Crispell*, 39 Mich. 82.

As to what is a sufficient expression of the "cause of the sale," within the *Maine* statute, see *Caldwell v. Blake*, 69 Me. 458.

In *Kansas*, also, the maxim, *de minimis non*, is applied to the judgment and the deed. *Dickens v. Crane*, 33 Kan. 344.

In *Louisiana*, misnaming the court was held not to invalidate the deed. *Stackhouse v. Zuntz*, 41 La. Ann. 415.

In *Florida*, recital of an estate as defendant (instead of its administrator previously named), was held to convey all the interest of the decedent's estate. *Adams v. Higgins*, 23 Fla. 13.

In *Tennessee*, a deed failing to recite the existence of the judgment, execution and levy is fatally defective. In *Byers v. Wheatley*, 59 Tenn. 163, the court, by McFarland, J., said: "It would be no answer to this to show that in fact there was a judgment, execution and levy. Their existence must be assumed in the deed, and when produced, they must correspond with the recitals of the deed."

2. *Henley v. Branch Bank*, 16 Ala. 552; *Zabriskie v. Meade*, 2 Nev. 285; 90 Am. Dec. 542.

3. The *New Jersey* act of 1831 is declared authoritative in *Den v. Sayre*, 16 N. J. L. 532.

"The deed shall be good and valid, and received in evidence as such, notwithstanding any variance between the recital in said deed and the execution by virtue of which the sale was made, and notwithstanding any variance between said execution and the judgment." . . . *New Jersey Rev.* 1877, p. 1043, § 8.

A sheriff had five executions in hand against B. Enjoined from selling under one, he sold under the other four. Held, that he need not recite the former. *Gifford v. Alexander*, 84 N. Car. 330.

(4) *Variance from the Return*.—In case of a discrepancy between the recitals in the deed and the return, the recitals in the deed govern.¹

(5) *Omnia Rite*.—In deraigning the title from the deed after long lapse of time, the maxim, *omnia rite præsumentur esse acta*, is applied to sustain the deed, notwithstanding some defective or omitted recitals.² Silence as to the levy may import that it was waived; or, in absence of objection seasonably interposed, it will be considered to have been regular.³ So, also, as to the appraisement,⁴ the place of sale,⁵ the publication⁶ and the notice.⁷

c. DESCRIPTION OF THE PROPERTY.—The requisites of the notice in designating the property apply also in the deed.⁸ As in voluntary conveyances, references to other documents and to maps and records are allowable in aid therein.⁹ Parol evidence

And a misrecital of the execution, or even a failure to recite any at all, will not vitiate a sale made under a valid execution. *Jones v. Scott*, 71 N. Car. 192.

In *New Jersey*, the deed shall recite the writ, and it may be good, notwithstanding a variance. *New Jersey Rev.*, 1877, p. 1043, § 8.

In *Armstrong v. McCoy*, 8 Ohio 136; 31 Am. Dec. 435, the court, by Grimke, J., said: "It is true, our statute declares that the execution shall be recited. It is often very difficult to distinguish between those ceremonies which are directory to the officer and those which are essential to the title. If any one general rule may be laid down it is, that every prerequisite, which can be considered as constituting the foundation of title, is essential and indispensable, and that whatever does not partake of that character is merely directory."

1. *Carroll v. Scheen*, 34 La. Ann. 423; *Roger v. Cawood*, 1 Swan (Tenn.) 142; 55 Am. Dec. 729; *Miller v. Miller*, 89 N. Car. 402.

In *Smith v. Kelly*, 3 Murph. (N. Car.) 510—in sustaining a deed to Kelly, made at the request of the bank which was named in the return as purchaser—the court, by Taylor, C. J., said: "A return is nothing but the sheriff's answer relative to that which he is commanded to do by the writ; and is intended to inform the court of that alone which it concerns them to know."

2. After forty years had elapsed, and both the execution and the execution docket were lost, the regularity of the

deed and proceedings was presumed from acquiescence of heirs of parties meanwhile. *Logan v. Pierce*, 66 Tex. 126.

Upon some points, the presumption may be indulged even before long lapse of time—*e. g.*, that the sheriff had an appraisement duly made, though not mentioned in his return. *Talbott v. Hale*, 72 Ind. 1.

3. *Hartwell v. Root*, 19 Johns. (N. Y.) 345; 10 Am. Dec. 282; *Blood v. Light*, 38 Cal. 649; 99 Am. Dec. 441. *Coker v. Dawkins*, 20 Fla. 141.

In support of an actual sale, evidence of intent to seize will sufficiently establish a levy. *Hamblen v. Hamblen*, 33 Miss. 455; 69 Am. Dec. 358; *Gassawa v. Hall*, 3 Hill (S. Car.) 289.

A variance between the deed and the levy indorsed on the execution may be explained by parol evidence. *Mathers v. Thompson*, 3 Ohio 272.

4. *Evans v. Ashby*, 22 Ind. 15.

5. *Bush v. White*, 85 Mo. 339.

6. *Kendrick v. Latham*, 25 Fla. 819.

7. He may recite that "notice was given as required by law," though the sale was by his predecessor, if the fact that notice was given appears in the return. *Richards v. Williams*, 59 Tenn. 186.

8. *Supra*, this title, *The Notice—Describing the Property*.

9. If a reference to a map is equally applicable to two different maps, the deed is void for uncertainty; the sheriff may not by parol identify the map intended. *Cadwalader v. Nash*, 73 Cal. 43. In another *California* case it was held that upon a decretal sale, the

is admissible to explain and identify names and locations.¹ Any essential ambiguity that cannot be so remedied renders the deed void for uncertainty.² If the description be sufficient, inconsistent particulars will not avoid the deed.³ A variance in the description between the certificate of sale and the deed is not fatal.⁴

d. THE ACKNOWLEDGMENT.—In some States, the acknowledgment of the deed is treated as a part of its execution, and made indispensable.⁵

description must be perfect in itself. *Crosby v. Dowd*, 61 Cal. 557.

1. As a general rule, where the property is not ascertainable from the description, the deed cannot be supported by showing by the sheriff what he intended to sell. *Mason v. White*, 11 Barb. (N. Y.) 173.

2. The fact that the purchaser had taken, and for many years held, possession of a particular tract, has been held proper for the jury's consideration. *St. Clair v. Shale*, 20 Pa. St. 105.

If the terms employed, as commonly understood in the neighborhood, clearly designate the property levied upon or sold, the description must be regarded as sufficient. *Hedge v. Drew*, 12 Pick. (Mass.) 141; 22 Am. Dec. 416; *Jackson v. Walker*, 4 Wend. (N. Y.) 462; *Christian v. Mynatt*, 11 Lea (Tenn.) 615; *Bates v. Bank of Mo.*, 15 Mo. 309; *Laughlin v. Hawley*, 9 Colo. 270.

Where the county is given a description in form: "A tract on which A B now lives adjoining C D, and supposed to contain eighty acres," has been sustained; the premises being made certain on parol explanation. *Webb v. Bumpass*, 9 Port. (Ala.) 201; 33 Am. Dec. 310; compare *Randolph v. Carlton*, 8 Ala. 606; *Swartz v. Moore*, 5 S. & R. (Pa.) 257; *Hyskill v. Givin*, 7 S. & R. (Pa.) 369; *Balch v. Zentmeyer*, 11 Gill & J. (Md.) 267.

A description establishing three sides of the land levied on has been held to be sufficient. In *Stephens v. Taylor*, 6 Lea (Tenn.) 311, the court, by Ewing, Sp. J., said: "If nobody owned on the fourth side, a straight line would close the hiatus; if any one did own on that side, the boundary would be controlled by that ownership."

In *Missouri*, the following description supplemented by parol explanation was held sufficient to sustain the levy and deed: "A tract containing 240 arpents, more or less, bounded on the south by the land of A and B, on

the west by land of C, and on the east by land of D and others, and includes the Hammond Spring." *Hammond v. Johnston*, 93 Mo. 198.

A deed describing land by metes and bounds "and all ways, passages, easements," was held not to include land adjoining used as a way, which was purchased by a distinct title, but not embraced in the metes and bounds set forth in the sheriff's deed. *Jackson v. Striker*, 1 Johns. Cas. (N. Y.) 284.

The law regulating the sheriff's duty may be looked to in ascertaining his intention as to the quantity. *Spiller v. Nye*, 16 Ohio 16.

3. *Dygert v. Pletts*, 25 Wend. (N. Y.) 402; *Bank of Mo. v. Bates*, 17 Mo. 583; *Wing v. Burgis*, 13 Me. 111.

A defendant's interest, embracing certain town lots susceptible of accurate description, cannot be seized, sold and conveyed under a general designation embracing the whole of the original tract. *Evans v. Ashley*, 8 Mo. 177; *Rector v. Hartt*, 8 Mo. 448; 41 Am. Dec. 650; *Henry v. Mitchell*, 32 Mo. 512.

In *Louisiana*, when the interest of an heir is to be sold, the quantity of the interest should be stated or the number of the heirs given. *Dearmond v. Courtney*, 12 La. Ann. 251.

In *Alabama*, where the execution defendant had conveyed directly to his wife, a sheriff's deed purporting to convey an estate of curtesy, was held to convey nothing. *Carrington v. Richardson*, 79 Ala. 101.

Under the *Maine* statute requiring the proprietors' names to be given if known, the sheriff need not state whether two own in common, nor, if in severalty, describe their parcels. *Caldwell v. Blake*, 69 Me. 458.

4. *Jackson v. Roberts*, 11 Wend. (N. Y.) 422.

5. The *Pennsylvania* statute requires it to be made by public proclamation in open court. B. P. Dig. L. *Pennsylvania*, p. 766, § 130. Thereupon the

In most States the deed is not invalidated by want of an acknowledgment.¹

7. **Registration.**—The decisions and the statutes are not uniform as to the effect of registration upon the purchaser's title. Ordinarily, the effect of the record as notice is the same as in that of a voluntary conveyance.²

entry on record is presumed to have been made on motion. *Robb v. Ankeny*, 4 S. & R. (Pa.) 128.

In *Missouri*, the deed is invalid without the acknowledgment. "The conveyance is the act of the law, and the law must be strictly complied with." *Ryan v. Carr*, 46 Mo. 483. A defective acknowledgment—*e. g.*, one made by a deputy sheriff in his own name—is not aided by the record. *Samuels v. Shelton*, 48 Mo. 444; *compare Adams v. Buchanan*, 49 Mo. 64.

The clerk's omission to recite that the acknowledgment was "before me," or that the sheriff personally appeared or was personally known to the court to be the sheriff who executed the conveyance, was held not to be fatal. *Bray v. Marshall*, 75 Mo. 327. The certificate should be brief; only the entry on the record should contain the names of parties and description of property. *Lincoln v. Thompson*, 75 Mo. 613.

In *Grover v. Fox*, 36 Mich. 467, the court by *Graves, J.*, said: "Although no acknowledgment is, in terms, required by the chapter regulating foreclosures, still the profession have always considered that the general statute applied and rendered it necessary that the execution should be regularly authenticated to complete the deed for record."

1. *Stephenson v. Thompson*, 13 Ill. 186; *In re Smith*, 4 Nev. 254; 97 Am. Dec. 531.

In *Indiana*, the deed is good against the execution defendant, though not acknowledged nor recorded. *Dixon v. Doe*, 5 Blackf. (Ind.) 106. The acknowledgment is essential to admission of the deed to record. *Doe v. Naylor*, 2 Blackf. (Ind.) 32.

In *Arkansas*, the certificate of acknowledgment may be appended when the deed is offered in evidence. *Hutchinson v. Kelly*, 10 Ark. 178.

The *Kansas* statute prescribes that the deed shall be "acknowledged and recorded as is provided by law to perfect the conveyance of real estate in other cases." *Kansas Gen. Stat.*

1889, § 4557. Thereunder, it seems, the deed would be valid without any acknowledgment. *Ogden v. Walters*, 12 Kan. 291.

In *Texas*, the deputy is the proper person to acknowledge his own execution of the deed. *Terrell v. Martin*, 64 Tex. 121.

2. In *Iowa* the deed need not be recorded for sixty days. *McClain's Iowa Stat.* 1888, § 4354. A purchaser, however, who fails to record his deed within the statutory period, does not forfeit his rights as against a purchaser from one not having the record title. *Lindley v. Mays*, 66 Iowa, 265.

In *North Carolina*, "no conveyance shall be good and available in law unless the same shall be acknowledged by the grantor and be registered in the county where the land shall lie within two years after the date."

. . . *North Carolina Code*, 1883, § 1245.

There it has been held that the title does not pass until the registration. *McMillan v. Edwards*, 75 N. Car. 81.

In *Maine*, in absence of any intermediate conveyance, the purchaser's failure to place his deed on record for more than nine months after the sale, will not vitiate his title. *Caldwell v. Blake*, 69 Me. 458.

The title, though not passing till the deed be recorded, relates back to its execution, and will prevail in ejectment brought before the registration. *Wallace v. Lawrence*, 1 Wash. (U. S.) 503.

The *Massachusetts* statute, that the sheriff's deed of an equity of redemption, being recorded "within three months after the sale, shall give to the purchaser all the debtor's right of redemption," has been held not to render the recording within that time a prerequisite to the vesting of the title in the purchaser. *Owen v. Neveau*, 128 Mass. 427.

In *Missouri*, a deed from a widow to her late husband's heirs will not prevail as against a sheriff's deed executed in the husband's lifetime, though

8. **Effect**—*a.* **RELATION BACK**.—The deed must be given such effect as will consummate the lien under which the sale was made, whether created by attachment, by docketing the judgment, by issuance of the execution, or by the levy.¹

b. **CONCLUSIVENESS OF RECITAL**—(1) *Upon the Parties*.—In general, the recitals of the deed, as to rendition of a judgment, issuance of an execution, regularity of a levy, proceedings of a sale and fact of a confirmation, are conclusive upon the defendant,² the plaintiff, the grantee, and all persons claiming title thereunder.³

In some States the statutes declare what recitals are necessary, and what the effect thereof upon the title.⁴

the former be recorded before the latter. *Bailey v. Winn*, 101 Mo. 649.

In *Iowa*, where land is sold in one county under execution issued on a judgment rendered in another, the recording of the deed is constructive notice, although no transcript of the judgment was filed in the former county. *Foreman v. Higham*, 35 Iowa 382.

1. See **RELATION**.

2. The deed, whether with warranty or not, does not bar the defendant from claiming the land under an after-acquired title. *Bigelow's Estop.* (5th ed.), p. 396; *Emerson v. Sansome*, 41 Cal. 552.

In those States where equity has jurisdiction to reform a deed at the instance of the defendant as well as of the plaintiff, the defendant may defeat ejectment by proving that the land, though embraced in the deed, was in fact excepted from the sale. *Bartlett v. Judd*, 21 N. Y. 200; 78 Am. Dec. 131; *McDaniel v. Bryan*, 8 Ill. App. 273.

The recitals are to be regarded only as inducement; the sheriff cannot bind a party whose land he may have improperly sold. *Leland v. Wilson*, 34 Tex. 79.

3. *French v. Edwards*, 13 Wall. (U. S.) 506; *Zabriskie v. Meade*, 2 Nev. 285; 90 Am. Dec. 542.

4. In *Colorado* the deed shall be *prima facie* evidence of the facts recited. *Colorado Annot. Stat.*, 1891, § 2555.

In *Iowa*, the deed shall be conclusive evidence that all the prerequisites of the law were complied with, from the listing up to its execution, both inclusive.

McClain's Iowa Rev. Stat., 1888, p. 344, § 1382.

The *California* statutes are only in-

tended to make them evidence of the facts recited without having to introduce the judgment and execution; so far as requiring anything beyond what is necessary to show the sheriff's authority to sell, they are merely directory. *Clark v. Sawyer*, 48 Cal. 133; *Blood v. Light*, 38 Cal. 649; 99 Am. Dec. 441.

In *Missouri*, the deed shall recite "the names of the parties to the execution, the date when issued, the date of the judgment, order or decree, and other particulars as recited in the execution; also a description of the property, the time, place, and manner of the sale, which recital shall be received as evidence of the facts therein stated." *Missouri Rev. Stat.*, 1889, § 4954.

The *Mississippi* statute prescribes the form of the deed at large. *Mississippi Rev. Code*, 1880, § 1241. So does that of *Illinois*. *Illinois Rev. Stat.* of 1887, p. 868, § 31. Also that of *Rhode Island*. *Rhode Island Pub. Stat.*, 1882, p. 615, § 116.

In *Minnesota*, the certificate of sale "shall be *prima facie* evidence of the facts therein stated," and shall, upon "expiration of the time for redemption, operate as a conveyance." *Minnesota Stat.*, 1891, §§ 4936, 4937.

In *Nebraska*, the deed shall recite "the substance" of the execution, the names of the parties, and the date of term of rendition of the judgment; "the deed shall be sufficient evidence of the legality of such sale and the proceedings therein until the contrary be proved." *Nebraska Comp. Stat.* 1889, p. 921, § 500.

The *Kansas* statute is like that of *Nebraska*. *Kansas Gen. Stat.* 1889, § 4557.

In *Ohio* "the deed shall be *prima facie* evidence of the legality and

(2) *As Against the Return.*—If the recitals in the return of the execution or in the certificate of sale vary from those in the deed, the latter must ordinarily govern.¹

(3) *Upon Strangers.*—As for strangers, recitals in the deed are only presumptive evidence of the facts recited.² In some States,

regularity of the sale." *Ohio Rev. Stat.* 1890, § 5402.

In *Wisconsin*, "a deed shall be executed in pursuance of a sale," and be "a proper conveyance." *Wisconsin Annot. Stat.* 1889, §§ 3016, 3017.

In *Pennsylvania*, the purchaser may "cause the judgment, and all' and singular the process issued thereon, under which such estate may have been seised and sold, together with all and singular the returns of such process, made by the officer executing the same, to be recited and set forth fully and at large in the deed." *B. P. Dig. Laws Pennsylvania*, p. 765, § 129.

1. See *supra*, this title, *The Return*.

In *Hihn v. Peck*, 30 Cal. 288, the court, by Shafter, J., said: "The power to sell, to recite, and to deed having its origin in the judgment and execution, must be proved by a production of both under the rule of best evidence; but when the power has become so proved, the sheriff becomes, so to speak, the accredited historian of his acts under it. He may narrate his proceedings on the back of the execution, and return it into court, and with or without that he may issue a certificate to the purchaser, and both the certificate and return, if made, would, within the limits of the authority delegated to him, be evidence against all persons of the facts stated or recited therein." "It is also the official duty of the sheriff to make a like statement or recital in his deed, and it follows that a recital so made must be entitled to the same effect as an instrument of evidence, as all the authorities concede to be due to an official return on execution if one be made."

In *California*, a constable's deed is not admissible in evidence of title, without proof of the judgment and execution. *Peterson v. Weissbein*, 80 Cal. 38.

In *Louisiana*, in a petitory action involving the issue whether the purchaser had failed to comply with the conditions of sale, it was held that under *Louisiana Code*, art. 702, prescribing the contents of the return, the

deed must control the return. *McCall v. Irion*, 41 La. Ann. 1126.

The question as to what sold is determined by the adjudication and not by the deed. *Herriman v. Janney*, 31 La. Ann. 276.

An adjudicatee in undisturbed possession for ten years after getting his deed, has an indefeasible title against all the world. *Stackhouse v. Zuntz*, 41 La. Ann. 415.

Under the *Rhode Island* statute, making the deed vest title in the purchaser, no return is necessary for its validity. *Foster v. Berry*, 14 R. I. 601.

So also, in *Missouri*. *Bray v. Marshall*, 75 Mo. 327.

So, also, in *North Carolina*, if the return be imperfect. *Miller v. Miller*, 89 N. Car. 402.

So in general. *Voorhees v. Jackson*, 10 Pet. (U. S.) 477.

2. *Durette v. Briggs*, 47 Mo. 356; *Union Bank v. Manard*, 51 Mo. 548; *McKee v. Lineberger*, 87 N. Car. 181.

In *Missouri*, so held, to defeat a collateral attack, based on a defect in the verification of the original petition. *Gilkeson v. Knight*, 71 Mo. 403.

In *North Carolina*, parol evidence was held admissible to show that the land was sold as one tract, though described in the deed as two. *Peebles v. Pate*, 90 N. Car. 348.

As between the purchaser and third persons recitals in a deed given by the succeeding sheriff are not conclusive as to what was sold by the predecessor. *Edwards v. Tipton*, 77 N. Car. 222. The fact that the grantor had gone out of office made his subsequent deed no less *prima facie* evidence of execution and sale. *Curlee v. Smith*, 91 N. Car. 172.

Under the *Nebraska Code* the sheriff's deed vests in the purchaser any estate that the debtor had at the time the land became liable to satisfy the judgment and any which he may acquire up to the time of sale. If the debtor had no interest the purchaser acquires no title. *Mansfield v. Gregory*, 8 Neb. 432.

So, also, in *Missouri*. *White v. Davis*, 50 Mo. 333.

the deed alone will not establish title in certain cases without proof of the judgment and execution.¹

9. Reforming or Renewing.—As a general rule equity will not aid a defective execution of a sheriff's deed.² In some States,

So, also, in *Kansas*. *Shields v. Miller*, 9 Kan. 390.

Here a deed void—*e. g.*, by a sheriff of one county conveying land situated in another—reciting an order of confirmation, is no evidence of the alleged fact. *Morrell v. Ingle*, 23 Kan. 32.

In *Georgia*, a deed void—*e. g.*, by a sheriff making himself and his wife usees—is inadmissible, even with parol evidence offered that the execution defendant pointed out the property, saw it sold and the deed executed. *Morrison v. Knight*, 82 Ga. 96.

In *Tennessee*, the presumption of the validity of the deed and the reliability of its recitals, are not overcome by proof that the land was sold without first laying off the homestead. *Burnett v. Austin*, 10 Lea (Tenn.) 564.

In *Pennsylvania*, the record of proclamation of acknowledgment of the deed in open court does not import such a *res adjudicata* as precludes inquiry into the legality of the proceedings by which the sale was made. *Braddee v. Brownfield*, 2 W. & S. (Pa.) 271.

After such acknowledgment, the validity of the grantee's title cannot be questioned in any collateral proceeding involving it, except for absence of authority or presence of fraud. *Cock v. Thornton*, 108 Pa. St. 637.

Where the return and the deed show that the sale was under one writ only, parol evidence was (by the majority of the judges) held inadmissible to prove that the sale was also made under another writ in the sheriff's possession at the same time. *Hare v. Bedell*, 98 Pa. St. 485.

The *New Jersey* rule that a sheriff's deed carries no title unless it appears affirmatively by recitals in the deed, or by proof *aliunde*, that the sale was advertised according to law, has not been changed by the act of 1864. *Henderson v. Hays*, 41 N. J. L. 387.

In *Arkansas*, the deed is not valid unless there were a regular judgment, execution, levy, advertisement and sale. *Hughes v. Watt*, 26 Ark. 228.

In *Illinois*, the deed is *prima facie* evidence that the grantee paid value. *Shelton v. Blake*, 115 Ill. 275.

Recitals of the certificate of purchase, without proof of the judgment, are not sufficient to sustain title under the deed. *Carbine v. Morris*, 92 Ill. 555.

1. *Hasbrouck v. Burhans*, 42 Hun (N. Y.) 376; *Leland v. Wilson*, 34 Tex. 79; *Peterson v. Weissbein*, 80 Cal. 38.

In *New York*, after lapse of many years, the deed recitals together with testimony of the sheriff that he sold the land under the execution corroborated by his register, are sufficient. *Phillips v. Shiffer*, 14 Abb. Pr. N. S. (N. Y.) 101. The *New York* act of 1886, making the deed presumptive evidence after lapse of twenty years, applies only to sales made after Sept. 1, 1887. *Goldman v. Kennedy*, 49 Hun (N. Y.) 157.

In *Texas*, in an action to recover land, a party offering a sheriff's deed in evidence must prove the judgment and execution, or state a purpose other than to prove title. *Tudor v. Hodges*, 71 Tex. 392.

In *Alabama*, a defendant in chancery, claiming title under a sheriff's sale but not in response to the allegations of the bill, must not only make the deed an exhibit, but also show the judgment, execution and levy. *Gordon v. Bell*, 50 Ala. 213.

2. "It may be stated as generally, though not universally true, that the remedial power of courts of equity does not extend to the supplying of any circumstance for the want of which the legislature has declared the instrument void; for otherwise equity would defeat the very policy of the legislative enactments." 1 Story's Eq. Jur. (13th ed.), § 177. "There may be exceptions to this rule." *Bright v. Boyd*, 1 Story (U. S.) 487.

In *Indiana*, a mistake in description will be corrected, if in the deed only. So held as to a probate sale. *Johns v. DeRoine*, 5 Blackf. (Ind.) 421. Otherwise, if the mistake extends through the sheriff's previous proceedings. *Rogers v. Abbott*, 37 Ind. 138. Compare *Vitito v. Hamilton*, 86 Ind. 137; *Lewis v. Owen*, 64 Ind. 446.

In *Ohio*, a like distinction is made. *Dickey v. Beatty*, 14 Ohio St. 389.

however, a sheriff's deed will be corrected in equity for fraud or mistake.¹

10. Canceling.—Ordinarily, grounds for vacating the sale are also grounds for canceling the deed.² Equity will annul a deed obtained by fraud, there being no adequate remedy at law.³ So, also, in case of mistaken and illegal proceedings.⁴

In *Ohio* and *Indiana*, after foreclosure of a mortgage including land not belonging to the mortgagor, a new action lies to reform the mortgage and to foreclose it as reformed. *Strang v. Beach*, 11 Ohio St. 283; 78 Am. Dec. 308; *Conyers v. Mericles*, 75 Ind. 443.

In *Missouri*, the rule that equity will not aid the imperfect execution of a statutory power has been applied to a false description in a sheriff's deed, and the only remedy declared to be to get a new deed in the court whence the process issued. *Ware v. Johnson*, 55 Mo. 500; *Hall v. Klepzig*, 99 Mo. 83.

Where the deed erroneously recited the dates of the judgment and sale, and an amended deed was lost in a cyclone before its registration, proof of these facts was held to establish the purchaser's title. *Dollarhide v. Parks*, 92 Mo. 178.

In *Virginia*, one who has bought one parcel of land cannot maintain a suit against one who has bought another, to compel a conveyance of part of the latter on the ground of a mistake in the officer's deed, there being no privity between them. *Garnett v. Loven*, 80 Va. 456.

In *Bartlett v. Judd*, 21 N. Y. 203; 78 Am. Dec. 131, on reforming the deed, the court, by Bacon, J., said: "The statute only makes the certificate presumptive evidence of the facts stated in it, and it clearly appears that the certificate recites a fact either falsely or mistakenly . . . The plaintiff was the purchaser. He stood by and heard the proclamation of the sheriff, that the sixty-three acres were excepted from the sale, and he purchased knowing that he was not bidding up this land, and that he was to have no title to it. Being chargeable with notice before he received his deed, it is both dishonest and inequitable for him to lay by for fourteen years after he has received his deed, during all which time the property has been constantly occupied by others, under a title which no one pretended to question, and then seek to recover."

Conversely, in another *New York* case, the execution defendants were restrained from asserting claim to a portion omitted in the deed. *De Riemer v. De Cantillon*, 4 Johns. Ch. (N.Y.) 85.

In *North Carolina*, where the title does not pass until the registration, if the deed be lost meanwhile, the purchaser's remedy is by an action against the sheriff and the execution defendant for a new deed and for possession. *McMillan v. Edwards*, 75 N. Car. 81.

The *Alabama* statute providing for obtaining an order upon the sheriff's successor to execute a new deed, does not authorize the court to order the reforming of a defective conveyance. *McCall v. White*, 73 Ala. 562.

In *Canada*, a sheriff in 1839, having conveyed more land than was sold, a new deed, executed in 1849, was held to be valid. *Doe v. Miller*, 10 U. C. Q. B. 65.

In *Illinois*, in analogy to the Statute of Limitations, a rule prevails to refuse a new deed after lapse of twenty years. *Rucker v. Dooley*, 49 Ill. 377; 95 Am. Dec. 614.

So also in *Missouri*. *In re Guenzler*, 6 Mo. App. 96.

1. In *Arkansas*, although the deed be bad for uncertainty, yet if all the proceedings else are regular, and the purchaser has paid, he has an equitable title as against the execution defendant, and the deed will be reformed. *Williams v. McIlroy*, 34 Ark. 85.

In *New Jersey*, equity will correct a misdescription in the sheriff's deed whereby part of the premises were omitted. *Zingssem v. Kidd*, 29 N. J. Eq. 516. So held, also, in case of an execution sale of a curtesy estate in lots 35 and 37, misdescribed as 39 and 41. *Vanderbeck v. Perry*, 28 N. J. Eq. 367.

2. See *supra*, this title, *Grounds for Vacating*.

3. *New England Mort. Sec. Co. v. Robson*, 79 Ga. 757.

4. In *Mississippi*, the deed may be canceled as to a homestead wrongly included in the sale, and maintained as

XXII. PLAINTIFF'S RIGHTS AND LIABILITIES.—The plaintiff's rights under an ordinary execution proceeding may differ from those under an extent.¹ He may forfeit rights by misconduct.² He may by his presence, advice or direction at a wrongful levy or sale, become liable as a joint trespasser with the sheriff.³ So, also, may his sureties in an indemnity bond.⁴ The plaintiff may maintain a bill in equity to cancel a deed fraudulently executed and antedated by the defendant.⁵ He may be protected as an innocent purchaser for value at his own sale, if without notice of an outstanding equity.⁶

to the other portion of the lands. *Semmes v. Wheatley* (Miss. 1890), 7 So. Rep. 430.

In *New York*, where, after proceedings failing to follow the statute in getting service by publication, an execution is obtained against an absconding debtor, the sale and the deed thereunder will be set aside. *Place v. Riley*, 32 Hun (N. Y.) 17.

Where the execution defendant has got the deed set aside, the grantee cannot recover the price under the *New York* statute as to reimbursement, if he colluded with the sheriff, or abused legal process. *McIntyre v. Sanford*, 89 N. Y. 634.

In *Illinois*, the deed cannot be attacked collaterally for mere inadequacy of price, although no order has been made confirming the report thereof. *McHany v. Schenk*, 88 Ill. 357.

Under a rule in analogy to the Statute of Limitation of twenty years, a deed was canceled that was executed twenty-nine years after the sale, the rights of innocent grantees intervening. *Rucker v. Dooley*, 49 Ill. 377; 95 Am. Dec. 614.

The deed cannot be set aside on motion. *Jenkins v. Merriwethen*, 109 Ill. 647.

In *North Carolina*, under an execution regularly issued in favor of a corporation, land was sold for enough to pay off the judgment and costs, but the purchaser was not required to pay his bid, upon a mistaken belief that at least that much of the corporation's assets would belong to the purchaser who received a deed for the land. The corporation was afterwards declared insolvent, and placed in the hands of a receiver who moved to set aside the sale, rescind the receipt on the execution and cancel the deed. It was held that, in absence of fraud, the sale was regular and the deed should not be an-

nulled; the receiver's remedy, if any, was to pursue the land, and charge it with the unpaid purchase money as assets. *Bank of Statesville v. Graham*, 82 N. Car. 489.

1. *Supra*, this title, *The Purchaser's Title—When the Plaintiff Purchases*.

2. *Supra*, this title, *Grounds for Vacating; Misconduct of Plaintiff*, etc.

3. *Goodyear v. Williston*, 42 Cal. 11; *Stewart v. Wells*, 6 Barb. (N. Y.) 79; *Syndacker v. Brosse*, 51 Ill. 357; *Armstrong v. Dubois*, 1 Abb. App. Dec. (N. Y.) 8.

He is responsible, upon his authorization, for what his attorney may direct in his name. *Foster v. Wiley*, 27 Mich. 244; 15 Am. Rep. 185; *Newberry v. Lee*, 3 Hill (N. Y.) 523; *Bates v. Silling*, 6 B. & C. 38; *Rowles v. Senior*, 8 Q. B. 771. But compare *Ford v. Williams*, 13 N. Y. 577; 67 Am. Dec. 83.

4. *Watmough v. Francis*, 7 Pa. St. 215; *Wetzell v. Waters*, 18 Mo. 396; *Ball v. Loomis*, 29 N. Y. 412; *Davis v. Newkirk*, 5 Den. (N. Y.) 94.

See *INDEMNITY CONTRACTS*, vol. 10, p. 429.

5. In *Georgia*, so held, where A's levy on B's land had been released on B's agreement to convey to A, and thereupon B executed to C a deed of timber growing thereon, antedated to precede the judgment. *Raines v. Dunning*, 41 Ga. 617. As to loss of his rights by laches, see *Tift v. Goode*, 47 Ga. 507; *Wilson v. Schneider*, 124 Ill. 628; *Ettenheimer v. Northgraves*, 75 Iowa 28.

6. But where the sheriff made a sale of chattels in terms, but without authority, "subject" to a certain mortgage, the execution creditor, having purchased under that condition, was held to be precluded from denying its effect. *Cable v. Byrne*, 38 Minn. 534.

The plaintiff is liable for proceeding to sell upon a satisfied judgment,¹ or after a full tender.² If his execution be issued on a void judgment, he is liable for proceeds of sale appropriated.³

XXIII. SHERIFF'S RIGHTS AND LIABILITIES—1. Fees and Poundage.—The sheriff's fees and poundage are fixed by statute; so, also, ordinarily, are his commissions upon decretal sales.⁴

2. Liability to the Plaintiff.—The sheriff is liable to the execution plaintiff for any unreasonably long refusal or neglect to sell. In some States this liability is defined by statute.⁵ So, also, as to

1. *Brown v. Feeter*, 7 Wend. 1 (N.Y.) 301.

Where the plaintiff and defendant set up that a judgment already paid was unsatisfied, caused execution to issue thereon, and land to be sold which, after the judgment had been conveyed away by the defendant, it was held that the grantee could, in an action on the case, recover of them for the consequent trouble and expense, without showing actual specific damage. *Swan v. Saddlemire*, 8 Wend. (N.Y.) 676.

2. *Mason v. Sudam*, 2 Johns. Ch. (N.Y.) 172; *Tiffany v. St. John*, 5 Lans. (N.Y.) 153.

The plaintiff is answerable for failing seasonably to notify the officer of anything rendering it improper to proceed further. *Jacobs v. Robb*, 10 U. C. Q. B. 276.

After the sale and a reversal of the judgment, the plaintiff is bound to restore only so much as he has received upon the execution. *Peck v. McLean*, 36 Minn. 228.

3. In *Minnesota*, where property levied on under a judgment in favor of A, void for want of jurisdiction, was already in the sheriff's hands under a prior levy on valid process in favor of B, and was sold for a gross sum, out of which both executions were satisfied, it was held that A was liable only for the proceeds of the sale received by him. *Gunz v. Heffner*, 33 Minn. 215.

In *Missouri*, he can recover from his attorney proceeds of a sale under a void judgment, withheld under claim of a purchaser who, knowing all the facts, procured issuance of the execution. *Hendrix v. Wright*, 50 Mo. 311. Compare a complicated *Texas* case: *Burns v. Ledbetter*, 56 Tex. 282.

4. See **SHERIFFS**; and *supra*, this title, *By Whom—Auctioneers*.

In absence of authority from the execution defendant, the sheriff has no

right to employ an auctioneer; he could not charge therefor within the *New York* statute prescribing fees and poundage. *Wallis v. Shelly*, 30 Fed. Rep. 747.

Under the *Iowa* statute, he is entitled to a percentage where the execution plaintiff is the purchaser, and the amount of the bid is not paid to the sheriff but credited upon the judgment. *Litchfield v. Ashford*, 70 Iowa 393.

In *Alabama*, if, after issuance of execution, the judgment be paid to the clerk of court, "he must collect the costs and commissions of the sheriff." *Alabama Civil Code*, 1886, § 771.

The percentage under the *Alabama* statute, taxable when the party obtaining a stay is successful, is not allowable where the defendant thereupon gets a reversal, and, on a new trial, the plaintiff recovers judgment for a less amount. *Tennessee*, etc., *R. Co. v. East Alabama R. Co.*, 81 Ala. 94.

Within the meaning of the *Oregon* act of 1885, p. 121, the amount of the plaintiff's bid credited on the execution is not "money actually made," on which the sheriff is entitled to a commission. *Coleman v. Ross*, 14 Oregon 549.

5. See *infra*, this title, *Amercement*.

In *California*, if he neglects to sell after being required by the creditor or attorney, he is liable to the creditor for the value of the property. *California Pol. Code*, 1889, § 4180. The court cannot require constables to sell property held by them under a justices' levy, and pay proceeds into court. *Brown v. Moore*, 61 Cal. 432.

If the sheriff refuses to sell on the ground of insufficiency of an undertaking on appeal, the court may make an *ex parte* order for him to proceed. *La Société Française v. McHenry*, 49 Cal. 351.

As to his rights in *Indiana*, to be subrogated to the plaintiff after default

his liability for not paying over money collected, less legal fees.¹

The sheriff is also answerable to the plaintiff for damages from inadequacy of price consequent upon the sheriff's misdoings, without any fault of the plaintiff.² So also for failure to make return.³

and payment, see *Burbank v. Slinkard*, 53 Ind. 493.

In *England*, the sheriff is liable if he fails "to use reasonable expedition" in selling. *Aireton v. Davis*, 9 Bing. 740. And a promise by the defendant's attorney to pay affords no excuse. *Jacobs v. Humphrey*, 4 Tvr. 272. (As to the English measure of damages, see *infra*, this title, *Amercement*.)

So, also, in *Indiana*. *State v. Herod*, 6 Blackf. (Ind.) 444.

The sheriff and his sureties are not liable if, after the levy, the plaintiff has negotiations with the defendant resulting in loss of the debt. *Dorrance v. Com.*, 13 Pa. St. 160.

Proof that the goods levied on did not belong to the defendant, constitutes a good defense to the execution plaintiff's action for not selling. *Harris v. Kirkpatrick*, 35 N. J. L. 392; *Union Bank v. Benham*, 23 Ala. 143; *Mason v. Watts*, 7 Ala. 703; *Snoddy v. Foster*, 1 Met. (Ky.) 160.

1. See *infra*, this title, *Amercement*. In *New York*, the sheriff must bring the money into court or pay it over to the plaintiff or his attorney by the return day; he need not sooner, though he may have collected it before. For money returned thereafter he is liable to pay interest. *Crane v. Dygert*, 4 Wend. (N. Y.) 675.

If after the sale, a third person sues for the property and recovers an amount exceeding that made on the execution, the sheriff will not be liable to the plaintiff for the money collected. So held, even where a constable had taken an indemnity bond and brought suit thereon. *Newland v. Baker*, 21 Wend. (N. Y.) 264.

The *New York* Code has not changed the rule that no demand is prerequisite to an action for withholding money collected. *Nelson v. Kerr*, 2 Thomp. & C. (N. Y.) 209.

In an action against a sheriff for a false return, it was held that the sheriff on the trial could not go behind the execution to show that it was void or voidable by reason of being irregularly and

prematurely issued. *Blivin v. Bleakley*, 23 How. Pr. (N. Y.) 124.

If after an authorized levy, the plaintiff takes the execution out of the sheriff's hands and keeps it until after the day fixed for sale, the sheriff and his sureties are not liable for the failure to sell; and this, though the sheriff suspend all further proceedings and deliver the property to the defendant before the day of sale. *Smith v. Martin*, 54 Ga. 600.

If the sheriff allows the administrators of a deceased execution defendant to sell personally levied on, he is liable to the plaintiff who cannot impeach the title of the purchaser. *Massey v. Farmers' Bank*, 1 Del. Ch. 399; 1 Harr. (Del.) 186.

2. *E. g.*, if he misinforms the plaintiff or his attorney of the place of sale, disregards the risk of sacrifice, and does not adjourn the sale. *State v. Moore*, 72 Mo. 285.

So also if, without payment of the bid, he surrenders the property to the purchaser, or otherwise treats the sale as consummated. *McCluskey v. McNeely*, 8 Ill. 578. Compare *Roberts v. Westbrook*, 1 Coldw. (Tenn.) 115.

As to a sale for less than two-thirds the appraised value, contrary to *Kansas* Civil Code, § 455, see *De Jarnette v. Verner*, 40 Kan. 224.

3. *Runlett v. Bell*, 5 N. H. 433; *McGregor v. Brown*, 5 Pick. (Mass.) 170; *Burk v. Campbell*, 15 Johns. (N. Y.) 456; *Keith v. Com.*, 5 J. J. Marsh. (Ky.) 359.

But this may be excused by the plaintiff's own act or waiver. *Granberry v. Crosby*, 7 Helsk. (Tenn.) 579; *Robertson v. Coker*, 11 Ala. 466; *Norris v. State*, 22 Ark. 524; *Shannon v. Clarke*, 3 Dana (Ky.) 152; *McKinley v. Tucker*, 6 Lans. (N. Y.) 214.

The sheriff cannot avail himself of a defect in the execution—*e. g.*, more than ninety days between the *teste* and return—to excuse failure to fulfill its mandates. *Wilson v. Huston*, 4 Bibb (Ky.) 332. Compare *Milburn v. State*, 11 Mo. 188; 47 Am. Dec. 148.

3. **Liability to the Defendant.**—It is a general rule that the sheriff may justify seizure and sale by an execution regular upon its face.¹ But this excuses no abuse of process, and many States have statutes jealously providing for the defendant's protection.²

In the absence of other executions in hand, the sheriff is liable to the defendant for failure to pay over to him any excess of the money collected after satisfaction.³

The sheriff is liable to the defendant for selling realty before personalty, or conversely, against the statute.⁴ So also, for any misconduct of sale causing gross and needless sacrifice; as by unlawfully massing or parceling,⁵ or selling real or personal property together,⁶ or not allowing his right of election of the portion to be sold.⁷

The sheriff is liable to the defendant for a wantonly excessive levy and sale,⁸ for selling after being served with an injunc-

1. *Norcross v. Nunan*, 61 Cal. 640.

"Whenever it appears that the process is regular on its face, and is issued by competent authority, a sheriff is justified in its execution, whatever may be the defect in the proceedings on which it was issued." *Alabama Civ. Code*, 1886, § 2776.

2. As to statutory liability to the defendant for selling without due notice, in the different States, see *infra*, this title, *Amercement*. See also *Enfield v. Blyler*, 67 Iowa 295.

As to statutory liability to him for selling exempt property in *Colorado*, etc., see *infra*, this title, *Amercement*. Compare *Van Dresar v. King*, 34 Pa. St. 201; 75 Am. Dec. 643; *Spencer v. Long*, 39 Cal. 700.

In *New York*, in a suit for levying on exempt property, he will not be permitted to show in defense that the judgment was for the purchase price, unless he sets it up in his answer. *Dennis v. Snell*, 54 Barb. (N. Y.) 411.

The sheriff may become liable to the defendant for proceeding under a void process. Otherwise, under an execution merely voidable. As to the effect of knowledge of facts rendering the proceeding void, see *Clearwater v. Brill*, 4 Hun (N. Y.) 728; *Wehle v. Conner*, 63 N. Y. 258; *McComb v. Reed*, 28 Cal. 281; 87 Am. Dec. 115.

If after full tender, the sheriff proceeds to sell he is liable to the defendant. *Jackson v. Law*, 5 Cow. (N. Y.) 248.

3. See collation of dissimilar statutes, *infra*, this title, *Amercement*.

4. *Simpson v. Hiatt*, 13 Ired. (N. Car.) 470; *Hassell v. Southern Bank*,

2 Head (Tenn.) 381; *Beeler v. Bullitt*, 3 A. K. Marsh. (Ky.) 280; 12 Am. Dec. 161; *Gorham v. Hood*, 27 Ga. 300.

As to the *Indiana* exception of incumbered personal property, see *Detrick v. State Bank*, 6 Ind. 439. As to equity's aid thereupon, see *Williams v. Reynolds*, 7 Ind. 622.

See *supra*, this title, *The Place for Selling*; and *Conducting the Sale*.

5. See *supra*, this title, *Conducting the Sale—Parceling*.

6. *E. g.*, machinery and a manufactory. *Cresson v. Stout*, 17 Johns. (N. Y.) 116; 8 Am. Dec. 373.

The sheriff is liable for neglect by which the property levied on is lost or squandered—*e. g.*, part of a raft of timber defectively moored and lost in a storm. *Jemer v. Joliffe*, 9 Johns. (N. Y.) 381.

If a constable so lames a mare levied on that she is worth less than before by the amount due on the execution, this is a satisfaction of the judgment, and precludes further proceeding on this or on an *alias*. *People v. Hopson*, 1 Den. (N. Y.) 574.

In *Alabama*, the sheriff may hire out horses levied on. *Alabama Civil Code*, 1886, § 2903.

7. *Evans v. Landon*, 6 Ill. 307.

As to the defendant's election of remedies in case of a sale for less than two-thirds the appraised value, contrary to *Kansas Civil Code*, § 455, see *De Jarnette v. Verner*, 40 Kan. 224.

8. See *infra*, this title, *Amercement*; *EXECUTIONS*, vol. 7, p. 149. Compare *Cook v. Palmer*, 6 B. & C. 739; *Batcheler v. Vyse*, 4 M. & S. 552; *Shropshire v. Pullen*, 3 Bush (Ky.) 512.

tion,¹ or after being notified of allowance of a writ of error,² or of a *certiorari*.³ A statute requiring him to pay taxes due on the property or by the owner is not remedial and must not be construed beyond the plain legislative intent.⁴ In *England*, also, sheriffs have always been held to a strict accountability for injuries consequent upon their fraud or neglect in seizing and selling property under execution.⁵

4. Liability to Third Parties.—The sheriff is liable to the real owner for chattels taken and sold under an execution against another person.⁶ But he is not liable for goods intermingled with the defendant's until the owner points them out and demands them.⁷

Many States have special statutes to relieve the sheriff's embarrassment upon claim intervention.⁸ In most States the

This liability does not affect the sheriff's right of property. *Dezell v. Odell*, 3 Hill (N. Y.) 215; 38 Am. Dec. 628.

1. So held where bankruptcy proceedings were pending. *Stinson v. McMurray*, 6 Humph. (Tenn.) 339.

2. And this though there has been no further supersedeas. *Belshaw v. Marshall*, 4 B. & Ad. 336; 24 E. C. L. 68. But compare *Foster v. Wiley*, 27 Mich. 244; 15 Am. Rep. 185; *Bryan v. Hubbs*, 69 N. Car. 423; *Payne v. The Governor*, 18 Ala. 320.

3. *Spencer v. Long*, 39 Cal. 700.

4. *E. g.*, *Alabama Code*, § 419. *Holding v. Thomas*, 62 Ala. 4.

5. *Laicock's Case*, Latch 187.

Of a sheriff who, without notice of the defendant's previous act of bankruptcy, paid over the proceeds of the sale to the plaintiff upon an indemnity, it was held that the defendant's assignee might recover in an action for money had and received. *Young v. Marshall*, 8 Bing. 43; 21 E. C. L. 215.

6. And this, though there has been no manual possession—*e. g.*, of sheep in an open field. *Neff v. Thompson*, 8 Barb. (N. Y.) 213. Compare, as to a stock of goods in a store, *Phillips v. Hall*, 8 Wend. (N. Y.) 610; 24 Am. Dec. 108. He may show in mitigation that the goods were taken from his custody and lawfully sold under a distress warrant issued by a third person. *Sherry v. Schuyler*, 2 Hill (N. Y.) 204. But not identity of name with the defendant's. *Jarmain v. Hooper*, 7 Scott N. R. 663.

7. *Shumway v. Rutter*, 8 Pick. (Mass.) 443; 19 Am. Dec. 340; *Paige v. O'Neal*, 12 Cal. 495.

He is not liable for property coming rightfully into his possession, unless demanded before suit. *Shaw v. Davis*, 55 Barb. (N. Y.) 389.

He is not liable to a mortgagee for selling on an execution against the mortgagor, if the defendant had the right of possession for a definite period. *Hull v. Carnley*, 11 N. Y. 501. And, conversely. *Mattison v. Baucus*, 1 N. Y. 295.

In *Iowa*, after judgment by default against a claimant, a sale may be valid though the default is afterwards taken off, and a trial of the right of property had. *Hughes v. Miller*, 2 Greene (Iowa) 9.

8. As to the proceedings in *Georgia* upon an affidavit of illegality, see *Georgia Code*, 1882, §§ 3664, *et seq.* See, also, the complicated case of *Thomas v. Johnston*, 53 Ga. 69; also *Whelchel v. Lucky*, 41 Fed. Rep. 114; *Sullivan v. Hearnden*, 11 Ga. 204, and *Gunn v. Woolfolk*, 66 Ga. 682.

As to the same in *Florida*, see *Florida Dig. Laws*, 1881, p. 524, § 19.

In *Pennsylvania* (in Philadelphia and Luzerne counties) the sheriff may have a rule issued to the claimant and to the execution plaintiff "for the adjustment of such claim" the costs to "be in the discretion of the court." *B. P. Dig. Pennsylvania Laws*, 1885, p. 750, § 56.

An indemnified sheriff should, on claim of third persons, apply for an interpleader under *Pennsylvania* act of 1848, and not return the writ stating the giving of bond. *Connelly v. Walker*, 45 Pa. St. 449.

As to claim and delivery, compare *South Carolina Code*, 1882, §§ 230, *et*

sheriff may recover from a bidder in default the deficiency on a resale.¹

A sheriff selling under a junior execution, and paying the money to the plaintiff therein, may be compelled to pay it on the writ properly entitled thereto.²

To another officer who has levied under a senior execution he is liable for any unwarranted interference.³

The sheriff is liable to the purchaser for injuries consequent upon the sheriff's neglect or misconduct.⁴

5. **Amercement.**—In many States, the statutes prescribe a penalty for the sheriff's refusal or neglect to sell property in his hands if subject to sale, or to pay over to the plaintiff the money collected, or to pay over to the defendant any excess remaining after satisfaction, or for a false return. These are very dissimilar in point of severity.⁵

seq.; *Mississippi Rev. Code*, 1880, §§ 1774, *et seq.*; *Utah Comp. Laws*, 1888, §§ 3287, *et seq.*; *Oregon Annot. Laws*, 1887, p. 265.

As to consequent rights of the sheriff thereon, see *INDEMNITY CONTRACTS*, vol. 10, p. 421.

In *Wisconsin*, the sheriff can state in his return the fact of competing claims, pay the money into court, and leave their priority therein to be determined. *McDonald v. Allen*, 37 Wis. 108; 19 Am. Rep. 754.

1. See *supra*, this title, *Resale—At Law*.

In *North Carolina*, equity will relieve against a mortgagee's purchase of an equity of redemption at sheriff's sale. *Camp v. Cox*, 1 Dev. & B. (N. Car.) 52; *Simpson v. Simpson*, 93 N. Car. 373.

2. *Drewe v. Lainson*, 11 A. & E. 529; 39 E. C. L. 154; *Kirk v. Vonberg*, 34 Ill. 440; *Peck v. Tiffany*, 2 N. Y. 451; *Jones v. Judkins*, 4 Dev. & B. (N. Car.) 454; 34 Am. Dec. 302; *Kennon v. Ficklin*, 6 B. Mon. (Ky.) 414; 44 Am. Dec. 776; *Isler v. Colgrove*, 75 N. Car. 334.

3. Compare *Foulks v. Pegg*, 6 Nev. 136; *Freeman v. Howe*, 24 How. (U. S.) 450; *Riggs v. Johnson Co.*, 6 Wall. (U. S.) 197; *Moore v. Withenburg*, 13 La. Ann. 22; *Fox v. Hempfield R. Co.*, 2 Abb. (U. S.) 151.

As to the sheriff's duty in case of conflicting executions, see *Metzner v. Graham*, 66 Mo. 653; also *supra*, this title, *Disposal of the Proceeds as Between Rival Executions*.

4. See *supra*, this title, *The Purchaser's Remedies—Recourse on the Sheriff*.

So held, where, by the sheriff's not posting the notices legally, his deed to the purchaser of an equity of redemption conveyed no title. *Sexton v. Nevvers*, 20 Pick. (Mass.) 451; 32 Am. Dec. 225.

The purchaser is not an "aggrieved party", within *California Code*, § 693, which prescribes a penalty for selling real property without notice, recoverable by the party aggrieved. *Kelley v. Desmond*, 63 Cal. 517.

5. **Alabama.**—For failure to pay over to plaintiff on demand liable "for the amount so collected and five per centum per month damages from the time such demand was made." For the sheriff's failure to make return, the plaintiff may recover "twenty per centum on the judgment." *Alabama Civ. Code*, 1886, § 3101.

Discharge of the defendant in bankruptcy after is no defense. *Noble v. Whetstone*, 45 Ala. 361.

Failure to make money which by due diligence could have been made, "for the amount of the execution, interest, and ten per centum damages thereon." § 3102. The same "for fraudulently making a false return." § 3103. "For failing to notify the plaintiff, his agent or attorney of the collection," etc., "for five per centum per month on the amount collected, from the time when the notice should have been given, not to exceed \$25 per month." § 3104. The sheriff is liable to the defendant for failure to pay over the excess, etc., for the amount of such excess and five per cent. per month after demand. § 3108.

Arizona.—For failure to pay over to plaintiff on demand, he is liable for

amount collected and five per cent. per month besides interest and costs. *Arizona* Rev. Stat. 1887, § 1938.

Arkansas.—For such failure the amount collected and ten per cent. per month from demand. To defendant, for failure to pay over the excess, he is liable for its amount and five per cent. per month from demand. *Arkansas* Dig. Stat. 1884, § 3965. For failure to return execution, amount of judgment and costs and ten per cent. Section 3964.

California.—For the failure to pay over the money, etc., the creditor may recover the amount with 25 per cent. damages, and interest at ten per cent. a month from demand. *California* Pol. Code, 1889, § 4181.

Colorado.—For selling exempt property he is liable to the party injured for three times the value of the property," with costs of suit. *Colorado* Annot. Stat. 1891, § 2564.

Connecticut.—For failure to return or for false return, he is "liable to pay all damages to the party aggrieved. No sheriff shall return in any case that he cannot do execution." *Connecticut* Gen. Stat. 1888, § 1992.

Dakota.—For failure to pay over, etc., on motion and two days' written notice, he shall "be amerced in the amount of said debt, damages and costs, with ten per cent. thereon, for the use of said plaintiff or defendant as the case may be." *Dakota* Comp. Laws 1887, § 5167.

Delaware.—For failure to return within the time limited, he "shall answer for the debt, damages and costs," etc. *Delaware* Laws, 1874, p. 685, § 50.

Florida.—For failure to return he shall be amerced \$100, "to be paid to the party grieved upon motion," etc. Dig. *Florida* Laws, 1881, p. 939, § 17.

Georgia.—For failure to pay over, etc., he shall be amerced 20 per cent. per annum, upon the sum from date of demand, "unless good cause be shown to the contrary." *Georgia* Code, 1882, § 1992.

The sheriff is liable to the plaintiff for the value of the property, if lost through neglect to sell and the defendant's becoming insolvent. *Neal v. Price*, 11 Ga. 297.

Idaho.—For selling without the prescribed notice, he forfeits \$500 "to the aggrieved party in addition to his actual damages." *Idaho* Rev. Stat. 1887, § 4483.

Illinois.—For neglecting to pay over, etc., besides ordinary recovery on bond, he shall "forfeit to the person injured five times the lawful interest of the money from the time of the demand until paid," recoverable by action on his bond or against himself alone. *Illinois* Rev. Stat. 1891, p. 1419, § 7; p. 1421, § 23.

Indiana.—For neglecting to return, or for a false return, he shall "be amerced in such amount as he might and should have levied," etc. *Indiana* Rev. Stat. 1881, § 784. For neglect to pay over to the execution creditor or debtor, when entitled, etc., "be amerced to the amount thus withheld." § 785.

Iowa.—For selling without the prescribed notice, he forfeits \$100 to the execution defendant in addition to the actual damages, etc. *Miller's Iowa* Rev. Stat. 1888, § 3081.

Kansas.—For failure to execute process "unless he makes it appear to the satisfaction of the court that he was prevented by inevitable accident from doing so, he shall be amerced in a sum not exceeding \$1,000 upon motion and ten days' notice, and shall be liable to the action of any person aggrieved by such failure." *Kansas* Gen. Stat. 1889, § 4832. If he "shall neglect to make due return or be guilty of any default or misconduct in relation thereto, he shall be liable to fine or attachment or both at the discretion of the court, subject to appeal; such fine, however, not to exceed \$200, and also an action for damages to the party aggrieved." § 1774.

Kentucky.—For a false return he shall be fined \$20 upon notice and motion, and be subject to pay the whole amount of the execution and costs. *Kentucky* Gen. Stat. 1887, p. 1086, § 10. (*Compare* p. 1201, § 20, as to triple damages for an illegal return.) For failure to pay over "on proper demand, be liable for the amount collected and fifteen per centum per annum interest thereon from such demand until paid and the costs of recovery, legal and extraordinary." Page 583, § 4. For failure to return within thirty days, "without reasonable excuse," be "liable to the plaintiff in execution for the amount thereof and thirty per centum damages thereon, and costs of recovery." § 5. Otherwise if the execution defendant is insolvent. § 7.

As to "excuse," see *Keith v. Com.*, 5 J. J. Marsh. (Ky.) 359. It is no rea-

sonable excuse that the execution was defective. *Wilson v. Huston*, 4 Bibb (Ky.) 332. Or was "accidentally misplaced." *Shippen v. Curry*, 3 Metc. (Ky.) 184. That the sheriff mailed it to the clerk's office, and was unable to find it after diligent search, is a reasonable excuse; but not 'available unless conclusively proven. *Mitcheson v. Foster*, 3 Metc. (Ky.) 334.

Louisiana.—For failure to execute process he is "responsible for the full amount owing on the claim sued on." *Louisiana Stat.* 1876, § 3594.

Maine.—"Any person injured by the neglect or misdoings of a sheriff who has first ascertained the amount of his damages by judgment," etc., "may at his own expense, in the name of the treasurer, institute a suit on his official bond," etc., and have judgment for "so much thereof as remains unpaid, with interest." *Maine Rev. Stat.* 1883, p. 659, § 14.

Maryland.—For failure to make return within the time limited, he is liable for the amount of the judgment. *Maryland Pub. Gen. Laws*, 1888, p. 1285, § 12. For failure to obey rule to bring money into court, be liable for amount of the plaintiff's claim, interest and costs, "without stay or execution, and without the right to supersede or appeal," etc. § 15.

Massachusetts has a provision substantially like that of *Maine*. *Massachusetts Pub. Stat.* 1882, p. 216, § 9.

Michigan.—For willful neglect to execute process, he shall "be fined by the officer issuing the same in a sum not exceeding \$25. *Michigan Annot. Stat.* 1882, § 7748. For neglecting to pay over money to the person entitled thereto within a reasonable time after demand, on conviction, "be punished by imprisonment in the county jail not more than one year, or by fine not exceeding four times the amount of money so received, or both, at the discretion of the court." § 9152.

Minnesota.—For failure to pay over money collected he is liable for "the amount found due, with twenty per centum thereon as damages," with all costs. *Minnesota Stat.* 1891, § 962. For neglecting to make return, "in addition to requiring the performance of the duty neglected, or the correction of the injury done, the court may impose upon such sheriff a fine for the use of the county, not exceeding \$200, provided that nothing herein shall prevent the person injured from maintaining an

action for damages against the sheriff or upon his official bond." § 963.

Mississippi.—For failure to pay over money collected he is liable for the full amount due with 25 per cent. damages and lawful interest until paid, to be recovered with costs, by motion on five days' notice. *Mississippi Rev. Code*, 1880, § 333. For making a false return be liable to pay to the plaintiff \$500. § 334. For failure to pay over to the defendant any excess of collection, a like penalty to that in section 333. § 335.

Missouri.—For failure to pay over money collected, he is liable for the amount, with lawful interest, also damages at five per cent. per month from demand, recoverable by civil action or by motion on two days' notice. *Missouri Rev. Stat.* 1889, § 4965.

Montana.—For selling without the prescribed notice, he forfeits \$500 to the aggrieved party, in addition to his actual damages. *Montana Comp. Stat.* 1887, p. 149, § 333. For failure to make due return or for misconduct, etc., his liability is that prescribed by the *Kansas* statute thereon. Page 874, § 863.

Nebraska.—For neglect to execute process, unless prevented, etc., the provision is identical with the *Kansas* statute, \$1,000, etc. *Nebraska Comp. Stat.*, 1889, p. 964, § 891. For failure to execute the writ or to sell, or to call in quest, or to make return, or to pay over on demand of the plaintiff, or to pay over the surplus on demand of the defendant, he shall on motion and two days' notice, "be amerced in the amount of said debt, damages and costs with ten per centum thereon, to and for the use of said plaintiff or defendant as the case may be." Page 924, § 513.

Nevada.—For neglect to pay over the money, etc., the provision is identical with the *California* statute thereon. *Nevada Gen. Stat.*, 1885, § 2128.

New Hampshire.—"If any officer be guilty of any fraud in the sale or return, he shall be liable to each party injured to pay him five times the sum defrauded." *New Hampshire Gen. Laws*, 1878, p. 546, § 9.

New Jersey.—For neglect to pay over the money, etc., he is liable to "be amerced in the value of the debt or damages and costs." *New Jersey Rev.* 1877, p. 1102.

New Mexico.—Any sheriff failing to pay over moneys for which he may be

responsible, shall be removed from office by the governor of the Territory. *New Mexico Comp.*, 1884, § 388.

New York.—For selling realty without the prescribed notice, the provision is substantially the *Kansas* statute thereon. B's *New York*, Rev. Stat., 1890, p. 1078, § 77. For failure to execute process and make return, "he is liable to the party aggrieved for the damages sustained by him, in addition to any fine or other punishment or proceeding authorized by law." Page 2699, § 7.

North Carolina.—For selling contrary to the statute, he forfeits, \$200 "to any person suing for the same, one-half for his own use and the other half to the use of the county." *North Carolina Code*, 1883, § 461.

Ohio.—For failure to execute writ, sell, pay over, etc., the provision is substantially the *Nebraska* statute. *Ohio Rev. Stat.* 1890, § 5594. So, also, as to the general penalty, \$1,000, etc. § 5596.

Oklahoma.—For neglecting to make return of the execution, or for making a false return, "he shall be amerced to the value of such property, not to exceed the amount necessary to satisfy the execution." *Oklahoma Stat.* 1890, § 4805. For neglecting to pay over to the execution creditor, or debtor, when entitled, he is amerced (as in *Indiana*) to the amount thus withheld. § 4806.

Oregon.—For failure of duty the remedy is upon the sheriff's "official undertaking." *Oregon Annot. Laws*, 1887, § 341. The action for neglect to levy or sell may be brought directly by the judgment creditor. *Habersham v. Sears*, 11 *Oregon* 431.

Pennsylvania.—To return process and pay over money the court may make rule on him. B. P. Dig. *Pennsylvania Laws*, 1885, p. 325, § 6. And may enforce the rule by attachment. *Hantz v. York Bank*, 21 *Pa. St.* 291.

Rhode Island has a provision substantially like that of *Maine* and *Massachusetts*. *Rhode Island Pub. Stat.* 1882, p. 544, § 10.

South Carolina.—For failure to make return, or for making a false return, he "shall be subject to rule, attachment, action, penalty and all other consequences provided by law for neglect of duty by executive or judicial officers." *South Carolina Code*, 1882, § 311, par. 2.

Tennessee.—For failure to make return or pay over to the plaintiff the money,

etc., he is liable for the amount due on the execution, and 12½ per cent. damages. *Tennessee Code*, 1884, § 4338. For failure to pay over to the defendant any excess, etc., he is liable for its amount, besides the damages. § 4339.

The defendant's insolvency will not mitigate on failure to make return. *Fowler v. McDaniel*, 6 *Heisk. (Tenn.)* 529. If without levy his official term expires before return day, there can be no summary proceeding against him for non-return. *State v. Parchmen*, 3 *Head (Tenn.)* 609.

Texas.—For selling without the prescribed notice, he forfeits to the party injured not less than \$10 nor more than \$200, in addition to such other damages as the party may have sustained, recoverable on five days' notice. *Texas Rev. Stat.* 1879, art. 2319. For failure to pay over the collection, he is liable for the amount with damages at five per cent. per month besides interest and costs, recoverable on motion on five days' notice. § 2325. So, also, for wrong refusal to levy or sell. § 2326. Or neglect to make return. § 2327.

Utah.—For selling without the prescribed notice he forfeits \$500 to the aggrieved party in addition to his actual damages. *Utah Comp. Laws*, 1888, § 3432.

Vermont.—For neglecting to return, or for making a false return, he shall be fined not exceeding \$100, and pay to the aggrieved party the damages and costs. *Vermont Rev. Laws*, 1880, § 857. If he fail to execute a writ against a town for taxes, the treasurer shall issue his extent to the high bailiff, who shall levy it on the sheriff's estate, or, for want thereof, commit the sheriff to jail. § 413.

If a deputy has authority from the execution creditor to manage according to his discretion, the sheriff is discharged of his liability for the deputy's official neglect. *Fletcher v. Bradley*, 12 *Vt.* 22; 36 *Am. Dec.* 324.

West Virginia.—For making such return as entitles any person to recover money from him, the court may, on motion, give judgment against him and his sureties for so much, principal and interest, as would, at the time such return ought to have been made, be recoverable with interest at not less than six nor more than fifteen per cent. per annum from that time until payment. *West Virginia Code*, 1891, p. 304, § 35.

Definition.

SHIFTED LAND WARRANT.

Definition.

SHIFTED LAND WARRANT.—A warrant which describes different land from that upon which the survey is actually made.¹

SHIFTING RISK.—See FIRE INSURANCE, vol. 7, p. 1008.

SHIFTING USE.—See USE.

SHIPBROKERS.—See BROKERS, vol. 2, p. 598.

SHIPMASTER.—See MASTER OF A VESSEL, vol. 14, p. 958.

SHIPPING ARTICLES.—See SEAMEN, vol. 21, p. 915.

SHIPPING COMMISSIONER.—See SEAMEN, vol. 21, p. 915.

Washington.—For failure to pay the money to the clerk within twenty days the penalty is twenty per cent. on the amount collected; one-half to the party to whom the judgment is payable, the other half to the county commissioners, for the use of the school fund. *Washington Code*, 1881, § 330.

Wisconsin.—For selling without the prescribed notice, penalty, \$1,000, and also the actual damages. *Wisconsin Annot. Stat.* 1889, § 2996. For neglect to return execution within five days after the return day, he forfeits the amount of the execution with interest from rendition of the judgment; § 3698. For failure to pay over the collection, he forfeits the amount with interest; § 3699.

Wyoming.—An action on the sheriff's bond must be brought within ten years. *Wyoming Comp. Laws*, 1876, p. 35, § 14.

In *England*, a sheriff unreasonably long, refusing or neglecting to sell, has only to respond to the plaintiff for the actual consequent damages; if these be not proven, the jury can only award nominal damage. *Bales v. Wingfield*, 2 N. & M. 831; *Clifton v. Hooker*, 6 Q. B. 468.

As to damages unliquidated or special at common law, see DAMAGES, vol. 5, pp 25, 50.

1. **Distinguished from Other Warrants.**—In *Lauman v. Thomas*, 4 Binn. (Pa.) 51, Tilghman, C. J., says: "Warrants or locations may be divided into several classes. The first are descriptive of the land intended to be surveyed, either precisely or with such reasonable certainty as is sufficient to designate it. If due diligence is used in obtaining a survey the title under these warrants attaches from the date. The second class comprehends those which give but a loose description of the land applied for. I take the warrant in ques-

tion to be of this nature. It fixes no precise spot, but allows a scope of several miles. The title under such a warrant cannot attach until the survey is made, for, till then, it cannot be certainly known where the land lies. I believe that a very large proportion of the location entered on the opening of the land office in the year 1769, was of this class. Great allowance must be made for looseness of description in a country very little explored. The third class consists of what are called shifted warrants or locations—that is to say, where the survey is made on land different from that described. These surveys have no validity, except against persons having notice of them, until the time of their acceptance in the office of the surveyor-general, for very obvious reasons. Being an alteration of the contract, they can have no force till accepted, because the proprietary was under no obligation to keep the land vacant, and may have suffered some other person to appropriate it before the return of the shifted survey. Indeed it was only by courtesy and the custom of the land office that such surveys were accepted at all.

Effect.—"The title on a shifted location does not, unless against a person having actual notice, attach before return of survey." *Boyles v. Kelly*, 10 S. & R. (Pa.) 214; *Fox v. Lyon*, 33 Pa. St. 474. "A shifted survey if fairly made, returned, and accepted by the proper authority, when there is no intervening opposing right, will hold and secure the lands." *Irwin v. Moore*, 2 Smith's Law (Pa.) 187; *Smith v. Walker*, 98 Pa. St. 141. See generally *Moore v. Shaver*, 6 S. & R. (Pa.) 130; *Miles v. Potter*, 2 Binn. (Pa.) 65; *Mix v. Smith*, 7 Pa. St. 77; *Keble v. Arthurs*, 3 Binn. (Pa.) 26; *Jones' Land Law*, § 32.

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I. DEFINITION.—In a technical sense a ship is a three-masted vessel navigated with sails,¹ but as employed in law the term includes all navigable structures propelled with sails as well as with steam.²

II. SHIPPING REGULATIONS—1. In General.—Congress has power to regulate commerce with foreign nations and among the several States.³ This power is complete in itself and has no limit other

1. See Black's L. Dict., p. 1092; 4 Wash. (U. S.) 530.

2. Cope v. Vallette Dry Dock Co., 119 U. S. 629.

By the Roman law the word "ship" apparently included everything which floated upon the waters and was accessory to commerce. Under the French law the definition is almost equally broad. The word ship includes every vessel of timber work able to float and to be carried upon the water. Boats and the smallest barks are comprehended in the same definition; even rafts are included. A Raft of Cypress Logs, 1 Flip. (U. S.) 545.

By the act of 17 and 18 Vict. 1854, ch. 100, § 2, "ship" includes every description of vessel used in navigation not propelled by oars. *Ex parte Ferguson*, L. R., 6 Q. B. 291.

In *Yarnberg v. Watson*, 13 Oregon 11, a vessel is defined to be any structure made to float upon the water for the purpose of commerce or war, whether impelled by wind, steam or oars. *Chaffe v. Ludeling*, 27 La. Ann. 611.

A torpedo steam launch attached to a division of a naval squadron, though not proved to have had any books, is a ship within the meaning of the prize act of June 30, 1864, ch. 174, § 10, rules 4 and 5. *U. S. v. Steever*, 113 U. S. 747.

A floating elevator was held to be a "ship" or "vessel" within the meaning of a certain statute. *The Hezekiah Baldwin*, 8 Ben. (U. S.) 556.

The term as used in the *California* Code includes steamboats, sailing vessels, canal boats, barges, and every structure adapted or intended to be navigated from place to place for the transportation of merchandise or persons. *California* Civ. Code, § 960.

The following have been held not within the meaning of the term:

A rowboat, *Fisher v. Camden*, etc., *Ferry Co.*, 124 Pa. St. 154.

An open boat, *U. S. v. An Open Boat*, 5 Mason (U. S.) 120.

A canal boat, *Hicks v. Williams*, 17

Barb. (N. Y.) 523; *Many v. Noyes*, 5 Hill (N. Y.) 34; *Yarnberg v. Watson*, 13 Oregon 11; *Crawford v. Collins*, 45 Barb. (N. Y.) 269; *King v. Greenway*, 71 N. Y. 413; *Fralick v. Betts*, 13 Hun (N. Y.) 633.

A ferry-boat, *Burkbeck v. Hoboken Ferry-boat Co.*, 17 Johns. (N. Y.) 54.

Coal barges or flat boats used to transport goods down a river and sold for lumber at their destination, *Jones v. Coal Barges*, 3 Wall. Jr. (C. C.) 53.

Fishing vessels, *Simpson v. Story*, 145 Mass. 497; 1 Am. St. Rep. 480.

And small undecked boats which do not go out of sight of land, *Farmer's Delight v. Lawrence*, 5 Wend. (N. Y.) 564.

Vessel in Unfinished State.—A boat in an unfinished state and wholly unfit for carriage of men or goods on water, or for any purpose for which such a vehicle is intended, is not a vessel. *Yarnberg v. Watson*, 13 Oregon 11; *The Vermont*, 6 Ben. (U. S.) 115.

In *Northup v. The Pilot*, 6 Oregon 298, the court, by Boyce, J., said: "The hull of a boat without the other parts necessary to its use is not a boat within the meaning of the statute to which the lien created by the statute could attach."

The materials which constitute a ship become one as soon as she leaves the ways and her keel strikes the element for which she was originally designed. *The Eliza Ladd*, 3 Sawy. (U. S.) 519.

3. *Passaic Bridge Case*, 3 Wall. (U. S.) 793; *Mumford v. Wardwell*, 6 Wall. (U. S.) 423; *Crandall v. Nevada*, 6 Wall. (U. S.) 42; *Woodruff v. Parham*, 8 Wall. (U. S.) 123; *State Freight Tax Cases*, 15 Wall. (U. S.) 279; *Weber v. Board of Harbor Com'rs*, 18 Wall. (U. S.) 66; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Janney v. Columbian Ins. Co.*, 10 Wheat. (U. S.) 411; *Groves v. Slaughter*, 15 Pet. (U. S.) 504; *Martin v. Waddell*, 16 Pet. (U. S.) 367; *New York v. Miln*, 11 Pet. (U. S.) 158; *Siliman v. Troy*, etc., *Bridge Co.*, 11

than that prescribed by the court.¹ It includes the power to prescribe what shall constitute American vessels, the national character of the seamen who shall navigate them, the rules and regulations for the intercourse and navigation of such vessels;² and, in fact, every subject of commerce to which legal discretion may apply.³ This power may be exercised wherever the subject exists even though it be within the territorial jurisdiction of several States.⁴ And when it is thus called into exercise, it is not only paramount but exclusive and cannot lawfully be interfered with to any extent.⁵

The power of Congress comprehends navigation within the limits of every State in the Union so far as that navigation may be in any manner connected "with commerce with foreign nations or among the several States or with the Indian tribes."⁶ If the commerce is purely internal commerce of a State, it is not included within this power.⁷ Each State has undeniable and unlimited jurisdiction over all matters pertaining to its own internal police. It can establish and regulate ferries across its rivers, control the moving of vessels in harbors within its borders, and enact health and inspection laws which by quarantine or otherwise may operate on persons brought within its jurisdiction in

Blatchf. (U. S.) 283; Passenger Cases, 7 How. (U. S.) 282; *Veazie v. Moor*, 14 How. (U. S.) 574; *Allen v. Newberry*, 21 How. (U. S.) 246; *Luther v. Borden*, 7 How. (U. S.) 72; *Dred Scott v. Sandford*, 19 How. (U. S.) 528; *Boyden v. Burke*, 14 How. (U. S.) 575; *Minot v. Philadelphia, etc., R. Co.*, 2 Abb. (U. S.) 342; 18 Wall. (U. S.) 206; *U. S. v. Seveloff*, 2 Sawy. (U. S.) 317; *Com. v. Charlestown*, 1 Peck. (Tenn.) 180.

1. State Freight Tax Cases, 15 Wall. (U. S.) 279; *The Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 44; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Pollard v. Hagan*, 3 How. (U. S.) 229; License Cases, 5 How. (U. S.) 588.

2. See NAVIGATION, vol. 16, p. 270.

3. *Wisconsin v. Duluth*, 96 U. S. 379; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Dred Scott v. Sandford*, 19 How. (U. S.) 622.

4. *U. S. v. New Bedford Bridge*, 1 Woodb. & M. (U. S.) 486; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Brown v. Maryland*, 12 Wheat. (U. S.) 419.

5. *Cooley v. Port Wardens*, 12 How. (U. S.) 299; *Sinnot v. Davenport*, 22 How. (U. S.) 227; *U. S. v. Duluth*, 1 Dill. (U. S.) 467; *Halderman v. Beckwith*, 4 McLean (U. S.) 286; *Rogers v. Cincinnati*, 5 McLean (U. S.) 337.

6. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1.

7. *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. (U. S.) 432; *Maguire v. Card*, 21 How. (U. S.) 250; *Allen v. Newbury*, 21 How. (U. S.) 244; *New Jersey Steam, etc., Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *The Genessee Chief v. Fitzhugh*, 12 How. (U. S.) 443; *Conway v. Taylor*, 1 Black (U. S.) 635; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *The Daniel Ball*, 10 Wall. (U. S.) 565; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713; *Minot v. Philadelphia, etc., R. Co.*, 2 Abb. (U. S.) 342; *The Thomas Swan*, 6 Ben. (U. S.) 45; *The Oconto*, 5 Biss. (U. S.) 463; *The Seneca*, 1 Biss. (U. S.) 372; *Corfield v. Coryell*, 4 Wash. (U. S.) 379; *U. S. v. The William Pope*, Newb. Adm. 258; *U. S. v. The James Morrison*, Newb. Adm. 245; *The Bright Star*, Woolw. (U. S.) 275; *State Tonnage Tax Cases*, Woolw. (U. S.) 215; *U. S. v. New Bedford Bridge Co.*, 1 Woodb. & M. (U. S.) 417; *Sullivan v. Hudson River Bridge*, 4 Blatchf. (U. S.) 83; *Com. v. Charlestown*, 1 Pick. (Mass.) 180; 11 Am. Dec. 161; *People v. Platt*, 17 Johns. (N. Y.) 195; 8 Am. Dec. 382; *People v. Saratoga, etc., R. Co.*, 15 Wend. (N. Y.) 113; *The Peytona*, 2 West. Law Mon.

the course of commercial operation.¹ This power of Congress to regulate commerce with foreign nations and among the several States does not, however, absolutely prohibit a State from legislating concerning commerce that is connected with foreign nations or among the several States.² Where this power is not exercised or lies dormant, a State may legislate. Inspection laws, quarantine, pilotage, port regulations, ferry laws, etc., enacted by a State, will not be invalid if no law which Congress has passed upon the same subject is violated.³ Where Congress does not act, the States must legislate on local and appropriate matters though they may be connected with commerce.⁴ But in case an act of the legislature of the State prescribes a regulation of the subject of commerce repugnant to and inconsistent with the regulation of Congress, the State law must give way.⁵ (See NAVIGATION, vol. 16, p. 275; PILOTS, vol. 18, p. 444.)

2. Registration and Enrollment.—Every vessel of the United States which is afloat is bound to have with her from the officers of her home port, either a register or an enrollment. The former is used when she is engaged in a foreign voyage or trade, and the latter when she is engaged in domestic commerce, usually called coasting trade.⁶ The purpose of a register is to declare the

518; *Whitaker v. Lorents*, 2 West. Law Mon. 520.

1. *King v. American Transp. Co.*, 1 Flip. (U. S.) 6.

A statute requiring owners of vessels navigated through canals within the State to furnish lists of the tons of freight and number of passengers, is a reasonable exercise of the police power of the State, and is within the constitutional authority of the legislature. *Canal, etc., Com'rs v. Willamette Transp., etc., Co.*, 6 Oregon 219.

2. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *License Cases*, 5 How. (U. S.) 583; *Withers v. Buckley*, 20 How. (U. S.) 84; *Smith v. Maryland*, 18 How. (U. S.) 71; *Cooley v. Port Wardens*, 12 How. (U. S.) 299; *U. S. v. New Bedford Bridge*, 1 Woodb. & M. (U. S.) 401; *Silliman v. Hudson River Bridge Co.*, 4 Blatchf. (U. S.) 409; *Passaic Bridge Case*, 3 Wall. (U. S.) 782.

3. *Gilman v. Philadelphia*, 3 Wall. (U. S.) 726; *Peete v. Morgan*, 19 Wall. (U. S.) 582; *Ex parte McNeel*, 13 Wall. (U. S.) 236; *Hobard v. Drogan*, 10 Pet. (U. S.) 121; *New York v. Miln*, 11 Pet. (U. S.) 141; *Holmes v. Jennison*, 14 Pet. (U. S.) 616; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *The James Gray v. The John Fraser*, 21 How. (U. S.) 184; *License Cases*, 5 How. (U. S.) 580; *Cooley v. Port*

Wardens, 12 How. (U. S.) 299; *U. S. v. The William Pope*, Newb. Adm. 258; *U. S. v. The James Morrison*, Newb. Adm. 247; *Silliman v. Hudson River Bridge Co.*, 4 Blatchf. (U. S.) 403; *The George S. Wright*, Deady (U. S.) 35; *The Panama*, Deady (U. S.) 32; *The California*, 1 Sawy. (U. S.) 467; *Horton v. Smith*, 6 Ben. (U. S.) 264; *Hunt v. Mickey*, 12 Met. (Mass.) 346; *Lincoln v. The Volusia*, 4 Pa. L. J. 65.

4. *Silliman v. Hudson River Bridge Co.*, 4 Blatchf. (U. S.) 83; *The America*, 1 Low. (U. S.) 177; *Passenger Cases*, 7 How. (U. S.) 558; *Cooley v. Port Wardens*, 12 How. (U. S.) 299.

5. *The George S. Wright*, Deady (U. S.) 594; *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet. (U. S.) 250; *New York v. Miln*, 11 Pet. (U. S.) 103; *Prigg v. Ccm.*, 16 Pet. (U. S.) 655; *Holmes v. Jennison*, 14 Pet. (U. S.) 540; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Sinnot v. Davenport*, 22 How. (U. S.) 227; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 743; *Crandall v. Nevada*, 6 Wall. (U. S.) 35; *U. S. v. Duluth*, 1 Dill. (U. S.) 472; *U. S. v. Hart*, 1 Pet. (C. C.) 390; *U. S. v. New Bedford Bridge*, 1 Woodb. & M. (U. S.) 418; *Com. v. Kimball*, 24 Pick. (Mass.) 359; 35 Am. Dec. 326.

6. *Badger v. Gutierrez*, 111 U. S. 734.

nationality of a vessel engaged in trade with foreign nations, and to enable her to assert that nationality wherever found. The purpose of an enrollment is to evidence the national character of a vessel engaged in the coasting trade or home traffic, and to enable such vessel to procure a coasting license.¹ If found afloat, whether by steam or sail, without one or the other of these, and without the right one with reference to the trade she is engaged in, or the place where she is found, she is not entitled to protection under the laws of the United States, but is liable to seizure for such violation of the law, and in a foreign jurisdiction or on the high seas can claim no rights as an American vessel.²

3. What Vessels Entitled to Register.—Under the statute only vessels built within the United States and belonging wholly to citizens thereof, and vessels which may be captured in war by citizens of the United States and lawfully condemned as prize, or which may be adjudged to be forfeited for a breach of the laws of the United States, may be registered.³ Vessels running on the ocean between ports of the same States carrying merchandise or passengers destined to foreign States,⁴ and foreign vessels wrecked on the coast of the United States may be registered if they are purchased and repaired by citizens thereof, providing it is satisfactorily proven that the repairs are equal to three-fourths of the cost of the vessel when repaired.⁵ If the person who owns the vessel either in whole or in part, is a citizen of the United States who usually resides in a foreign country, he is not entitled to the benefits of registry during the continuance of such residence, unless he be a consul of the United States or an agent or partner in some house of trade consisting of citizens of the United States actually carrying on trade within the United States.⁶

4. Place of Registration.—The registry is required to be made at the home port of the vessel.⁷ The home port is the place where or nearest to which the owner, or if more than one, the managing owner resides, and that continues to be the home port until another has been established by a change of the owner's residence.⁸ If the owner's residence is in one district and the vessel is built in another, the place where the vessel is built is

See *U. S. v. Forrester*, Newb. Adm. 81.

1. *U. S. v. Leetzel*, 3 Wall. (U. S.) 566.

2. *Badger v. Gutierrez*, 111 U. S. 734; *Hozey v. Buchanan*, 16 Pet. (U. S.) 215; *Fox v. Paine, Crabbe* (U. S.) 271; *Blanchard v. The Martha Washington*, 1 Cliff. (U. S.) 467; *Crapo v. Kelly*, 16 Wall. (U. S.) 633; *Colson v. Bonzey*, 6 Me. 474; *The John J. Wiltsie*, 3 Ben. (U. S.) 251.

3. U. S. Rev. Sts., § 4132.

4. *Lord v. Goodall, etc.*, S. S. Co., 4 Sawy. (U. S.) 292.

5. *The Mohawk*, 3 Wall. (U. S.) 566.

6. *U. S. v. Gillies*, 1 Pet. (C. C.) 159.

7. *Hill v. The Golden Gate*, Newb. Adm. 308; *Morgan v. Parham*, 16 Wall. (U. S.) 471.

8. *The Ellen Holgate*, 30 Fed. Rep. 126; *Hays v. Pacific Mail S. S. Co.*, 17 How. (U. S.) 596; *Morgan v. Parham*, 16 Wall. (U. S.) 477; *St. Louis v. Wiggins Ferry Co.*, 11 Wall. (U. S.) 432; *Crapo v. Kelly*, 16 Wall. (U. S.) 640; *Pickell v. The Loper*, Taney's Dec. (U. S.) 500; *Blanchard v. The Martha Washington*, 1 Cliff. (U. S.) 466. See *MARITIME LIENS*, vol. 14, p. 417.

the home port until after her delivery and her first voyage.¹ So if a citizen of the United States becomes the owner by purchase of a vessel entitled to be registered while the vessel is in a district other than the one where the purchaser resides, the vessel may be registered by the collector of the district where she may be at the time of the conveyance; and whenever she arrives within the district comprehending the port to which she belongs, the certificate of registry obtained may be delivered up to the collector who may grant a new one in lieu of the first.²

The former registry is temporary and the latter permanent. But the words permanent and temporary do not imply that they are co-existent but successive. A vessel cannot have two registers at the same time.³ If a vessel is temporarily registered at a port other than that to which she belongs and she afterwards arrives at her home port and is registered anew, the temporary register is to be delivered up.⁴

5. Mode of Registration.—A registry is granted on condition that an oath declaring the name of the vessel, her burden, etc., be taken and subscribed by the owner before the officer authorized to make the registry.⁵ A bond is always required to be given by the husband or managing owner of the vessel conditioned that the certificate of registry shall be used solely for the vessel for which it is granted.⁶ If the registry is obtained by false swearing,⁷ or if a certificate of registry is fraudulently used for a vessel not entitled thereto, the vessel may be forfeited.⁸

1. *Scott v. The Plymouth*, 5 McLean (U. S.) 463; *Newb. Adm.* 56; *Tree v. The Indiana*, *Crabbe* (U. S.) 497; *Thomas v. The Kosciusko*, 11 N. Y. Leg. Obs. 38.

2. *Blanchard v. The Martha Washington*, 1 Cliff. (U. S.) 467; *Chadwick v. Baker*, 54 Me. 14.

3. *Chadwick v. Baker*, 54 Me. 9.

4. *Desty on Shipp. & Adm.*, § 17; *The Margaret*, 9 Wheat. (U. S.) 421; *The Maria*, *Deady* (U. S.) 100.

5. See U. S. Rev. Sts., § 4142; *Weston v. Penniman*, 1 Mason (U. S.) 306; *The Active*, *Olc. Adm.* 286.

6. See U. S. Rev. Sts., § 4146; U. S. v. *Montell*, *Taney's Dec.* (U. S.) 47; *Allen v. U. S.*, *Taney's Dec.* (U. S.) 118; *Sinnot v. Davenport*, 22 How. (U. S.) 227.

7. U. S. Rev. Sts., §§ 4143, 4163. See *The Monte Christo*, 6 Ben. (U. S.) 148.

If one of two partners in a house of trade in this country obtain a United States register for a ship by swearing that he, together with his partner of the city of New York, are the sole owners of the vessel for which the

registry is obtained, when in fact his partner is domiciled in England, the vessel is liable to forfeiture under the Registry Act of Dec. 31, 1792, § 4, although such statement is made in good faith and under a misconception of the real character which a foreign domicile impresses upon an owner residing abroad. *The Venus*, 8 Cranch (U. S.) 253.

U. S. Rev. St., § 4189, which declares that for fraudulently obtaining a certificate of registration, etc., a vessel "shall be liable to forfeiture," does not effect a present absolute forfeiture, but only gives a right to have the vessel declared forfeited upon due process of law, and the property in the same remains in the owner until seizure and condemnation, which latter relates back to the time of seizure, and invalidates all intermediate sales. *The Kate Heron*, 6 Sawy. (U. S.) 106.

8. U. S. Rev. Sts., § 4189; *The Neptune*, 3 Wheat. (U. S.) 601; *The Luminary*, 8 Wheat. (U. S.) 407; *The Margaret*, 9 Wheat. (U. S.) 421; *The Monte Christo*, 6 Ben. (U. S.) 148; *The Mary Celeste*, 2 Low. (U. S.) 354.

6. When New Registry Required.—A new register must be obtained upon the sale or alteration of the vessel.¹ If not registered anew as described by the statute, the vessel forfeits her national character and the privileges attached to it.² The question at what time the new register is to be obtained and at what time the vessel shall be affected by the failure to obtain it, is susceptible of some doubt. By a fair and natural construction of the statute, it would seem, however, that the new register should be obtained at the time of delivering up her formal certificate of registry.³

7. Enrollment of Vessels.—The provision of the statute regulating the enrollment of vessels is the same as that providing for registration in similar cases,⁴ and it applies to sloops of over fifty tons' burden on the Hudson river,⁵ but not to canal boats without oars, masts or steam power,⁶ nor to open boats.⁷ The enrollment and license of a vessel gives it the right to carry on the coasting trade and land persons and property in the course of her commercial navigation⁸ or to carry passengers between the several States,⁹ but it does not confer the right to encroach upon the ferry privileges of others.¹⁰

8. Registry and Enrollment as Evidence.—The registry is not of itself evidence of ownership except so far as it is confirmed by some auxiliary circumstance showing that it was made by the authority or assent of the person named in it, and who is sought to be charged as owner.¹¹ Without such connecting proof the register has been held not to be even *prima facie* evidence to charge a person as owner, and even with such proof, it is not conclusive evidence of ownership.¹² When the register is obtained

The forfeiture imposed by Act of July 18, 1866, 14 Stat. 184, § 24, now Rev. Stat., § 4189, for using a fraudulent register, is an absolute one, and vests the property in the United States from the time when the fraud is committed. *The Mary Celeste*, 2 Low. (U. S.) 354.

1. See U. S. Rev. Sts., § 4159; U. S. v. Forrester, Newb. Adm. 81; U. S. v. The Hawke, Bee Adm. 34; Johnson v. Merrill, 122 Mass. 153; Davidson v. Gorham, 6 Cal. 343.

2. See U. S. Rev. Sts., § 4170; *Desty on Shipp. & Adm.*, § 16.

3. U. S. v. Willings, 4 Cranch (U. S.) 48.

4. U. S. Rev. Sts., § 4312, formerly act of Feb. 18, 1793, ch. 8, § 2. See also *The Mohawk*, 3 Wall. (U. S.) 566; *The Two Friends*, 1 Gall. (U. S.) 118; U. S. v. *The Forester*, Newb. Adm. 81; *Sinnot v. Davenport*, 22 How. (U. S.) 227; *Fox v. Paine*, Crabbe (U. S.) 271; *The Acorn*, 2 Abb. (U. S.) 435.

5. *Martin v. Acker*, B. & H. Adm. 280.

6. U. S. v. *The Penn*, 18 Inter. Rev. Rec. 56.

7. Rev. Sts. U. S., § 4585; *Buckley v. Brown*, 3 Wall. Jr. (U. S.) 199; *Martin v. Acker*, B. & H. Adm. 280.

8. *Conway v. Taylor*, 1 Black (U. S.) 602.

9. *State Freight Tax Cases*, 15 Wall. (U. S.) 232; *Morgan v. Parham*, 16 Wall. (U. S.) 471; *Silliman v. Troy*, etc., *Bridge Co.*, 11 Blatchf. (U. S.) 385.

10. *Conway v. Taylor*, 1 Black (U. S.) 603.

11. *Bradbury v. Johnson*, 41 Me. 582; 66 Am. Dec. 264; *Scudder v. Calais Steamboat Co.*, 1 Cliff. (U. S.) 381; *Colson v. Bonzey*, 6 Me. 474; *Lord v. Ferguson*, 9 N. H. 380.

12. *Bass v. Steele*, 3 Wash. (U. S.) 381.

A sworn copy of the steamboat register from the records of the custom house is not *prima facie* evidence of

on the oath of one of several part owners, it has been held *prima facie* evidence to charge them where no notice of an intent to deny the ownership was previously given.¹ So, where the question of ownership is merely incidental, the registry alone has been deemed sufficient *prima facie* evidence.² It may be admitted as one item in connection with other evidence to establish ownership.³ It may also be admitted against the person on whose affidavit it is obtained.⁴ But in favor of the person claiming as owner, it is no evidence at all, being nothing more than his own declaration.⁵ It is conclusive evidence that she was in a fit state to be registered;⁶ and it is also conclusive evidence as to who is master,⁷ and as to the vessel being insured.⁸ The registry or enrollment of a vessel is *prima facie* evidence of the port to which the vessel belongs.⁹ The enrollment is conclusive to show her character as a domestic vessel,¹⁰ but not her ownership.¹¹ It is competent for the real owner to show by parol evidence that his claim is well founded, and that the certificate of registry or enrollment had been fraudulently made and issued in the name of another.¹² See BOOKS AS EVIDENCE, vol. 2, p. 467j.

ownership, even against the party making it on affidavit, without the proof connecting the party charged with the register by his direct or accepted act. *Jones v. Pitcher*, 3 Stew. & P. (Ala.) 136; 24 Am. Dec. 26.

On an indictment under a law which makes criminal certain acts done on board a vessel owned in whole or in part by a citizen of the United States, an American register is not even *prima facie* evidence of such ownership, though such registry is made by the government only on the presupposition of such ownership and after oath by one or more persons of such ownership by them; nor is general reputation of such ownership any evidence of it. Ownership in such a case is a fact to be proved as other facts. *U. S. v. Brune*, 2 Wall, Jr. (C. C.) 264.

A creditor attaching a steamer may show by parol that his debtor holds a real interest in her, though she is registered in the name of another. The registry was intended to protect against fraud and not as a shield to fraud. *Ealer v. Freret*, 11 La. Ann. 455.

1. *Stokes v. Carne*, 2 Camp. 339.
2. *Moore v. Anderson*, 8 Ind. 18.
3. *Brooks v. Minturn*, 1 Cal. 481.
4. *Pirie v. Anderson*, 4 Taunt. 652; *Flower v. Young*, 3 Camp. 240; *Ligon v. New Orleans Nav. Co.*, 9 Martin (La.) 781; *Hacker v. Young*, 6 N. H. 95; *Cooper v. South*, 4 Taunt. 802.

5. 1 Greenl. Ev., § 494; 3 Kent's

Com., § 149; *Bixby v. Franklin Ins. Co.*, 8 Pick. (Mass.) 86; *West v. Peniman*, 1 Mason (U. S.) 306; *Tinkler v. Walpole*, 14 East 226; *McIver v. Humble*, 6 East 169; *Frazier v. Hopkins*, 2 Taunt. 5; *Jones v. Pitcher*, 1 Stew. & P. (Ala.) 135; 24 Am. Dec. 716; *Bradbury v. Johnson*, 41 Me. 582; 66 Am. Dec. 264; *Ring v. Franklin*, 2 Hall (N. Y.) 1; *U. S. v. Brune*, 2 Wall, Jr. (C. C.) 264; *Desty on Shipp. & Adm.*, § 19.

6. *Combs v. Mansfield*, 3 Drew. 193.

7. *The Dubuque*, 1 Abb. (U. S.) 20.

8. *Ohl v. Eagle Ins. Co.*, 4 Mason (U. S.) 172; *U. S. v. Bartlett*, 2 Ware (U. S.) 17; *Desty's Shipp. & Adm.*, § 19.

9. *The Jennie B. Gilkey*, 19 Fed. Rep. 129; *Blanchard v. The Martha Washington*, 1 Cliff. (U. S.) 463; *Dudley v. The Superior, Newb. Adm.* 176; *The Sarah Starr*, 1 Sprague (U. S.) 453.

10. *Tree v. The Indiana, Crabbe* (U. S.) 479; *Dudley v. The Superior, Newb. Adm.* 176; *The Troy, Newb. Adm.* 181.

11. *Jordan v. Young*, 37 Me. 276; *Colson v. Bonzey*, 3 Me. 474; *Hatch v. Smith*, 5 Mass. 42; *Bixby v. Franklin Ins. Co.*, 8 Pick. (Mass.) 86; *U. S. v. The W. F. Johnson*, 18 Leg. Int. (Pa.) 334; *The Nancy Dell*, 14 Fed. Rep. 744.

12. *Scudder v. Calais Steamboat Co.*, 1 Cliff. (U. S.) 381; *Calais Steamboat*

9. **License for Coasting Trade.**—A license under the act of Congress to prosecute the coasting trade is a warrant to traverse the waters washing or bounding the coast of the United States,¹ or to employ the vessel in trade between one State and the interior of another. The authority conferred is paramount to any privileges that may be obtained under State legislation.² But such a license gives a vessel no right to use, free of tolls or of any condition whatsoever, the canals constructed by a State or the water-courses partaking of the character of canals exclusively within the interior of a State, and made practicable for navigation by the funds of the State or by privileges that may have been conferred for the accomplishment of the same end.³ Nor is such a license to be construed as impairing the power of the State to obstruct the navigable waters within its limits, but to confer upon the vessel only the right to navigate the waters so far as navigable.⁴

Vessels must pursue the proper business for which they are licensed.⁵ A vessel licensed for the codfishery is not authorized by her license to engage in the mackerel fishery.⁶ So if a licensed vessel proceeds upon a foreign voyage without first giving up her enrollment of license and being duly registered, she is liable to seizure and forfeiture.⁷ If a vessel licensed for the coasting

Co. v. Van Pelt, 2 Black (U. S.) 388; Prescott v. De Forest, 16 Johns. (N. Y.) 169; Williams v. Merle, 11 Wend. (N. Y.) 80; 15 Am. Dec. 604.

1. Veazie v. Moor, 14 How. (U. S.) 568.

2. Gibbons v. Ogden, 9 Wheat. (U. S.) 1; Silliman v. Hudson River Bridge Co., 4 Blatchf. (U. S.) 405; Pennsylvania v. Wheeling etc., Bridge Co., 18 How. (U. S.) 421; Foster v. Davenport, 22 How. (U. S.) 244; Sinnot v. Davenport, 22 How. (U. S.) 227; Gilman v. Philadelphia, 2 Wall. (U. S.) 713.

The power of Congress to require licenses from vessels carrying on the coasting trade is derived from its power to regulate commerce among the States. Although a vessel navigates only from port to port in the same State, if its employment constitutes a link in a chain of commerce among the States, it will be considered as in the coasting trade. Otherwise, as to a ferry across a river within the limits of one State. As far as regards the authority of the State and general governments, such ferry does not differ from a toll bridge. U. S. v. The James Morrison, Newb. Adm. 241.

3. Veazie v. Moor, 14 How. (U. S.) 568. See San Francisco v. California Steam Nav. Co., 10 Cal. 504.

4. Hatch v. Wallamet Iron Bridge Co., 7 Sawy. (U. S.) 127.

5. U. S. v. Paryntha Davis, 1 Cliff. (U. S.) 532; 3 Wars (U. S.) 161; The Harriett, 1 Story (U. S.) 164; The Active v. U. S., 7 Cranch (U. S.) 100; The Eliza, 2 Gall. (U. S.) 4; Sinnot v. Davenport, 22 How. (U. S.) 227; The Nymph, 1 Ware (U. S.) 257; 1 Sumn. (U. S.) 516; U. S. v. The Echo, 4 Blatchf. (U. S.) 446. See Meigs v. The Northerner, 1 Wash. Ter. 91.

6. U. S. v. Paryntha Davis, 1 Cliff. (U. S.) 532.

In rendering judgment in this case, the court by Clifford, J., said: "Undoubtedly a vessel licensed for the codfishery may take mackerel for bait and for consumption by the crew, as provisions during the trip; and as fresh mackerel make the best bait, the crew may take them as frequently and in such quantities as it may be reasonably necessary for them to do for those purposes; and where it appears that they pursued the proper business for which the vessel was licensed, in good faith, and on the return of the vessel, or at the time of her seizure, have only such quantity of mackerel on hand as may reasonably be inferred from the circumstances to have been taken in the fair exercise of that legitimate right, the law does not authorize the forfeiture of the vessel because there happens to be some excess."

7. U. S. Rev. Sts., § 4337; The Reso-

trade engages in any illegal traffic,¹ or any employment beyond the scope of the license, it works a forfeiture.²

10. Inspection Laws.—The statute imposes on the owners of steam vessels the duty of applying annually for inspection.³ The boiler and hull must be inspected in order to determine whether the vessel is suitable for the services in which it is employed.⁴ If it is a passenger steamer, it must be furnished with life-preservers, and it must also have a certificate from the inspectors specifying the number of passengers that may lawfully be carried.⁵ Steam vessels belonging to a State and used by its officers to enforce the State fishery laws,⁶ and ferryboats engaged in transporting, upon a river within the limits of a single State,

lution, 2 Gall. (U. S.) 47; *The Julia*, 1 Gall. (U. S.) 43; *U. S. v. The Mars*, 1 Gall. (U. S.) 237; *The Eliza*, 2 Gall. (U. S.) 4; *The Lark*, 1 Gall. (U. S.) 55; *The Friendship*, 1 Gall. (U. S.) 45; *The Three Brothers*, 1 Gall. (U. S.) 142; *U. S. v. The Hawke*, Bee Adm. 34; *U. S. v. The Parynthia Davis*, 3 Ware (U. S.) 162; *Taber v. U. S.*, 1 Story (U. S.) 1; *The Active v. U. S.*, 7 Cranch (U. S.) 100. Compare *U. S. v. The Margaret Yates*, 22 Vt. 663.

The term "foreign voyage" in the statute means a voyage intended to some place beyond the territorial jurisdiction of the United States. *The Lark*, 1 Gall. (U. S.) 55; *The Atlantic*, 1 Ware (U. S.) 121.

The penalty imposed by the statute is not incurred by merely dropping down the bay and anchoring at a customary place in the harbor, if no sufficient crew appeared on board to perform, and no intention was manifested at that time to commence a foreign voyage. *The Julia*, 1 Gall. (U. S.) 43; *The Friendship*, 1 Gall. (U. S.) 45; *The Active v. U. S.*, 7 Cranch (U. S.) 100. Nor is the statute violated by the vessel leaving the wharf with intent to go to sea while she yet remains within the port. If seized before she gets out of the port, the offense is not consummated. *The Active v. U. S.*, 7 Cranch (U. S.) 100. See *U. S. v. The George Darby*, 16 L. R. N. S. 566.

A voyage, although to a foreign port, if within the usual voyage of vessels licensed for fisheries, is not a foreign voyage within the meaning of the statute. *The Three Brothers*, 1 Gall. (U. S.) 142.

1. *The Resolution*, 2 Gall. (U. S.) 47; *U. S. v. The Mars*, 1 Gall. (U. S.) 237; *The Two Friends*, 1 Gall. (U. S.)

118; *The Active v. U. S.*, 7 Cranch (U. S.) 100.

A fishing vessel on her return from a fishing voyage touched a foreign port for wood and water; while there, the master took on board two barrels marked "crockery" to be brought to a port in the United States. The master was not aware of their contents, and he received them as a favor for the party sending them without accepting or expecting any compensation. They proved to contain liquor. *Held*, that the vessel was not liable to forfeiture under the statute. *The Willie G.*, 11 Inter. Rev. Rec. 127.

2. *U. S. v. Parynthia Davis*, 1 Cliff. (U. S.) 532; 3 Ware (U. S.) 161; *The Nymph*, 1 Ware (U. S.) 257; 1 Story (U. S.) 516; *The Active v. U. S.*, 7 Cranch (U. S.) 100; *The Reindeer*, 2 Wall. (U. S.) 383; *U. S. v. The Hawke*, Bee Adm. 34; *The Eliza*, 2 Gall. (U. S.) 4; *U. S. v. The Louisa Barbara*, Gilp. (U. S.) 332; *U. S. v. The Echo*, 4 Blatchf. (U. S.) 446. See *Meigs v. The Northerner*, 1 Wash. Ter. 78.

The coming of a coasting vessel from one port to another in the same State having on board foreign goods without exhibiting a manifest of such cargo, is not cause of forfeiture. *The America*, 1 Gall. (U. S.) 231.

A boat licensed as a towboat, does not violate the law requiring different licenses for passenger boats and towboats, by carrying a single passenger. *The Morning Star*, 4 Biss. (U. S.) 62.

3. *The Jacob G. Neafie*, 3 Ben. (U. S.) 851.

4. U. S. Rev. Sts., §§ 4417, 4418.

5. U. S. Rev. Sts., §§ 4464, 4466.

6. *The Governor Robert McLane v. U. S.*, 35 Fed. Rep. 926; *The Oyster Police Steamers of Maryland*, 31 Fed. Rep. 763.

goods, etc., destined for other States,¹ and small crafts used in transporting the owner and his workmen across a river between two States are within the provisions of the inspection laws.² The law is also held to apply to steamers transporting passengers, even though engaged on a navigable water between ports of the same State.³

Penalties are imposed for a violation of the statute requiring the inspection of vessels, and for a non-compliance with the provision respecting the number of passengers that may lawfully be carried by a passenger steamer.⁴ The penalty for carrying more passengers than authorized by the inspectors is not incurred where the excess crowd aboard against the will of the officers of the boat.⁵ A neglect, however, on the part of the master to take reasonable measures to ascertain and restrict the number of

1. *The Sunswick*, 6 Ben. (U. S.) 112. U. S. Rev. St., §§ 4464-4466, respecting the number of passengers that may lawfully be carried by a passenger steamer, have no application to a ferryboat, though temporarily employed as an excursion boat. *Schwerin v. North Pac. Coast R. Co.*, 36 Fed. Rep. 710.

2. *Hartranft v. Du Pont*, 118 U. S. 223; compare *The City of Salem*, 38 Fed. Rep. 762.

The moving of a vessel in an unfinished state from one place to another in the course of construction and not for the purpose of earning money, is not navigation within the meaning of the section enforcing a penalty of \$500 for violation of the navigation laws in running the vessel without having her hull, boiler, etc., inspected. *The Joshua Leviness*, 9 Ben. (U. S.) 339.

A small pleasure boat, without deck, propelled by a small steam engine, and run occasionally by its owners for pleasure only, was held not within the provisions of the United States steam inspection laws, which require every ferryboat, canal boat, yacht "or other small craft of light character, propelled by steam," to be inspected. *U. S. v. The Mollie*, 2 Woods (U. S.) 318.

3. *The City of Salem*, 37 Fed. Rep. 846; *U. S. v. Burlington, etc., Ferry Co.*, 21 Fed. Rep. 331. See *The Gretna Green*, 20 Fed. Rep. 901. Compare *The Bright Star*, Woolw. (U. S.) 266.

A vessel plying between two ports in the same State upon any navigable water of the United States, but engaged exclusively in the domestic commerce of the State, is within the United States admiralty jurisdiction; and for not carrying passengers or life-preservers, as prescribed in U. S.

Rev. St., § 4466, her owners are liable to a libel *in personam* to recover the penalty prescribed in § 4500. *U. S. v. Burlington, etc., Ferry Co.*, 21 Fed. Rep. 331; *The City of Salem*, 38 Fed. Rep. 762.

In *The Hazel Kirke*, 23 Blatchf. (U. S.) 292, 25 Fed. Rep. 601, a steamboat plying the waters of an inlet of the Atlantic Ocean, wholly within New York, but for and in connection with a railroad engaged in interstate commerce, is held within the provisions of the Federal statute prescribing penalties for steamers carrying more passengers than their certificates of inspection permit. Nor does such a boat, being a general passenger boat, become a ferryboat, and therefore within the exception in the statute merely because she runs upon a ferry route.

A Federal law requiring inspection of steam vessels engaged as tugs and towing boats, etc., does not apply to such a vessel employed upon a river exclusively within the limits of the State in towing vessels engaged in commerce among the several States, the tug not being itself so engaged. *The Farragut*, 6 Blatchf. (U. S.) 207; *The Oconto*, 5 Biss. (U. S.) 460.

4. *The Columbia*, 39 Fed. Rep. 617; *The Sunswick*, 6 Ben. (U. S.) 112; *U. S. v. Morton*, 1 Low. (U. S.) 179; *The Idaho*, 29 Fed. Rep. 187. See *Waring v. Clarke*, 5 How. (U. S.) 441.

Lien for Fine Imposed.—There is a lien on the vessel for the fine imposed by the statute regulating the number of passengers which may be brought on a vessel from a foreign port. *The Strathairly*, 124 U. S. 558.

5. *The Geneva*, 26 Fed. Rep. 647.

passengers received on board, in consequence of which an excessive number are carried, warrants a conviction. A master may be fined, although he did not in fact know that he had on board more than the lawful number.¹ Where the evidence is conflicting and doubtful as to whether a steamer in fact carried more than the number allowed; the penalty is not incurred.² So where a passenger steamer does not carry or purpose to carry a number of passengers additional to the number authorized by its certificate, and does not go or purpose to go out of the waters where it is authorized by its certificate to ply, it is not a violation of the statute.³ The penalty is not incurred by a ferryboat, though temporarily employed as an excursion boat.⁴ Nor is it incurred by a tugboat employed exclusively within the limits of a State.⁵ Nor by a tugboat carrying as passengers a few friends of the owner to witness the test of her machinery.⁶

11. *Survey of Ships.*—The statutes also contain regulations in regard to the survey of ships.⁷ The object of a survey is to relieve seamen of the obligation of proceeding on a voyage in a

1. *U. S. v. Thomson*, 12 Fed. Rep. 245; 8 Sawy. (U. S.) 122. *United States v. The Columbia*, 39 Fed. Rep. 617.

2. *The Harlem*, 27 Fed. Rep. 237.

In an action to enforce a lien upon a steamboat for carrying passengers on a certain trip in excess of the number allowed by law, two disinterested witnesses who were passengers on the boat on the trip in question, swore that they took up a position at the gangways by which the passengers passed off the boat and made an actual count as they were passing off, the count being written down at the time, and that the number so ascertained exceeded by 777 the number allowed by law. The agent of the steamboat testified that during the trip, in going from one landing to another, he saw some one counting the passengers, and he went to the purser's office and found there a certain number of bunches of tickets taken from the passengers; that on the supposition that there were 100 tickets in a bunch, as it was usual to so bunch them, he estimated that they could still take on 786 passengers at the next landing, and that he so reported to the owner, but he did not count the tickets nor did he know that the bunches which he saw contained all the tickets that had been taken. Notwithstanding the report of the agent, the owner directed that only 700 passengers should be taken on at the next landing. It further appeared that some of the passengers did not have tickets, but paid

their fare on the boat. *Held*, that the testimony of the witness on behalf of libellant must be taken as true. *The Columbia*, 39 Fed. Rep. 617.

3. *The Pope Catlin*, 31 Fed. Rep. 408.

4. *Schwerin v. North Pac. Coast R. Co.*, 36 Fed. Rep. 710.

5. *The Farragut*, 6 Blatchf. (U. S.) 207.

A steamtug employed in towing rafts and lumber on a river exclusively within the State is not liable to seizure for not having been inspected. *The Tug Oconto*, 5 Biss. (U. S.) 460.

6. *U. S. v. Guess*, 48 Fed. Rep. 587.

7. *U. S. Rev. Sts.*, §§ 4557, 4559.

In *New York*, the duty of examining damaged vessels or cargoes is imposed upon a board entitled "The Port Wardens of the Port of New York" and composed of nine members, three of whom shall be nautical men. *New York Laws*, 1857, ch. 405, §§ 1, 3.

The employment of a private individual to survey a vessel just arrived from a foreign port, in a damaged condition, before the discharge of her cargo, or any measures taken for a future voyage, and on such survey to determine what repairs were necessary, and his performance of that duty, are not a violation of the laws of that State, which confer upon the port wardens of the city of New York the exclusive power to make surveys of vessels deemed unfit to proceed to sea, and to judge of the repairs which may

ship that is unseaworthy,¹ and to assist the judgment of the master as to his proceeding to repair or sell the ship, and protect him in the fair discharge of his difficult and often critically responsible duty in great emergencies, by giving him the aid of the opinion of other men of sound judgment, intelligence and skill in nautical affairs.² Although surveys are and may be ordered by courts of admiralty, yet it is not an indispensable requisite. A survey may be made upon the mere private application of the master directly to the surveyors, or an American consul may interpose in behalf of the master and appoint the surveyors at his request.³ (See also SEAMEN.)

III. OWNERSHIP AND CONTROL—1. Generally.—The owners of a ship may hold the property in partnership,⁴ or as tenants in common.⁵ When the owners hold a vessel in partnership the rules

be necessary for the safety of such vessels on their intended voyage. Port Wardens of New York v. Cartwright, 4 Sandf. (N. Y.) 236.

English Statutes.—In England, a surveyor's certificate is prerequisite to registration of the ship; Merchant's Shipping Act, 1854, 17 & 18 Vict., ch. 104, § 36; and no passenger ship shall proceed to sea unless she shall have been surveyed under the direction of the emigration officer at the port of clearance, but at the expense of the owner or charterer thereof, by two or more competent surveyors to be appointed by the emigration commissioners. Passengers' Act 1855, 18 & 19 Vict., ch. 119, § 19. But any steamer may carry passengers not exceeding twelve in number, although she has not been surveyed by the board of trade as a passenger steamer, and does not carry a board of trade certificate as provided by the Merchants' Shipping Act of 1854 with respect to passenger steamers; Merchants' Shipping Act 1876, 39 & 40 Vict., ch. 80, § 160; and the board of trade, if satisfied with the foreign certificate of survey, may dispense with any further survey of a foreign passenger steamer or emigration ship. Merchants' Shipping Act 1876, 39 & 40 Vict., ch. 80, § 19.

1. The exercise of the right of survey by seamen is fully treated in the article SEAMEN under the heading *Unseaworthiness of Ship*.

2. Potter v. Ocean Ins. Co., 3 Sumn. (U. S.) 27.

A regular survey by competent persons is *prima facie* evidence of the propriety of making the repairs made in pursuance of their recommendation. The Ship Fortitude, 3 Sumn. (U. S.) 228.

3. Potter v. Ocean Ins. Co., 3 Sumn. (U. S.) 43.

4. McClellan v. Cox, 36 Me. 95; 58 Am. Dec. 736; Knox v. Campbell, 1 Pa. St. 366; 44 Am. Dec. 140; Milburn v. Guyther, 8 Gill (Md.) 92; 50 Am. Dec. 681; Patch v. Wheatland, 8 Allen (Mass.) 102; Hewitt v. Sturdevant, 4 B. Mon. (Ky.) 453; Patterson v. Chalmers, 7 B. Mon. (Ky.) 595; Harding v. Foxcroft, 6 Me. 76; Seabrook v. Rose, 2 Hill Eq. (S. Car.) 553; Phillips v. Purington, 15 Me. 425; Mumford v. Nicoll, 20 Johns. (N. Y.) 611; Milton v. Mosher, 7 Met. (Mass.) 244; Lamb v. Durant, 12 Mass. 54; 7 Am. Dec. 31; Wright v. Hunter, 1 East 20; Doddington v. Hillett, 1 Ves. Sr. 497; Allen v. Hawley, 6 Fla. 142; 63 Am. Dec. 198; Campbell v. Mullett, 2 Swanst. 551; Nugent v. Locke, 4 Cal. 318; Williams v. Lawrence, 47 N. Y. 462.

5. Knox v. Campbell, 1 Pa. St. 366; 44 Am. Dec. 139; McClellan v. Cox, 36 Me. 95; 58 Am. Dec. 736; Milburn v. Guyther, 8 Gill (Md.) 92; 50 Am. Dec. 681; Merrill v. Bartlett, 6 Pick. (Mass.) 46; Thorndike v. DeWolf, 6 Pick. (Mass.) 120; Nicoll v. Mumford, 4 Johns. Ch. (N. Y.) 522; Revens v. Lewis, 2 Paine (U. S.) 202; Williams v. Sheppard, 13 N. J. L. 76; Buddington v. Stewart, 14 Conn. 404; Hopkins v. Forsyth, 14 Pa. St. 34; 53 Am. Dec. 513; Macy v. DeWolf, 3 Woodb. & M. (U. S.) 193; Patterson v. Chalmers, 7 B. Mon. (Ky.) 595; Harding v. Foxcroft, 6 Me. 76; French v. Price, 24 Pick. (Mass.) 13; Lamb v. Durant, 12 Mass. 54; 7 Am. Dec. 31; Jackson v. Robinson, 3 Mason (U. S.) 142; Magruder v. Bowie, 2 Cranch (C. C.) 577; Montell v. The William H. Rutan, 1 Int. Rev. Rec. 125; Allen v. Hawley, 6 Fla. 142; 63 Am. Dec. 198; Bucknam

governing ordinary partnerships apply.¹ One partner may bind the firm by chartering the ship on its behalf,² or he may sell³ or mortgage⁴ the entire interest of the firm in the vessel, and it is immaterial whether this is done by signing the firm's name or the name of each copartner separately.⁵

So a majority of the part owners of a ship can employ her against the will of the others, upon giving them security to the value of their shares.⁶ Where a ship is sent on a voyage by some of the part owners against the will of the others, the dissentients are not entitled to share the profits of the voyage;⁷ nor are they liable to contribute to its losses.⁸ But where a ship is employed by all the part owners or by some of them, but not against the will of the others,⁹ they all share in the gross earnings and contribute to the expenses incurred in obtaining them. And in such a case there is little, if any, difference between the account which is taken between the part owners and that which would be taken if they were actually partners.¹⁰ Before any division of profits is made amongst the part owners, the gross freight or earnings of the adventure must be applied in payment of the expenses of the voyage yielding them, including the cost of repairs and outfit for that voyage.¹¹

The general relation of part owners in ships is that of tenants

v. Brett, 22 How. Pr. (N. Y.) 233; *Wright v. Marshall*, 3 Daly (N. Y.) 331; *Sheehan v. Dalrymple*, 19 Mich. 241; *Green v. Briggs*, 6 Hare 395; *Helme v. Smith*, 7 Bing. 709; 20 E. C. L. 300; *Owston v. Ogle*, 13 East 538; *Ex parte Young*, 2 Ves. & B. 242; *Ex parte Harrison*, 2 Rose 76.

1. *Allen v. Hawley*, 6 Fla. 142; 63 Am. Dec. 198; *Wright v. Hunter*, 1 East 20; *Williams v. Lawrence*, 47 N. Y. 462; 1 Parsons Shipp. & Adm. 91; *Bates' Law of Partnership*, § 71.

If two or more persons who own a ship as part owners, agree to prosecute a voyage jointly, each contributing services and time and sharing in profits and losses, they are partners. *Doddington v. Hallett*, 1 Ves. Sr. 497; *Mumford v. Nicoll*, 20 Johns. (N. Y.) 611; reversing the decision of Chancellor Kent in the same case, 4 Johns. Ch. (N. Y.) 522. See also *Macy v. DeWolf*, 3 Woodb. & M. (U. S.) 193; *Hewitt v. Sturdevant*, 4 B. Mon. (Ky.) 453; *Hinton v. Law*, 10 Mo. 701; *Gardner v. Cleveland*, 9 Pick. (Mass.) 334; *Julio v. Ingalls*, 1 Allen (Mass.) 41; *Bulfinch v. Winchenbach*, 3 Allen (Mass.) 161; *Pragoff v. Heslep*, 1 Am. Law Reg. 747. See, however, *Hopkins v. Forsyth*, 14 Pa. St. 38; 53 Am. Dec. 513.

They stand to each other as *quasi* partners accountable for the excess which one should have advanced or paid beyond the other. *Doddington v. Hallett*, 1 Ves. Sr. 497; *Holderness v. Shackels*, 8 B. & C. 612; 3 M. & R. 25; 15 E. C. L. 315; *Mumford v. Nicoll*, 20 Johns. (N. Y.) 625; *Hewitt v. Sturdevant*, 4 B. Mon. (Ky.) 466; *Starbuck v. Shaw*, 10 Gray (Mass.) 492; *Pragoff v. Heslep*, 1 Am. L. Reg. 747.

2. *Thomas v. Clark*, 2 Stark 451.

3. *Lamb v. Durant*, 12 Mass. 54; 7 Am. Dec. 31; *Jones v. Sims*, 6 Port. (Ala.) 138.

4. *Ex parte Howden*, 2 M. D. & D. 574; *Patch v. Wheatland*, 8 Allen (Mass.) 102; *Milton v. Mosher*, 7 Met. (Mass.) 244.

5. 1 Parsons Shipp. & Adm. 91; *Patch v. Wheatland*, 8 Allen (Mass.) 102.

6. See McLachlan on the Law of Merchant Shipping 89.

7. *Davis v. Johnson*, 4 Sim. 539; *Anonymous*, 2 Ch. Cas. 36.

8. *Horn v. Gilpin*, 1 Ambl. 255.

9. *Straly v. Winson*, 1 Vern. 296.

10. *Lindley on Partnership* 67.

11. *Green v. Briggs*, 6 Hare 395; *Alexander v. Simms*, 8 Beav. 80; *Lindsay v. Gibbs*, 22 Beav. 522.

in common.¹ A partnership relation cannot be presumed.² It cannot ordinarily exist without an express contract to that effect.³ It is the established rule that where two or three persons not partners in trade and not purchasing with partnership names become the owners of a vessel they are considered tenants in common, and upon the death of any of them, the interest of the decedent goes to his representatives, and not to the owners by right of survivorship.⁴ If they purchase or agree to have a ship built, and there is nothing in the instrument, transfer or written evidence of ownership defining the proportion in which the owners are to hold the property, they will, in the absence of proof to the contrary, be presumed to have equal shares.⁵

2. Powers of Part Owners—*a. GENERALLY.*—If a part-owner of a ship takes possession and uses it on a foreign voyage, no action will lie; but if, after taking possession, he destroys the property, or the vessel is lost at sea, he is then liable, because the joint ownership does not empower him to destroy the property of the other.⁶ And so, generally, if a tenant in common, though rightfully in possession, yet by negligence causes the destruction of the property, an action will lie against him.⁷ A part owner may sell the whole ship or the share of another part owner, but the sale will be void unless it is confirmed and ratified by those whose shares are sold.⁸ And if an unauthorized sale is carried into effect, it is held to be a constructive destruction of the property, for which trover may be maintained by the owners against the seller, or against the purchaser, if he also sells the property as his own.⁹

b. MANAGEMENT OF THE VESSEL.—In the management of the vessel the opinion of the majority of the owners prevails unless

1. *McLellan v. Cox*, 36 Me. 95; 58 Am. Dec. 736; *Coursin's Appeal*, 79 Pa. St. 220.

2. *Hopkins v. Forsyth*, 14 Pa. St. 34; 53 Am. Dec. 513; *Williams v. Sheppard*, 13 N. J. L. 76; *Knowlton v. Reed*, 38 Me. 246; *Holderness v. Shackels*, 8 B. & C. 612; 15 E. C. L. 315; *Patterson v. Chalmers*, 7 B. Mon. (Ky.) 595; *McLellan v. Cox*, 36 Me. 95; 58 Am. Dec. 736.

3. *Macy v. DeWolf*, 3 Woodb. & M. (U. S.) 193; *Revins v. Lewis*, 2 Paine (U. S.) 202; *Foster v. The Pilot No. 2*, Newb. Adm. 215; *Montell v. The William H. Rutan*, 1 Int. Rev. Rec. 125.

4. *Knox v. Campbell*, 1 Pa. St. 366; 44 Am. Dec. 140.

5. 1 *Parson's on Shipp. & Adm.* 90; *Glover v. Austin*, 6 Pick. (Mass.) 209; *Alexander v. Dowie*, 1 H. & M. 152; 37 Eng. L. & Eq. 549; *Ohl v. Eagle Ins. Co.*, 4 Mason (U. S.) 172.

6. *Lowthorp v. Smith*, 1 Hayw. (N. Car.) 255.

7. *Chesley v. Thompson*, 3 N. H. 9; *Maddox v. Goddard*, 15 Me. 218; 33 Am. Dec. 604; *Herrin v. Eaton*, 13 Me. 193; 29 Am. Dec. 499; *Anders v. Meredith*, 4 Dev. & B. (N. Car.) 199; 34 Am. Dec. 376.

But in *Moody v. Buck*, 1 Sandf. (N. Y.) 304, where one of two joint owners of a vessel took upon himself the management, direction, and control of the whole vessel, and by his carelessness, inattention, negligent and improper conduct, the vessel took fire and was consumed, it was held that he was not liable to the other part owner.

8. *Oviatt v. Sage*, 7 Conn. 95.

9. *White v. Osborn*, 21 Wend. (N. Y.) 72; *Wilson v. Reed*, 3 Johns. (N. Y.) 175; *Farr v. Smith*, 9 Wend. (N. Y.) 338; 24 Am. Dec. 162; *Welds v. Oliver*, 21 Pick. (Mass.) 559; *Hrde v. Stone*, 9 Cow. (N. Y.) 230; 18 Am. Dec. 501; 7 Wend. (N. Y.) 354; 22 Am. Dec. 582; *Thomson v. Cook*, 5 N. J. L. 580; *Farrar v. Beswick*, 1 M. & W.

it forbids its employment, in which case it yields to the minority who desire its employment, because the public interest must be protected in securing employment to the vessel.¹ The majority may employ or dismiss the master and crew;² they may direct repairs and supplies,³ and they may change her employment from the performance of foreign voyages to the coasting trade, and also to the fishing business, if the vessel be of a suitable character for such employment.⁴

If the minority oppose a voyage, they may compel the other owners to give security to the amount of their respective shares before the vessel sails,⁵ but they cannot exact bonds to cover the indebtedness of the vessel, nor to indemnify them against loss in her future employment.⁶ A part owner will be deemed to have consented unless he prohibits the voyage or expressly notifies the other part owners that he will not be responsible for losses incurred.⁷ So, a part owner in the absence of the other part owners may represent them in the management of the vessel, and they will be bound by his acts and contracts.⁸

3. General Liability of Owners.—The owners of a ship are responsible for obligations *ex delicto* as well as obligations *ex contractu*.⁹ They are liable not only for their own acts, but for those of their agents resulting in the violation of their duty as common carriers.¹⁰ If they contract to insure a cargo and fail to

682; *Mayhew v. Herrick*, 7 C. B. 229; 62 E. C. L. 229; *Barton v. Williams*, 5 B. & Ald. 395; 7 E. C. L. 145.

1. *Tunno v. The Betsina*, 5 Am. L. Reg. 406; *Ward v. Ruckman*, 36 N. Y. 26.

2. *Gould v. Stanton*, 16 Conn. 12; *The William Bagaley*, 5 Wall. (U. S.) 406; *The Marengo*, 1 Low. (U. S.) 52; *Tunno v. The Betsina*, 5 Am. L. Reg. 406; *Ward v. Ruckman*, 36 N. Y. 26.

In the case of a master and part owner something more is required before the court will proceed to dispossess a person who is also a proprietor in the vessel, and whose possession, therefore, the common law is, upon general principles, inclined to maintain. *The New Draper*, 4 Rob. Adm. 387.

3. *Revens v. Lewis*, 2 Paine (U. S.) 202.

4. *Hall v. Thing*, 23 Me. 461.

5. *The Marengo*, 1 Low. (U. S.) 52; *The William Bagaley*, 5 Wall. (U. S.) 406; *Fox v. Paine, Crabbe* (U. S.) 271; *Christy v. Craig*, 2 Mer. 137; *Ouston v. Hebden*, 1 Wils. 101; *Gould v. Stanton*, 16 Conn. 12. See *The Apollo*, 1 Hagg. Adm. 310; *Coyne v. Caples*, 7 Sawy. (U. S.) 360.

The owner of one-eighth of a vessel,

and known to be such by the other owners, omitted, without fraudulent intent, to comply with the requisitions of the revenue laws, and the other owners projected a voyage of which he disapproved, and prayed for the usual security. *Held*, that the other owners should give security to double the value of his share for the return of the vessel. *Fox v. Paine, Crabbe* (U. S.) 271.

6. *Desty's Shipp. & Adm.* § 37; *The Ocean Belle*, 6 Ben. (U. S.) 263.

7. *Christy v. Craig*, 2 Mer. 137; *Davis v. Johnson*, 4 Sim. 539; *Holmes v. Bigelow*, 3 Desaus. (S. Car.) 497; *Macy v. De Wolf*, 3 Woodb. & M. (U. S.) 204; *The Marengo*, 1 Low. (U. S.) 56; 1 *Sprague* (U. S.) 507; *Davis v. Johnson*, 4 Sim. 539; *Willings v. Blight*, 2 Pet. Adm. 288; *Helme v. Smith*, 5 M. & P. 744.

8. *Montgomery v. Wharton*, 2 Pet. Adm. 397.

9. *Ramsay v. Allegre*, 12 Wheat. (U. S.) 611; *The Rebecca*, 1 Ware (U. S.) 188; *Joy v. Allen*, Woodb. & M. (U. S.) 318; *Thomas v. Osborn*, 19 How. (U. S.) 38. See *Howland v. Coffin*, 47 Barb. (N. Y.) 653.

10. *McMahon v. Davidson*, 12 Minn. 357; *Kalion Chemical Co. v. The*

do so, and the cargo is lost,¹ or if they enter into certain agreements as to the carriage and delivery of freight, they are liable for damages resulting from a breach of such contracts.² They are liable for the loss of the cargo by theft, embezzlement, sale or destruction of the cargo by the master or crew, or by a third person,³ although ordinary diligence was exercised,⁴ and though guilty of neither fraud nor fault.⁵ They are liable for injuries to the person as well as to the cargo,⁶ and for injuries to other vessels occasioned by their negligence, or the negligence of their employés.⁷ Though a statute may exempt them from liability for loss by fire, they, nevertheless, are in no case excused from responsibility where the injury is caused by their design or

Iroquois, 38 Fed. Rep. 151; McGuire v. Golden Gate, 1 McAll. (U. S.) 105. See *infra*, this title, *Injuries and Wrongs to Passengers*.

1. McPhail v. Williams, 41 Fed. Rep. 61; Gokey v. Fort, 44 Fed. Rep. 364; *In Re Sinclair*, 8 Am. L. R. Eq. 206; Naylor v. Baltzell, Taney's Dec. (U. S.) 55; Sutton v. Mitchell, 1 T. R. 18; The Augusto, 29 Fed. Rep. 334; The Flash, Abb. Adm. 67; The Rebecca, 1 Ware (U. S.) 188. See The Phebe, 1 Ware (U. S.) 263; The Paragon, 1 Ware (U. S.) 322; Morewood v. Enequist, 23 How. (U. S.) 495.

2. Laverty v. Clausen, 40 Fed. Rep. 542.

3. The Cheshire, 2 Sprague (U. S.) 28; U. S. v. Burroughs, 3 McLean (U. S.) 405; U. S. v. Morgan, 11 How. (U. S.) 162; King v. Shepherd, 3 Story (U. S.) 356; Jordan v. White, 4 La. N. S. 335; Watkinson v. Laughton, 8 Johns. (N. Y.) 213; Elliott v. Rossell, 10 Johns. (N. Y.) 1; 6 Am. Dec. 306; Gibbon v. Paynton, 4 Burr. 2298; Morse v. Slue, 1 Vent. 190; Trent, etc., Nav. Co. v. Wood, 3 Esp. 127; Smith v. Shepherd, Abb. on Sh. 252; Sprowl v. Kellar, 4 Stew. & P. (Ala.) 382; Schieffelin v. Harvey, 9 Johns. (N. Y.) 170; 5 Am. Dec. 206; Williams v. Branson, 1 Murph. (N. Car.) 417; 4 Am. Dec. 562. And see U. S. Rev. Sts., § 4283.

4. Trent, etc., Nav. Co. v. Wood, 4 Dougl. 287; 3 Esp. 127; Joy v. Allen, 2 Woodb. & M. (U. S.) 314; Orange Co. Bank v. Brown, 9 Wend. (N. Y.) 85; 25 Am. Dec. 129.

5. Trent, etc., Nav. Co. v. Wood, 4 Dougl. 287; 3 Esp. 127; Morse v. Slue, 1 Vent. 190; King v. Shepherd, 3 Story (U. S.) 356; Barclay v. Curcullay Gana, 3 Dougl. 389.

In order to render the owner of a

vessel liable for cargo lost, it is not sufficient to show that the contract for transporting it was made by the master, but it must also appear that the owner had given the master authority to make such a contract. Naylor v. Baltzell, Taney's Dec. (U. S.) 55.

6. Hrebrik v. Carr, 29 Fed. Rep. 298; The Epsilon, 6 Ben. (U. S.) 378.

The propeller ferry-boat New York, after getting 100 feet from her landing, undertook to back in for a passenger, and in doing so drifted broadside on the wire cable of the ferry-boat Albina. The river was much swollen, and, owing to the pressure of the current and wind on the Albina, her cable was held up at or near the surface of the water, so that it caught the New York just under her guards, and held her there as on a pivot, while the pressure of the current on her hull forced it down stream until she capsized up stream, and then washed down stream under the wire. As the boat careened, Samuel Taylor, a passenger in the forward cabin, jumped out of the down-stream window, and was caught between the cable and the boat, as the latter passed under the former, and received injuries of which he died the same day. *Held*, the death of Taylor was caused by the negligent and unskilled handling of the New York in conjunction with the cable of the Albina, which, stretched as it was, on the surface of the water, was an unlawful obstruction to navigation, and that both were liable. Ladd v. Foster, 31 Fed. Rep. 827.

7. Inland, etc., Coasting Co. v. The Commodore, 40 Fed. Rep. 258; Serviss v. The Chattahoochee, 37 Fed. Rep. 153; 39 Fed. Rep. 368; Boyer v. The Connecticut, 45 Fed. Rep. 374. See NAVIGATION, vol. 16, p. 270.

neglect.¹ But the owner of a vessel is never made liable as a carrier merely by virtue of his ownership. The vessel must also have been in his employment so as to make him a party to the contract for carriage. Thus, if the owner charters his vessel to another, the charterer alone is liable. The criterion of liability, therefore, is not ownership, but employment. The party who has the control of the vessel and in whose absence it is engaged is regarded as the owner *pro hac vice*, and as such is answerable to the freighter.² Part owners of a vessel are not liable as co-partners for the loss of goods shipped on board of it, unless the employment of the vessel is also for their joint benefit, by her earnings.³ They may well be and generally are partners as to the freighting business carried on by means of their steamers, and if they are, their contracts relating thereto will be governed by the law of partnership.⁴

4. Liability of Owners for Repairs and Supplies.—There is a treble security for one who repairs a ship or supplies it with necessities: 1, the person of the master; 2, the specific ship; 3, the personal security of the owners.⁵ The master carries with him authority from the owners to contract for labor and supplies which may be necessary to the safe prosecution of the voyage.⁶ If he procures necessary repairs to be done without any express contract, an implied obligation arises as well against the owners as against

1. Heye v. North German Lloyd, 33 Fed. Rep. 60.

2. Tuckerman v. Brown, 17 Barb. (N. Y.) 192; Gove v. Moses, 1 Wash. Ter. 13; The Casco, 1 Davies (U. S.) 184; Beecher v. Bechtel, 3 Blatchf. (U. S.) 40; Reynolds v. Toppan, 15 Mass. 370; 8 Am. Dec. 110; Strader v. Lamberth, 7 B. Mon. (Ky.) 589; Philadelphia v. Naglee, 1 Ashm. (Pa.) 137. See Moseley v. Lord, 2 Conn. 389; Howard v. Odell, 1 Allen (Mass.) 85; Baxter v. Wallace, 24 How. Pr. (N. Y.) 484; Jones v. Blum, 2 Rich. (S. Car.) 475.

The owner of a vessel under a charter, the hirer having the whole control of the vessel for the time, to victual and man her, and pay over a portion of the net proceeds to the owner for the use of the vessel, is not liable to the shippers of goods on board the vessel, which had been embezzled, or otherwise not accounted for by the master. Reynolds v. Toppan, 15 Mass. 370; 8 Am. Dec. 110; Cutler v. Winsor, 6 Pick. (Mass.) 335; 17 Am. Dec. 385; Perry v. Osborne, 5 Pick. (Mass.) 422; Thorn v. Hicks, 7 Cow. (N. Y.) 697.

The same principle is applicable to a contract of hire of the vessel which existed only in parol. Taggard v. Loring, 16 Mass. 336; 8 Am. Dec. 140.

A vessel being chartered by a minor does not render the general owner liable to shippers, the contract being only voidable by the minor. Thompson v. Hamilton, 12 Pick. (Mass.) 425; 23 Am. Dec. 619.

The general owner is owner for the voyage, notwithstanding a charter-party, where the vessel is navigated at his expense, and by his master and crew, and where he retains the possession and management of her during the voyage, and a part of the vessel for his own use. The Volunteer, 1 Sumn. (U. S.) 551. See Certain Logs of Mahogany, 2 Sumn. (U. S.) 589.

3. Jones v. Sims, 6 Port. (Ala.) 138.

4. Russell v. Minnesota Outfit, 1 Minn. 162.

5. Rick v. Coe, Cowp. 639; 1 T. R. 108; *Ex parte* Bland, 2 Rose 91; The Brig Nestor, 1 Sumn. (U. S.) 73. See Abbott v. Baltimore, etc., Steam Packet Co., 1 Md. Ch. 544; Bronde v. Haven, Gilp. (U. S.) 592; 3 Kent's Com. 196.

6. If the repairs are not such as a prudent owner would order, he being present and having charge of the vessel in the condition in which she actually is found, the master is liable. Whitten v. Tisdale, 43 Me. 453.

himself.¹ He is not personally liable unless he subjects them to an expense when forbidden so to do,² or unless there is a special promise by the master.³ If the vessel is chartered by the master, he is deemed the owner *pro hac vice*, and like any other charterer is alone responsible for the supplies furnished for the intended voyage, and he is not restricted, in making his purchases, to the port where the vessel lies, but he may purchase in a neighboring port if he thinks proper.⁴

Where a materialman furnishes supplies in a foreign port or to a foreign ship, the presumption is that he relies on the ship itself for security.⁵ Where credit is thus given to a vessel for advances made to furnish supplies, it constitutes a lien that can only be removed by positive evidence showing that the master was in possession of funds applicable to the expenses, or of a credit of his own or of the owners of his vessel.⁶

The owners of a vessel may be liable for supplies upon the ground of agency,⁷ or on the ground of a special promise.⁸ The owners are not liable where the supplies are furnished and the repairs made on the credit of the vessel or ship's agents.⁹ It results, therefore, that the obligation to pay rests upon the person to whom the credit is given. If the master employs workmen, he is answerable because of his contract, and the owner is answerable because of his relation to the property and the authority he is supposed to give the master. If no contract at all should be proved, but the work was proved to be done within the knowledge of the owner, he would be answerable on account of the benefit he received, and it would be presumed that the work was done at his instance and request.¹⁰

1. *Abbott v. Baltimore, etc., Steam Packet Co.*, 1 Md. Ch. 542; *Stedman v. Feidler*, 25 Barb. (N. Y.) 608.

The owner of a canal boat is liable for provisions and necessities furnished and charged to the captain. *Phillips v. Tapper*, 2 Pa. St. 323.

2. *Revens v. Lewis*, 2 Paine (U. S.) 202.

Shipowners are answerable for repairs done or supplies furnished for their ships, by order of the master, he being their agent, and they receiving the benefit of such repairs or supplies. *Colson v. Bonzey*, 6 Me. 474.

3. *James v. Bixby*, 11 Mass. 34.

If the owner can make out by evidence that the credit was given to the master alone for such supplies; if it appears that there was a special promise taken from him and relied upon, the owner will not be liable. *Abbott v. Baltimore, etc., Steam Packet Co.*, 1 Md. Ch. 542.

4. *Kenzel v. Kirk*, 37 Barb. (N. Y.) 113.

5. *The H. B. Foster*, 3 Ware (U. S.) 165. See *Fox v. Holt*, 4 Ben. (U. S.) 278; 36 Conn. 558.

6. See *MARITIME LIENS*, vol. 14, p. 412.

7. *Revens v. Lewis*, 2 Paine (U. S.) 202.

Thus, where, by the contract letting the vessel to the master, the owners agree to procure and pay for certain supplies before the beginning of the voyage and they afterwards authorize the master to buy them, held that they were liable for his purchase, not by reason of his authority as master, but on the ground of the particular authority given. *Mayo v. Snow*, 2 Curt. (U. S.) 102.

8. *James v. Bixby*, 11 Mass. 36.

9. *Jennings v. Griffiths*, R. & M. 42; *Abbott v. Baltimore, etc., Steam Packet Co.*, 1 Md. Ch. 542; *Cox v. Reid*, 1 C. & P. 602; 11 E. C. L. 491; *Macy v. DeWolf*, 3 Woodb. & M. (U. S.) 200; *Post v. Kimberly*, 9 Johns. (N. Y.) 470.

10. *James v. Bixby*, 11 Mass. 35.

a. PART OWNERS.—One part owner may bind the other part owners for necessary repairs and supplies.¹ If the repairs become necessary in a foreign port and are made to enable the ship to perform the voyage upon which she had been dispatched by all concerned, a contribution may be called for by the one who advances his money for the purpose.² One part owner will not, however, be liable to another part owner for repairs made by him at the home port, unless they are made with the knowledge and consent of the one sought to be charged.³ Where one of several part owners of a vessel is the master or ship's husband, in the absence of any special agreement he is presumed to have authority to do everything necessary to be done for the employment of the vessel, and has authority to make repairs and bind the vessel for the same; but as between the owners, he cannot subject them to expense, when forbidden so to do, and such expenses may be charged to his own share.⁴

b. MORTGAGOR AND MORTGAGEE.—If the mortgagee is in

1. *McPhail v. Williams*, 41 Fed. Rep. 61; *DeWolf v. Tupper*, 24 Fed. Rep. 289; *Patterson v. Chalmers*, 7 B. Mon. (Ky.) 598; *Chapman v. Durant*, 10 Mass. 47; *Hardy v. Sproule*, 29 Me. 258; *Muldon v. Whitlock*, 1 Cow. (N. Y.) 290; 13 Am. Dec. 533; *Schemerhorn v. Loines*, 7 Johns. (N. Y.) 311; *Gallatin v. The Pilot*, 2 Wall. (U. S.) 592; *Macy v. DeWolf*, 3 Woodb. & M. (U. S.) 193; *Webb v. Pierce*, 1 Curt. (U. S.) 112; *Marquand v. Webb*, 16 Johns. (N. Y.) 89; *Jennings v. Griffiths*, R. & M. 49; *Thompson v. Finden*, 4 C. & P. 158; 19 E. C. L. 320; *Baldney v. Ritchie*, 1 Stark. 338; *Wright v. Hunter*, 1 East 20; *Westerdill v. Dale*, 7 T. R. 307.

If the repairs were wholly obviously unnecessary, part owners can neither have a lien on the ship nor a personal claim against those of the part owners who did not order them. 1 *Parsons Shipp. & Adm.* 101; *The Ship Fortitude*, 3 Sumn. (U. S.) 228; *Merwin v. Shailer*, 16 Conn. 489; *Phillips v. Ledley*, 1 Wash. (U. S.) 296; *Leddo v. Hughes*, 15 Ill. 41; *The Vibilia*, 1 W. Rob. 1; *The Sophie*, 1 W. Rob. 368; *McIntosh v. Mitcheson*, 4 Exch. 175; *Pratt v. Tunno*, 2 Brev. (S. Car.) 449; *Wainwright v. Crawford*, 3 Yeates (Pa.) 131.

2. *Benson v. Thompson*, 27 Me. 474; 66 Am. Dec. 617; *Stedman v. Feidler*, 25 Barb. (N. Y.) 608; *Patterson v. Chalmers*, 7 B. Mon. (Ky.) 598; *Basset v. Crowell*, 3 Robt. (N. Y.) 72; 28 How. Pr. (N. Y.) 241.

And it has been held that as me-

chanics have a lien upon a ship in certain cases when they are repaired by them, they may in such cases, though set to work by one of the owners, maintain an action against them all for their pay. *Benson v. Thompson*, 27 Me. 474; 66 Am. Dec. 617.

In *Starr v. Knox*, 2 Conn. 221, the court by Swift, C. J., said: "It is a general right that the owners of vessels are liable for necessary disbursements and repairs and supplies procured by the master during a voyage. Though in some instances this may be very hard on the master, as where he has chartered the vessel, yet it is for the advantage of shipowners that this rule should be adopted; otherwise, vessels might be lost for want of power in the master to pledge the credit of the owners for necessary repairs and supplies."

3. *McPhail v. Williams*, 41 Fed. Rep. 61; *Hardy v. Sproule*, 31 Me. 72; *Elder v. Larrabee*, 45 Me. 590; 71 Am. Dec. 567; *Benson v. Thompson*, 27 Me. 470; 66 Am. Dec. 617. See *The William Thomas v. Ellis*, 4 Harr. (Del.) 309. Where repairs were made and the supplies furnished on the order of one of two part owners of a ship, each being a half owner, with the previous knowledge and consent of the other, it was held that both of the part owners were liable. *McPhail v. Williams*, 41 Fed. Rep. 61.

4. *Revens v. Lewis*, 2 Paine (U. S.) 202; *Benson v. Thompson*, 27 Me. 474; 66 Am. Dec. 617.

possession of a vessel and holds himself out as absolute owner, he is liable for supplies and repairs,¹ though his relation to the ship was unknown to the creditor when the demand arose;² but he is not liable for repairs made to the vessel on the credit of the mortgagor, or other person having the equitable title.³ A mortgagee of a vessel, not in possession, and not exercising any control over her management, or receiving any part of her earnings, cannot be held liable for supplies and repairs furnished to her.⁴ So where the person furnishing supplies consults the record at the customhouse and finds that a person has taken a bill of sale of a vessel absolute in its terms, and is registered as owner, such owner will not be liable if the bill of sale was only intended as collateral security, and it is shown that he never took the vessel into his possession or control, or exercised any rights of ownership.⁵ But if a mortgagee out of possession orders goods or services as for himself, or agrees to pay for them if supplied to the ship, he will be bound to pay for them without any reference to his interest in the ship.⁶

1. *Tucker v. Buffington*, 15 Mass. 477.

A mortgagee of a ship in possession is liable to the master for his wages if the voyage is performed for the benefit of the mortgagee. *Champlin v. Butler*, 18 Johns. (N. Y.) 169.

2. *Miln v. Spinola*, 6 Hill (N. Y.) 218; 4 Hill (N. Y.) 177.

3. *Lord v. Ferguson*, 9 N. H. 380. See *Brooks v. Bondsey*, 17 Pick. (Mass.) 441; 28 Am. Dec. 313; *Champlin v. Butler*, 18 Johns. (N. Y.) 169; *Jones v. Blum*, 2 Rich. (S. Car.) 475.

A mortgagee of an interest in a vessel not in his possession, is under no obligation to contribute for repairs which he did not order. The ship's agents are not his agents, and they act under no authority from him. And it makes no difference that the vessel is registered in his name. *McLellan v. Shinn*, 15 Wall. (U. S.) 105.

The mortgagee of a vessel, although he is the legal owner, is not liable for repairs made on the credit of the mortgagor alone, where the vessel is navigated for the exclusive benefit of the mortgagor, and is under his entire control. And the mortgagee, if he is sought to be charged in such a case, may give in evidence his private transactions or course of business in reference to the vessel, in order to show that his connection with her was that of agent or consignee, and that it was not under his control, or navigated for his benefit. *Cordray v. Mordecai*, 2 Rich. (S. Car.) 518.

4. *Fox v. Holt*, 30 Conn. 558; *Blanchard v. Fearing*, 4 Allen (Mass.) 118; *Miln v. Spinola*, 4 Hill (N. Y.) 117; *Brooks v. Bonsey*, 17 Pick. (Mass.) 441; 28 Am. Dec. 313; *Hesketh v. Stevens*, 7 Barb. (N. Y.) 488; *McIntyre v. Scott*, 8 Johns. (N. Y.) 159; *Ring v. Franklin*, 2 Hall (N. Y.) 1; *Birkbeck v. Tucker*, 2 Hall (N. Y.) 121; *Cordray v. Mordecai*, 2 Rich. (S. Car.) 518; *Duff v. Baird*, 4 Wall. (U. S.) 240; *Philips v. Ledley*, 1 Wash. (U. S.) 226; *Lord v. Ferguson*, 9 N. H. 380; *Colson v. Bonzey*, 6 Me. 474; *Cutler v. Thurlo*, 20 Me. 213; *Winslow v. Tarbox*, 18 Me. 132; *Briggs v. Wilkinson*, 7 B. & C. 30; 14 E. C. L. 10; *Baker v. Buckle*, 7 Moore 349; *Annett v. Carstairs*, 3 Camp 354; *Twentyman v. Hart*, 1 Stark. 366; *Jackson v. Burnham*, 1 H. Bl. 114.

The mortgagee of a ship, though the register or enrollment of the vessel stand in his name, if he has not the actual possession and control of the vessel mortgaged, is not answerable for supplies furnished by order of the mortgagor, or by the master acting under his orders. *Cutler v. Thurlo*, 20 Me. 213; *Lord v. Ferguson*, 9 N. H. 380.

5. *Howard v. Odell*, 1 Allen (Mass.) 85; *Blanchard v. Fearing*, 4 Allen (Mass.) 118.

6. *Ring v. Franklin*, 2 Hall (N. Y.) 1; *Weber v. Sampson*, 6 Duer (N. Y.) 358; *Birkbeck v. Tucker*, 2 Hall (N. Y.) 121; *Fish v. Thomas*, 5 Gray (Mass.) 45; 66 Am. Dec. 348.

5. Limitation of Liability.—By the ancient law of the sea there was no limitation as to the law of a wrongdoer.¹ The owner's liability has been changed by statute.² When a shipowner sends his ship to sea, his responsibility for collisions and other losses, happening through the fault of those in charge of her and without his privity and knowledge, is limited to the capital embarked in the adventure, and the profit he may gain from it in the form of freight or its equivalent. If the ship is sunk or destroyed and no freight earned, his whole responsibility is at an end. If either or both are saved in whole or part, to that extent his liability remains.³

The act limiting the liability of shipowners is not retroactive.⁴ It applies to torts, to embezzlement,⁵ loss by fire,⁶ damage, or injury incurred, occasioned, or done without their privity or knowledge⁷ and not to responsibility for obligations *ex*

If the mortgagee of a vessel appears, from the register and papers to be the absolute, unconditional owner of a vessel, he is bound by such evidence, and will be liable for the necessary disbursements in repairs and supplies, procured by the master during the voyage, if the individuals so making the advances make them on the credit of such evidence. *Starr v. Knox*, 2 Conn. 215.

1. *The Wildrangers*, 32 L. J. Adm. 49; 7 L. T. N. S. 724.

2. 25 & 26 Vict. Ch. 63, § 54; U. S. Rev. St., §§ 42, 83. See *London, etc., R. Co. v. James, L. R.*, 8 Ch. 241.

For history of statutory changes of owner's liability for collisions, see *Norwich, etc., Transp. Co. v. Wright*, 13 Wall. (U. S.) 104.

3. *In re The City of Para*, 44 Fed. Rep. 689; *The Abbie v. Stubbs*, 28 Fed. Rep. 719; *The Jose E. More*, 37 Fed. Rep. 122; *Thomassen v. Whitwell*, 9 Ben. (U. S.) 403; *Allen v. Mackay*, 1 Sprague (U. S.) 219; *The Clement*, Sprague (U. S.) 257; *The Ann Caroline*, 2 Wall. (U. S.) 538; *The Scotland*, 105 U. S. 24; *The Great Western*, 118 U. S. 520; *Norwich, etc., Transp. Co. v. Wright*, 13 Wall. (U. S.) 104; *Naylor v. Baltzell*, Taney's Dec. (U. S.) 55.

The liability of an owner of a vessel engaged in carrying goods for freight for cargo lost without his fault is limited to the value of the ship and freight; and even though the master execute a bottomry bond hypothecating as well the cargo as the ship and freight, and the cargo is afterwards sold on such bond, the owner's personal liability will be no greater. *Naylor v. Baltzell*, Taney's Dec. (U. S.) 55.

4. *Chappell v. Bradshaw*, 35 Fed. Rep. 923.

5. U. S. Rev. St., § 4283; *Goodrich Transp. Co. v. Gagnon*, 36 Fed. Rep. 123.

Libellant, claiming by grant from Mexico the right to take the guano from the island of Arena Cay, alleged that the master of the schooner had willfully, fraudulently, and unlawfully loaded and carried away from the island a cargo of guano, and sold it in Philadelphia, and libeled the schooner for the value of the cargo. The proof showed that the master had, as carrier, under a charter-party with a charterer who claimed a right to take the guano, received it on board at the island, without any knowledge of libellant's claim, and had delivered it to the consignees in Philadelphia, in accordance with his charter-party, without notice or information of any other claimant or ownership. *Held*, that the schooner was not liable. *The B. F. Hart*, 35 Fed. Rep. 535.

6. *Moore v. American Transp. Co.*, 24 How. (U. S.) 1; *Walker v. Western Transp. Co.*, 3 Wall. (U. S.) 150; *In re Providence, etc.*, S. S. Co., 6 Ben. (U. S.) 124.

7. *The Niagara v. Cordes*, 21 How. (U. S.) 26; *U. S. v. The Mollie*, 2 Woods (U. S.) 318; *The Harrison*, 2 Abb. (U. S.) 74; *The Rebecca*, 1 Ware (U. S.) 188; *The City of Norwich*, 1 Ben. (U. S.) 89; *Schieffelin v. Harvey*, 6 Johns. (N. Y.) 170; 5 Am. Dec. 206; *Allen v. Mackay*, 1 Sprague (U. S.) 219; *Norwich, etc., Transp. Co. v. Wright*, 13 Wall. (U. S.) 104; *Moore v. American Transp. Co.*, 24 How. (U. S.) 1; *The Epsilon*, 6 Ben. (U. S.) 378.

contractu.¹ An amendment extending the benefits of limited liability legislation to "all vessels used on lakes and rivers or in inland navigation, including canal boats, barges, and lighters" has been held valid. Even though the subjects of this extended limitation of liability of the territory in which it is effected are partially within the region of State control, the act will be sustained by the courts wherever the power of Congress extends and as to all these objects to which it attaches.²

The statute limiting liability is not to be applied to a case of collision where both vessels are in fault and until the balance of damage has been struck, and then the party against whom the decree passes may have the benefit of the statute (if he is other-

Loss of Life.—The limited liability act of 1851 (U. S. Rev. Sts., §§ 4283-4285), which provides that the liability of the shipowner "for any loss, damage, or injury by collision, or for any act, matter, or thing (loss), damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge" of the owner, shall in no case exceed the value of the interest of the owner, applies to damages for loss of life, and where the owner has taken appropriate proceedings to obtain the benefit of that act, the person injured is barred of the right to maintain a separate action for such injuries. *Butler v. Boston, etc., R. Co.*, 130 U. S. 527.

1. *The Rebecca*, 1 Ware (U. S.) 188; *Joy v. Allen*, 2 Woodb. & M. (U. S.) 318; *Stinson v. Weyman*, 2 Ware (U. S.) 172; *Ramsay v. Allegre*, 12 Wheat. (U. S.) 611; *Thomas v. Osborn*, 19 How. (U. S.) 38; *In re Sinclair*, 8 Am. L. Reg. 206; *Sutton v. Mitchell*, 1 T. R. 18; *Naylor v. Baltzell*, Taney's Dec. (U. S.) 55.

The act of June 26, 1884, limiting the liability of the owners of vessels "on account of the same" to their interests in the vessel and the freight pending, is to be construed as *in pari materia* with the act of 1851 (U. S. Rev. St., §§ 4283, 4285), and in accordance with the general maritime law, and does not embrace the personal contracts of such owners, or such as they have adopted as their personal liabilities. *Gokey v. Fort*, 44 Fed. Rep. 364.

2. *The Katie*, 40 Fed. Rep. 480; *Ex parte Garnett*, 141 U. S. 1.

The act limiting the owner's liability is applicable to ferry boats plying the East River between New York and Hunter's Point. *The Garden City*, 26 Fed. Rep. 776.

To tugboats going occasionally to and from ports of different States on the Great Lakes. *In re Vessel Owners' Towing Co.*, 26 Fed. Rep. 169.

To a steamboat engaged in interstate commerce on the Great Lakes. *In re Goodrich Transp. Co.*, 26 Fed. Rep. 713.

The act does not, however, apply to boats navigating streams connecting the Great Lakes. *Cuddy v. Horn*, 46 Mich. 596; 41 Am. Rep. 178.

Nor to the destruction of buildings and goods on the land by a fire communicated by the vessel, though duly licensed and engaged in the coast trade. *Goodrich Transp. Co. v. Gagnon*, 36 Fed. Rep. 123. But it was held to apply to a case where a tug carelessly injured a viaduct. *In re Vessel Owners' Towing Co.*, 26 Fed. Rep. 169.

English Statutes Limiting Liability.—Collisions in the Mediterranean sea beyond British jurisdiction between an English and a Belgian vessel whereby the latter with her cargo was sunk, held that the 25 and 26 Vict., ch. 63, § 54, with respect to limiting liability applied equally to British and foreign vessels. *The Amalia*, 1 Moore P. C. C. N. S. 471; 9 Jur. N. S. 1111. So it was held where a British ship damaged a foreign ship by collision within the distance of three miles from the shore of the United Kingdom, the provisions of that statute limiting the liability of the owner for the value of the ships applied. *General Iron Screw Collier Co. v. Schurmanns*, 1 J. & H. 180; 6 Jur. N. S. 883.

A railway company, carrying passengers and goods partly by railway and partly by its own ships, is entitled to the limitations of the liability of shipowners imposed by the merchants'

wise entitled to it) in respect to the balance which he is decreed to pay.¹ Where several vessels are in fault for collision, the damages should be divided between them *pro rata*, subject to the limitation of liability prescribed by the statute. If the money recoverable from either vessel is less than her share of the loss of the cargo, such money should be first applied on account of the cargo; and the other vessels or their owners are chargeable *pro rata*, up to their limit of liability for the balance of the whole loss of the cargo belonging to a third person not in fault, and for their proportion of the loss of any other vessel; but the latter, to make good the loss of cargo, must apply thereto any moneys coming to her from her own loss, so far as necessary to make good her share of the cargo lost. Either vessel thus paying more than her share of the whole loss, is entitled to the benefit of the judgment against any other party, up to the limit of his liability, for any excess paid in the first instance on his account.² The point of time for taking the value of the owner's interest in the vessel as the measure of his liability is at the termination of the voyage, whether by the arrival of the ship in port or by her loss at sea.³ If the vessel is sunk the value to be taken is her value as she lies sunk, which is the value of the wreck when raised, less the expense of raising; the expense of subsequent repairs or insurance moneys received by the owners cannot be added.⁴

6. Ship's Agent.—The owners generally appoint some person, usually one of their number, to be manager. He is called the ship's agent or the ship's husband.⁵ It is his duty to order the necessary repairs, furnish the supplies, procure the seamen, take care of the vessel in port, see that she has on board necessary

shipping act. London, etc., R. Co. v. James, 8 L. R. Ch. 241; 28 L. T. N. S. 48.

1. The North Star, 106 U. S. 17.

2. The Doris Eckhoff, 41 Fed. Rep. 156.

3. Place v. Norwich, etc., Co., 118 U. S. 468; The Great Western, 118 U. S. 520; The Abbie C. Stubbs, 28 Fed. Rep. 719.

Where a steamer collides with and injures a bark, but proceeds on her voyage and is stranded and wrecked by the negligence of her master and crew, but through no cause connected with the collision, the wrecking is the termination of the voyage, and the measure of the owner's liability for the damage to the bark is the value of the wreckage and material. Thomassen v. Whitwell, 118 U. S. 520.

Where a steamer collides with and sinks a ship, and being partly injured herself puts back to port, but by rea-

son of her injuries, sinks and becomes a total loss, except that some strippings are saved, her sinking is the termination of the voyage, and the measure of her owner's liability under the statute is the value of the strippings saved. Dyer v. National Steam Nav. Co., 118 U. S. 507.

Where a vessel has been repaired after collision and a libel has afterwards been brought against her, and the owner's petition for a limitation of their liability under the statute, the value of the vessel is taken as it was just after the collision and not at the time of the attachment. *Ex parte Right*, 10 Ben. (U. S.) 14.

4. *In re* Norwich, etc., Transp. Co., 8 Ben. (U. S.) 312.

Insurance is no part of the owner's interest and does not enter into the amount for which he is held liable. Place v. Norwich, etc., Transp. Co., 118 U. S. 468.

5. Gould v. Stanton, 16 Conn. 23.

and proper papers, make contracts for freight and to collect the returns thereof.¹ Having been appointed by a majority of the shareholders, he is supposed to speak and act the sentiments of the majority; his acts, when within the scope of his authority, are the acts of the owners.² He may appoint himself to act as broker to the ship in collecting and distributing the freight,³ and he may charge a commission for the purchase of the outfits and pay the bills of the vessel; and he may charge interest on the excess of his disbursements over the amounts received by him from the time of the occurrence of such excess.⁴ But he cannot insure the vessel,⁵ or purchase a cargo,⁶ or make any assignment of the whole freight to secure money advanced to him, without special authority.⁷ Nor can he borrow money,⁸ or bind the owners by making a negotiable note or accepting a negotiable bill of exchange in the name of the owners, as agent, in payment for supplies.⁹

Where a ship's agent orders supplies, they are deemed in law to be furnished on the credit of each and all the owners, unless the contrary is shown.¹⁰ But if the one who furnishes the supplies deals with the ship's agent in such a way as to justify the principals in believing that he dealt with the agent on his personal credit only, he will be estopped from setting up a claim against the owners.¹¹ Or, if the owner dies, the authority of the

1. *Sims v. Brittain*, 4 B. & Ad. 375, 24 E. C. L. 78; *Ouston v. Ogle*, 13 East 538; *Benson v. Heathorn*, 1 Y. & C. Ch. 326; *Gould v. Stanton*, 16 Conn. 12; *Turner v. Burrows*, 8 Wend. (N. Y.) 144.

2. *Gould v. Stanton*, 16 Conn. 23. See *Elder v. Larrabee*, 45 Me. 590; 71 Am. Dec. 567.

3. *Smith v. Lay*, 3 K. & J. 105.

4. *Reynnell v. Kimball*, 5 Allen (Mass.) 356.

5. *The Ole Oleson*, 20 Fed. Rep. 384; *Turner v. Burrows*, 5 Wend. (N. Y.) 543; 8 Wend. (N. Y.) 144; *Foster v. U. S. Ins. Co.*, 11 Pick. (Mass.) 85; *Patterson v. Chalmers*, 7 B. Mon. (Ky.) 595; *Bell v. Humphreys*, 2 Stark. 325; *French v. Backhouse*, 5 Burr. 2,727; *Robinson v. Gleadow*, 2 Bing. N. Cas. 156; 29 E. C. L. 290.

The facts that the plaintiff, for five or six years, had been ship's husband, and the owner of more than half of the ship, and had kept her insured for himself and the other owners jointly, by policies obtained by him annually, without any interference by the other owners, warrant the court in inferring that all the owners authorized him, not only to procure insurance, on the interest of all in that form, but to settle by arbitration or

otherwise, any claim for a loss under such a policy. *Nicholson v. Mercantile Ins. Co.*, 106 Mass. 399.

6. *Hewett v. Buck*, 17 Me. 147; 35 Am. Dec. 243; *The Ole Oleson*, 20 Fed. Rep. 384.

7. *Guion v. Trask*, 1 DeG., F. & J. 373.

8. *The Ole Oleson*, 20 Fed. Rep. 384.

9. *Taber v. Cannon*, 8 Met. (Mass.) 456.

10. *Stedman v. Feidler*, 20 N. Y. 437.

11. *Muldon v. Whillock*, 1 Cow. (N. Y.) 290; 13 Am. Dec. 533; *Cheever v. Smith*, 15 Johns. (N. Y.) 276; *Thompson v. Finden*, 4 C. & P. 158; 19 E. C. L. 320; *Reed v. White*, 5 Esp. 122. See *Wyatt v. Hurtsfort*, 3 East 147.

Where the ships' husbands purchased coal for a line of steamships, and gave their own notes for the price, signed with their firm name, "J. H. & Son," and there was nothing on their face to indicate that the makers were not to be held responsible as principals, held, that they were personally liable, and the fact that they were co-owners, and as such liable jointly with other owners, did not change the liability which they voluntarily assumed. *Snelling v. Howard*, 7 Robt. (N. Y.) 400.

Where a person supplied stores to a

agent is revoked, and the estate of the deceased is not thereafter chargeable.¹ He cannot even appropriate the proceeds of the sale of the deceased part owner's share to the payment of outstanding bills charged to the vessel.² In the absence of any special agreement or usage, one part owner of a ship, who has contributed with the others in proportion to their interests to her outfit for a voyage, is not liable, while the adventure is unfinished, to an action at law for his proportion of the amount of a bill of exchange drawn by the master in a foreign port upon the managing owner, and paid by him; and such liability is not therefore the subject of a set-off in an action at law.³ (See *CONSIGNEE*, vol. 3, p. 663.)

IV. SALE AND TRANSFER—1. By Parol.—A vessel is personal property, and is governed by the laws regulating personal property in respect to mere questions of ownership and incumbrances.⁴ Like any other personal chattel, the title of a vessel may pass by parol.⁵ Where the property in the vessel is transferred without a bill of sale or other written evidence, there must be proof of an agreement to sell and purchase; and also proof of a valuable consideration when the title is asserted against creditors of the vendor, and a delivery of the vessel in port at the time of the sale.⁶

ship on the order of several owners, who acted as the ship's husband, and took his note in payment, and gave a receipt in full, held, that all the owners were liable, the note not being paid. *Schemerhorn v. Loines*, 7 Johns. (N. Y.) 311.

1. *Stedman v. Feidler*, 20 N. Y. 437.

2. *Curtis v. Blanchard*, 45 Me. 228.

3. *Starbuck v. Shaw*, 10 Gray (Mass.) 492.

4. *Thomas v. The Kosciusko*, 11 N. Y. Leg. Obs. 38.

5. *Chadbourn v. Duncan*, 36 Me. 91. See *Lynch v. The Seminole*, 43 Fed. Rep. 168; *Badger v. Bank of Cumberland*, 26 Me. 428; *Richardson v. Kimball*, 28 Me. 463; *Barnes v. Taylor*, 31 Me. 329; *U. S. v. Willings*, 4 Cranch (U. S.) 55; *Calais, etc., Co. v. Van Pelt*, 2 Black (U. S.) 385; *The Amelie*, 6 Wall. (U. S.) 18; *Scudder v. Calais Steamboat Co.*, 1 Cliff. (U. S.) 370; *Weaver v. The S. G. Owens*, 1 Wall. Jr. (C. C.) 349; *Thorne v. Hicks*, 7 Cow. (N. Y.) 697; *Stacy v. Graham*, 3 Duer (N. Y.) 452; *Wendover v. Hogeboom*, 7 Johns. (N. Y.) 308; *Merritt v. Johnson*, 7 Johns. (N. Y.) 473; 5 Am. Dec. 289; *Sharp v. United Ins. Co.*, 14 Johns. (N. Y.) 201; *Leonard v. Huntington*, 15 Johns. (N. Y.) 298; *Taggard v. Loring*, 16 Mass. 336; 8 Am. Dec. 140; *Lamb v. Dur-*

ant, 12 Mass. 54; 7 Am. Dec. 31; *Lord v. Ferguson*, 9 N. H. 380; 1 Mason (U. S.) 317; *Welsh v. Parrish*, 1 Hill (S. Car.) 155; *Bixby v. Franklin Ins. Co.*, 8 Pick. (Mass.) 86; *Vinal v. Burrill*, 16 Pick. (Mass.) 401. Compare *Ohl v. Eagle Ins. Co.*, 4 Mason (U. S.) 172; *Hozey v. Buchanan*, 16 Pet. (U. S.) 220.

A bill of sale is not absolutely necessary for the transfer of a ship. *Bixby v. Franklin Ins. Co.*, 8 Pick. (Mass.) 86; *Vinal v. Burrill*, 16 Pick. (Mass.) 401; *Chadbourn v. Duncan*, 36 Me. 89; *Wendover v. Hogeboom*, 7 Johns. (N. Y.) 308; *Anth. (N. Y.)* 121; *Taggard v. Loring*, 16 Mass. 336; 8 Am. Dec. 140; *Badger v. Bank of Cumberland*, 26 Me. 428.

The payment and acceptance of the price of a vessel is sufficient to complete the sale between the seller and purchaser, without any bill of sale or other written instrument. *Metcalf v. Taylor*, 36 Me. 28.

In Oregon the Code, § 773, requires contracts for the sale of a "vessel" to be in writing. *Held*, not to apply to a contract for the sale of the incomplete portion of a boat. *Yarnberg v. Watson*, 13 Oregon 11.

6. *Richardson v. Kimball*, 28 Me. 463. See *Rice v. McLanen*, 42 Me. 157.

Delivery of a vessel to the agent of the person for whom it was built, unaccompanied by any written conveyance, and with no intent on the part of the agent to appropriate the property to his own use, must be understood as vesting the title in the owner, and the subsequent act of the agent in taking the bill of sale to himself from the builders, four months afterwards, would not divest the owner's title and vest it in the agent.¹ The national character is not *ipso facto* lost by a parol transfer, but the American registry act makes the production of a bill of sale requisite to entitle the ship to be registered anew, and the want of such new registry, forfeits the national character.² Under the English registry acts, all transfers, or agreements for transfers, made without reciting the certificate of registry at length in the bill or instrument of sale or agreement for transfer, are void.³

2. By Bill of Sale.—A bill of sale only *prima facie* shows a transfer of title.⁴ In order to constitute a full right under it, the transfer should be *bona fide* and for a valuable consideration.⁵ If *bona fide*, it is good as against creditors although the possession of the ship is not taken by the purchaser.⁶ Parol evidence may be given to vary its terms. If it expresses a certain sum as the consideration, the vendor may prove an oral agreement to pay an additional sum upon a certain contingency, and recover such sum upon the happening of the event, though the bill of sale be absolute in its terms;⁷ or it may be shown by parol evidence to be only a mortgage.⁸ But an absolute bill of sale of a vessel will be construed as a mortgage only upon the clearest proof that it was intended as security.⁹ The fact that a bill of sale of a vessel was merely intended as a mortgage will not prevent the holders from maintaining an action for the conversion of the vessel against a person claiming under a barratrous sale by the master.¹⁰ So one who

1. *Scudder v. Calais Steamboat Co.*, 1 Cliff. (U. S.) 370.

2. *U. S. v. Willings*, 4 Cranch (U. S.) 48; *Hatch v. Smith*, 5 Mass. 42.

3. *Western v. Penniman*, 1 Mason (U. S.) 306; *Leland v. The Medora*, 2 Woodb. & M. (U. S.) 47; *Gibson v. Stephens*, 8 How. (U. S.) 399; *Ex parte Halkett*, 19 Ves. 474; 3 Ves. & B. 135; *Sutton v. Buck*, 2 Taunt. 302; *Atkinson v. Maling*, 2 T. R. 462.

4. *Seaman v. Enterprise F. & M. Ins. Co.*, 21 Fed. Rep. 778.

5. *Hozey v. Buchanan*, 16 Pet. (U. S.) 215.

Where a bill of sale of a ship was given to the captain in order to conceal her foreign character—held, that a purchaser from the captain, in good faith, would be protected, though he had notice of a claim by the actual owner. *Vernonet v. Delaire*, 2 Desaus. (S. Car.) 323.

6. *D'Wolf v. Harris*, 4 Mason (U. S.) 515.

7. *Clark v. Deshon*, 12 Cush. (Mass.) 589.

8. *McLellan v. Shinn*, 15 Wall. (U. S.) 105. See *The Panama*, Olc. Adm. 343.

Where a bill of sale of a vessel is absolute on its face, but the registry pursuant thereto was made a long time after the date of the bill, evidence to show that the bill of sale was by way of mortgage, and did not take effect absolutely till the latter date, and that the buyer did not enter into possession until such latter date, is proper, and should be admitted to rebut the presumption of ownership, in an action to charge the mortgagee as owner of the ship. *Bryan v. Bowles*, 1 Daly (N. Y.) 171.

9. *Purington v. Akhurst*, 74 Ill. 490.

10. *Clark v. Wilson*, 103 Mass. 219; 4 Am. Rep. 532.

has taken and caused to be recorded a bill of sale of the vessel absolute in form, but intended only as collateral security, and who has never taken the control of her, can recover on a policy insuring against "barratry of the master, unless the insurer be owner of the vessel," although he has charged the premiums to the real owner, if such charge has been without the owner's authority.¹

Where the execution of a bill of sale is made a condition precedent to the payment of any portion of the subscription raised by a joint stock company for the purchase of a vessel, it is at the risk of the owners until the bill of sale is executed, or the vessel itself is delivered to the stockholders. If it is burned before such conditions are performed, a subscriber who has paid a portion of his stock may recover back the money so advanced.² So where a sale of a vessel is made part cash, and the balance of the purchase money to be paid upon delivery by the vendor to the vendee of a bill of sale, the plaintiff cannot recover the balance until the condition precedent is performed.³

By the law of the *United States* relating to the registering and enrollment of vessels, the inaccurate recital⁴ or the omission of the certificate of registry in a bill of sale, does not, as in *England*, avoid the sale, but merely deprives the vessel of her American character.⁵ A bill of sale is good though it does not recite the certificate prescribed by the registry act.⁶ If a bill of sale of a ship containing blanks for the recital of the register is executed and delivered, and afterwards the blanks are filled up by the consent of the vendor and vendee, it will be good.⁷

3. Sale by the Builder.—Where a ship builder agrees to construct a vessel for the purchaser, no property is vested in the party for whom it is constructed until it is finished or delivered,⁸ though it be agreed that payment shall be made to the builder during the progress of the work, and such payments are made accordingly.⁹ But this general rule does not prevail where the vessel is constructed under the superintendence of the party for whom she is

1. *Clark v. Washington Ins. Co.*, 100 Mass. 509; 1 Am. Rep. 135.

2. *Murray v. Richards*, 1 Wend. (N. Y.) 58.

3. *Fowler v. Fisk*, 12 Cal. 112.

4. *D'Wolf v. Harris*, 4 Mason (U. S.) 515.

In *England* the omission invalidates the sale. *Westerdell v. Dale*, 7 T. R. 306.

5. *Philips v. Ledley*, 1 Wash. (U. S.) 226.

6. *D'Wolf v. Harris*, 4 Mason (U. S.) 515; *Mitchell v. Taylor*, 32 Me. 434.

7. *Woolley v. Constant*, 4 Johns. (N. Y.) 54; 4 Am. Dec. 246.

8. *Low v. Austin*, 20 N. Y. 181; *Andrews v. Durant*, 11 N. Y. 35; 62 Am. Dec. 55; *Johnson v. Hunt*, 11 Wend.

(N. Y.) 139; *Haney v. Rosabelle*, 20 Wis. 24; *U. S. v. Tillottson*, 1 Paine (U. S.) 306; *Mucklow v. Mangles*, 1 Taunt. 218; *Scudder v. The Calais Steamboat Co.*, 1 Cliff. (U. S.) 378.

9. *Andrews v. Durant*, 11 N. Y. 35; 62 Am. Dec. 55; *Haney v. The Rosabelle*, 20 Wis. 247; *Mucklow v. Mangles*, 1 Taunt. 218.

In the *Sam Slick*, 1 Sprague (U. S.) 289, it is held that the vessel in process of construction under a contract between the merchant and the builder, does not usually, at least against third persons, become the property of the merchant upon his making the first payment.

A ship was built upon a special contract providing that certain portions of the price should be paid according to

built or his agent, and payments for her based upon the progress of the work are to be made by installments as the work is done. In such cases, the person for whom the vessel is built is regarded as the real owner.¹ Nor does this rule apply to a conveyance of the keel and other parts of the unfinished vessel; such a conveyance vests the property in the vendee and draws after it all subsequent additions.²

If the parties agree that the vessel shall be built of a certain kind of material, the purchaser assumes the risk of defects which are naturally incident to such material.³ But if a ship is ordered for a special and designated purpose, there is an implied warranty of fitness for that purpose.⁴

Where the contract has been completed and the vessel has been finished and delivered to the party for whom she was built, and has been approved by him, the property vests in such party.⁵ Delivery of a vessel to the agent of the person for whom she was built unaccompanied by any written conveyance and with no intent on the part of the agent to appropriate the property to his own use, must be understood as vesting the title in the owner.⁶ Where it is stipulated that the vessel shall be built, calked, finished, and ready for the rigger to complete his work, launched and delivered afloat in the harbor at a certain time, the builder is bound to have the vessel ready for the rigger so that she may be completed and launched on the day specified.⁷ So, where it is stipulated that a vessel shall be delivered at one of two places at the option of the purchaser, it is the duty of the vendor to give notice to the purchaser when the vessel is completed that he might make the election.⁸

4. Sale Under Decree of Admiralty.—The sale of a vessel under a decree *in rem* by a court of admiralty passes the title as to all the

the progress of the work; part when the keel was laid, and part when they were at the light plank. The builder signed his certificate to enable the purchaser to have the ship registered in his own name. *Held*, that the property vested in the latter from the time of the registry. *Woods v. Russell*, 5 B. & Ald. 942; 7 E. C. L. 310. See *Battersby v. Gale*, 4 A. & E. 458; *Atkinson v. Bell*, 8 B. & C. 277; 15 E. C. L. 216.

For a rule contrary to that stated in the text, see *Moody v. Brown*, 34 Me. 107; 56 Am. Dec. 640, where it is held that payments made by installments passed the property.

What Is Sufficient Delivery.—Where a vessel is sold to be delivered to the buyer in a certain city, and the buyer does not designate a particular place for delivery, the seller is justified in tendering a delivery at safe anchorage in the harbor. He cannot be called upon to place the vessel in a dry dock,

in order that the purchaser may there examine her. *Lincoln v. Gallagher*, 79 Me. 189.

1. *Woods v. Russell*, 5 B. & A. 942; 7 E. C. L. 310; *Clarke v. Spence*, 4 A. & E. 448; 31 E. C. L. 107; *Laidler v. Burlinson*, 2 M. & W. 602; *Atkinson v. Bell*, 8 B. & C. 277; 15 E. C. L. 216.

2. *Glover v. Austin*, 6 Pick. (Mass.) 209. See *Sumner v. Hamlet*, 12 Pick. (Mass.) 76.

3. *Cunningham v. Hall*, 4 Allen (Mass.) 268; 1 Sprague (U. S.) 404.

4. *Chambers v. Crawford*, Add. (Pa.) 151; *Shepherd v. Pybus*, 3 M. & G. 868; 42 E. C. L. 452.

5. *Andrews v. Durant*, 11 N. Y. 35; 62 Am. Dec. 55.

6. *Scudder v. Calais Steamboat Co.*, 1 Cliff. (U. S.) 370.

7. *Curtis v. Brewer*, 17 Pick. (Mass.) 513.

8. *Spooner v. Baxter*, 16 Pick. (Mass.) 409.

world if it is a condemnation as prize, or for forfeiture as contraband, or for smuggling, or to pay salvage, or discharge a bottomry bond, or to satisfy any of the liens known to maritime law.¹ But if the ship is sold for unseaworthiness, the validity of the sale will depend upon the actual facts; if it is shown to have been necessary and justified, the sale will be valid, but if unnecessary the sale will be void.² To invalidate the sale of a vessel, under the decree of a court of admiralty, on the ground of fraud, it must appear that the proceedings were both collusive and fraudulent, and that the purchaser was cognizant of the fraud.³

5. Transfer Without Delivery.—If a ship be at sea,⁴ or abroad, a transfer by mortgage,⁵ or bill of sale without delivery,⁶ or a delivery without a bill of sale, is good as against all persons.⁷ But

1. *U. S. v. Malekadhel*, 2 How. (U. S.) 210; *The Tremont*, 1 W. Rob. 163; *Attorney-Gen'l v. Norstedt*, 3 Price 97; *The Helena*, 4 Rob. 3; *Hughes v. Cornelius*, 2 Show 232; *Imire v. Castrique*, 8 C. B. N. S. 405; 98 E. C. L. 405; *Slocum v. Mayberry*, 2 Wheat. (U. S.) 1.

In *The Trenton*, 4 W. R. 657, it was held that the sale of the vessel by proceedings *in rem* in a court of competent jurisdiction extinguishes all liens upon her and vests a clear and indefeasible title in the purchaser.

An American vessel was captured by a French privateer and carried into a Spanish port where she was dismantled and abandoned. The vessel having stranded upon the beach was some months after sold at auction by the commanding officer of the port, and purchased by an American, who afterwards repaired her at great expense and brought her to New York, where she was claimed by the original owner. In an action of trover brought by the original owner, it was held that the vessel, being abandoned and a wreck, and having been sold according to the laws of *Spain*, in cases of wreck or derelict, the property was transferred by the sale to the purchaser, who thereby acquired a valid title against all the world. *Grant v. Lachlin*, 4 Johns. (N. Y.) 34.

2. *Fales v. Gibbs*, 5 Mason (U. S.) 465; *Reid v. Darby*, 10 East 143; *Morris v. Robinson*, 3 B. & C. 196; *Hunter v. Prinsep*, 10 East 378; *The Segredo*, Spinks Adm. 57; *The Warrior*, 2 Dods. 288; *The Fanny & Elmira*, Edw. Adm. 17; *The Pitt*, 1 Hagg. Adm. 240.

3. *The Garland*, 16 Fed. Rep. 283.

4. *Putnam v. Dutch*, 8 Mass. 291; *Badlam v. Tucker*, 1 Pick. (Mass.) 389;

11 Am. Dec. 202; *Joy v. Sears*, 9 Pick. (Mass.) 4; *Gardner v. Howland*, 2 Pick. (Mass.) 599; *Turner v. Coolidge*, 2 Met. (Mass.) 350; *Crapo v. Kelly*, 16 Wall. (U. S.) 640; *Winsor v. McLellan*, 2 Story (U. S.) 492; *Wheeler v. Sumner*, 4 Mason (U. S.) 183; *Brinley v. Spring*, 7 Me. 241.

A ship at sea is included in the general term "effects," and will pass, in a conveyance, under the words "goods, merchandise, and effects." *Welsh v. Parish*, 1 Hill (S. Car.) 155.

5. *Portland Bank v. Stacey*, 4 Mass. 663; 3 Am. Dec. 253; *Portland Bank v. Stubbs*, 6 Mass. 425; 4 Am. Dec. 151; *Morgan v. Biddle*, 1 Yeates (Pa.) 3; *Brinley v. Spring*, 7 Me. 241; *Badlam v. Tucker*, 1 Pick. (Mass.) 389; 11 Am. Dec. 202.

6. *Putnam v. Dutch*, 8 Mass. 291; *Crapo v. Kelly*, 16 Wall. (U. S.) 640; *Conard v. Atlantic Ins. Co.*, 1 Pet. (U. S.) 386; *Gibson v. Stevens*, 8 How. (U. S.) 399; *Leland v. The Medora*, 2 Woodb. & M. (U. S.) 117; *Ohl v. Eagle Ins. Co.*, 4 Mason (U. S.) 172; *Gardner v. Howland*, 2 Pick. (Mass.) 599; *Brown v. Heathcote*, 1 Atk. 160; *Greaves v. Hepke*, 2 B. & Ald. 131; *Atkinson v. Maling*, 2 T. R. 462; *Ex parte Halkett*, 19 Ves. 474; 3 Ves. & B. 135; *Wilkes v. Ferris*, 5 Johns. (N. Y.) 335; 4 Am. Dec. 364; *Ingraham v. Wheeler*, 6 Conn. 277; *Pleasants v. Pendleton*, 6 Rand. (Va.) 473; 18 Am. Dec. 726; *Morgan v. Biddle*, 1 Yeates (Pa.) 3; *Brinley v. Spring*, 7 Me. 241.

7. A offered to sell his interest in a vessel to B for a given price. B accepted the proposition, took possession of the vessel, loaded and sent her on a voyage. Two days out she was lost. B had received no bill of sale of her, and the terms of payment had not been

the transferee must take possession on her return,¹ for the title of a vessel transferred in this way is subject to be defeated if there should be negligence in not taking possession of her within a reasonable time after her return to port.² The same doctrine is applicable to goods which, while at sea, are the subject of a *bona fide* sale; all the interests of the vendor becoming vested in the vendee, and the captain becoming his agent respecting them or their proceeds as soon as he receives notice of the transfer.³ The sale of a vessel⁴ and cargo abroad at the time, by *bona fide* bill of sale, is valid against the vendor's creditors, provided the vendee takes possession thereof without delay upon the return of the vessel.⁵

6. Transfer of Licensed Vessels.—Whenever a licensed vessel is transferred to any person who is not at the time of such transfer a citizen of the United States, it works a forfeiture.⁶ A licensed vessel cannot be sold in a foreign port unless her license be previously surrendered.⁷

definitely agreed upon. A brought his action to recover the agreed price. *Held*, that the plaintiff was entitled to judgment for that sum. *Rice v. McLarren*, 42 Me. 157.

1. *Portland Bank v. Stubbs*, 6 Mass. 425; 3 Am. Dec. 253.

2. *Brinley v. Spring*, 7 Me. 241; *Badlam v. Tucker*, 1 Pick. (Mass.) 389; 11 Am. Dec. 202. See *Davidson v. Gorham*, 6 Cal. 343.

In *Gardner v. Howland*, 2 Pick. (Mass.) 601, the court by Parker, C. J., said: "Indeed it is a well-known principle in the law-merchant, that the sale of a vessel at sea with a delivery over to the vendee of such evidence of title as may be in possession of the vendor, is sufficient to pass the property in the vessel against creditors, provided there be no such negligence in regard to possession when the vessel arrives as will give ground for presumption of fraud."

The owners of one-half of a vessel, some months previous to their bankruptcy, conveyed by a bill of sale, as security for a debt of \$2,000, their half, the other half being owned by the master, and agreed to assign all future policies of insurance thereon as further security for the same debt, which was done, it being agreed that the mortgagors might use the vessel for their own benefit until default of payment. The bill of sale was not recorded. The vessel, at the time of sale, was at sea in possession of the master. Between that time and the filing of the petition in bankruptcy,

the vessel came once to Boston, the place of business and residence of the mortgagors, and twice to Bath, the place of business and residence of the master, but the mortgagees did not take possession. Five days before filing the petition, they sent notice to the masters of the bill of sale, the said mortgaged moiety of the vessel having been sold by direction of the assignee. *Held*, that the proceeds of the sale should be paid to the mortgagee. *Winsor v. McLellan*, 2 Story (U. S.) 492.

3. *Gardner v. Howland*, 2 Pick. (Mass.) 601.

4. *Portland Bank v. Stacey*, 4 Mass. 661; 3 Am. Dec. 253; *Putnam v. Dutch*, 8 Mass. 287; *Buffington v. Curtis*, 15 Mass. 528; 8 Am. Dec. 115; *Joy v. Sears*, 9 Pick. (Mass.) 4.

5. *Portland Bank v. Stacey*, 4 Mass. 661; *Peters v. Ballistier*, 3 Pick. (Mass.) 495; *Gardner v. Howland*, 2 Pick. (Mass.) 599.

6. U. S. Rev. Sts., §§ 4377, 4378; *The Two Friends*, 1 Gall. (U. S.) 118; *Phillips v. Ledley*, 1 Wash. (U. S.) 226; *The Active v. U. S.*, 7 Cranch (U. S.) 100; *U. S. v. The Hawke*, Bee Adm. 34; *The Julia*, 1 Gall. (U. S.) 233; *U. S. v. The Mars*, 1 Gall. (U. S.) 237; *The Eliza*, 2 Gall. (U. S.) 4; *U. S. v. Paryntha Davis*, 1 Cliff. (U. S.) 532; *The Nymph*, 1 Sumn. (U. S.) 516.

7. *U. S. v. The Hawke*, Bee Adm. 31; *Kelly v. The Prosperity*, Bee Adm. 38; *British Consul v. The Favourite*, Bee Adm. 39.

7. **What Property Passes to Purchaser.**—Whatever is on board a ship for the object of the voyage and adventure in which she is engaged, belonging to the owners and constituting a part of the ship and her appurtenances, passes with a sale thereof.¹ A chronometer designed to discover the longitude at sea;² a rudder and cordage purchased for a ship;³ sails and rigging, though detached;⁴ fishing stores of a vessel engaged in the fisheries,⁵ and provisions, have been held to pass as appurtenances.⁶ So, upon the sale or transfer of a vessel, the certificates of registry or enrollment pass to the purchaser.⁷

8. **Rules Regulating Sales of Ships.**—If a builder constructs a ship by order of the purchaser, there is an implied warranty on the part of the builder that it shall be, both as to workmanship and as to the materials used in its construction, fit for the service for which it was ordered.⁸ Where a purchaser buys a ship already constructed, he must examine, judge and test it for himself, and is ordinarily bound to discover any obvious defects or imperfections.⁹ The sale may, however, be effected by representation.¹⁰ But if it is reduced to writing, new stipulations or representations cannot generally be shown by parol evidence.¹¹ A seller of a ship "with all faults" is not liable for latent defects, unless he has used some artifice to conceal them from the buyer.¹² If he knew of secret defects in her and used means to prevent

1. *Gale v. Laurie*, 5 B. & C. 165; 11 E. C. L. 187; *The Dundee*, 1 Hagg. Adm. 109.

Ballast.—Movable ballast, whether it consists of iron, stone, or any other substance, is not a necessary appurtenance to the ship. *Burchard v. Tapscott*, 3 Duer (N. Y.) 363; *Kynter's Case*, 1 Leon 46; *Lano v. Neale*, 2 Stark. 105.

Cargo.—The cargo of a whaling vessel does not pass by the bill of sale of a ship, stores, and other appurtenances. 1 *Parson's Shipp. & Adm.* 81; *Langton v. Horton*, 5 Beav. 9; 23 *Leg. Obs.* 524.

2. *Richardson v. Clark*, 15 Me. 421.

3. *Woods v. Russell*, 5 B. & Ald. 942; 7 E. C. L. 310; *Goss v. Quinton*, 3 M. & G. 825; 42 E. C. L. 430.

4. *The Alexander*, 2 Dods. 217.

5. *The Dundee*, 1 Hagg. Adm. 109; *Hoskins v. Pickersgill*, 3 Dougl. 222.

Materials which are fitted and form part of the ship pass, even though they are not attached to the ship; but not when merely bought for the ship and intended for it. *Wood v. Bell*, 6 E. & B. 355; 88 E. C. L. 355; 36 Eng. L. & Eq. 148.

A new ash-pan purchased for the boiler prior to the sale of a steamboat

and delivered but not placed on the boat, was held to pass by the bill of sale. *The Steamboat Fashion*, Newb. Adm. 67.

6. *Brough v. Whitmore*, 4 T. R. 206.

7. *Barnes v. Taylor*, 31 Me. 329.

8. *Cunningham v. Hall*, 4 Allen (Mass.) 268.

9. *The Sam Slick*, 1 Sprague (U. S.) 289.

The purchaser of a vessel, partly laden, which on proceeding to sea proves rotten and unseaworthy, may, under the law of *Louisiana*, which imposes on the seller the duty of warranting the thing sold against hidden defects, have an action for reduction of the price by reason of the difference in value between the thing as warranted, and as it was in fact. *Bulkley v. Honold*, 19 How. (U. S.) 390.

10. *Shepherd v. Kain*, 5 B. & Ald. 240; 7 E. C. L. 82; *Schneider v. Heath*, 3 Camp. 390. Compare *Dyer v. Lewis*, 7 Mass. 284.

11. *Freeman v. Baker*, 5 B. & Ald. 797; 5 C. & P. 475; *Pickering v. Dowson*, 4 Taunt. 779; *Mumford v. McPherson*, 1 Johns. (N. Y.) 414, 3 Am. Dec. 339.

12. *Baglehole v. Walters*, 3 Camp. 154.

the purchaser from discovering them, or makes a fraudulent representation of her condition at the time of the sale, he cannot avail himself of the stipulation "sold with all faults."¹

What is necessary to make a sale complete is a question of law, but whether the necessary facts exist or not is for the jury to determine. If the parties do not themselves understand the trade to be completed, but that some other material thing is to be done before the rights of either can be changed, it cannot be so treated by others.² The title does not ordinarily vest on a first payment.³ If the sale is unconditional, the purchaser is liable for repairs and supplies, though he may never have taken possession of the vessel, and though neither the master nor the merchant furnishing the supplies had any knowledge of the sale.⁴ Where one advances money to enable another to buy the vessel and takes a power of attorney to sell her and deposits the bill of sale received by the purchaser as security for the advance, the party holding such bill of sale acquires, by its delivery to him, no hypothecation of the vessel or the interest in her enabling him to maintain a petitory or possessory action; he takes only a naked power to sell.⁵

9. **Mortgages.**—The mortgage of a ship is in some respects

1. *Schneider v. Heath*, 3 Camp. 506.

The vendor of a ship represented her to have been built in 1816, when in fact she had been launched the year before. *Held*, the vendee was entitled to recover damages as it was a false representation, although it was agreed that the ship should be taken "with all faults." *Fletcher v. Bowsher*, 2 Stark. 561.

Where an advertisement for the sale of a ship described her as "a copper fastened vessel," adding that she was to be taken with all faults without any allowance for any defects whatsoever, and it appeared that she was only partially copper fastened, *held*, notwithstanding the words "with all faults without any allowance for any defects" the vendor was liable for the breach of warranty. *Shepherd v. Kain*, 5 B. & Ald. 240; 7 E. C. L. 82.

But where one sold a vessel and in the bill of sale described her as of certain dimensions and burden, when in truth she was of less dimensions and burden, it was held that the purchaser could not maintain an action of the case against the seller as for a false affirmation and promise. *Dyer v. Lewis*, 7 Mass. 284.

2. *Hawthorne v. Bowman*, 3 Sneed (Tenn.) 524; *The Oriole*, 1 Sprague (U. S.) 31.

3. *The Sam Slick*, 1 Sprague (U. S.) 289.

4. *Lord v. Ferguson*, 9 N. H. 380; *Flanders v. Merritt*, 3 Barb. (N. Y.) 201.

A contract was made for the sale of a vessel, the possession of which was taken immediately, and it was agreed that the bill of sale was not to be given until the whole of the purchase-money was paid, and in the mean time the register stood in the name of the original owner, who exercised no control, however, over the vessel in any respect. *Held*, that such original owner was not liable for repairs made by direction of the master, as agent for, and on the credit of, the purchaser, between the time of executing the contract and the final consummation of it by the delivery of a bill of sale; but that the purchaser must be looked to for payment. *Leonard v. Huntington*, 15 Johns. (N. Y.) 298.

A, the sole owner of a ship, made a written contract to convey her to B upon payment of his note for the price. From that time B had exclusive control of her, appointed the master, etc. *Held*, that A was not liable for money furnished to the master to pay for repairs. *Tyler v. Holmes*, 38 Me. 258.

5. *The Perseverance*, B. & H. Adm. 385.

analogous to a bottomry bond, but in others wholly different.¹ It has none of the characteristics or attendants of a maritime loan, and is entered into without reference to navigation or perils of the sea.² A court of admiralty has no power to decree the sale of a mortgage, nor on that account can it declare the ship to be the property of the mortgagee and decree the possession to be given to him.³ In order, however, to give validity to a mortgage upon a vessel alleged to be a vessel of the United States employed in the coasting trade, as against the State statute, it must be made to appear that she was registered and also that she was enrolled and licensed as required by the act of Congress.⁴

Where there is no language in the mortgage, and no other agreement to constrain or control it, the mortgagee has the right of immediate possession.⁵ If he fails to take possession as soon as he reasonably can, he is liable to have his title defeated by any third party who acquires a right to the ship in ignorance of the mortgagee's prior title, and in good faith, unless protected by some agreement or the provisions of some statute in his behalf.⁶ Where a vessel mortgaged to secure a debt remains in the mortgagor's possession, a mortgagee has no lien upon her earnings, and cannot compel a specific appropriation of them to the payment of the debt.⁷ If he takes possession, or does any act which can be deemed in some degree equivalent to public notice that he is owner, this actual or apparently actual possession, added to his legal title as owner, seems to confer upon him the responsibilities and liabilities of an owner.⁸

1. 1 Parson's Shipp. & Adm. 132.

2. Bogart v. Steamboat John Jay, 17 How. (U. S.) 402.

3. See Schuchardt v. Babbage, 19 How. (U. S.) 239; Bogart v. Steamboat John Jay, 17 How. (U. S.) 402.

4. Best v. Staple, 61 N. Y. 71.

Before registry, a vessel is subject to the laws of the State; and a mortgage thereof, duly recorded, is valid. But after registry, the vessel is subject to the laws of the United States; and a mortgage not recorded in compliance therewith, is valid only as against the mortgagor, his heirs and devisees, and parties having actual notice thereof. Perkins v. Emerson, 59 Me. 319. See Stinson v. Minor, 34 Ind. 89.

5. Foster v. Perkins, 42 Me. 168.

A mortgagee of one-eighth of a vessel, not in possession, may maintain an action of trover against the assignee of the mortgagor, who refuses to comply with a demand for possession, and claims title in himself as against the mortgagee. Wood v. Stockwell, 55 Me. 76.

6. Tucker v. Buffington, 15 Mass.

477; Portland Bank v. Stubbs, 6 Mass. 422; 4 Am. Dec. 151; Atkinson v. Maling, 2 T. R. 462; *Ex parte Mathews*, 2 Ves. 272; Mair v. Glennie, 4 M. & S. 240.

A written pledge of a vessel, then building, for advances, with an agreement that the pledgee might purchase her at his option, but with no delivery of possession, is incompetent to avoid a subsequent transfer of the vessel by a bill of sale, to a third person. Bonsey v. Amee, 8 Pick. (Mass.) 236.

A ship at sea was mortgaged to secure a debt, the mortgagor to remain in possession till default of payment. *Held*, that the transfer was valid against a subsequent attaching creditor, though no possession was taken, nor demand made, by the mortgagee, till after condition broken. Badlam v. Tucker, 1 Pick. (Mass.) 389; 11 Am. Dec. 282.

7. Tenney v. State Bank, 20 Wis. 152.

8. Miln v. Spinola, 4 Hill (N. Y.) 177; 2 Parson's Shipp. & Adm. 126.

Mere possession of the document is

If a mortgagor of a vessel sells it without authority from the mortgagee, a bill in equity will lie against the mortgagor's estate, to subject the proceeds of the sale, existing in the form of notes, to the payment of the mortgage.¹ So, where a part owner of a vessel and cargo mortgages his share thereof, and afterwards he and the other owners appoint an agent to sell the whole cargo, such agent after selling the cargo and receiving the proceeds is liable to the mortgagee in an action for money had and received of the mortgagor's share of those proceeds.²

10. Registration.—The subject of the registration of sales and mortgages of vessels is regulated by the laws of Congress.³ The requirements of these laws cannot be superseded or supplied by those of a State law.⁴ If the vessel transferred is one to which the laws of Congress do not apply, the conveyance may be recorded according to the provisions of the statute of the State where she belongs.⁵ Registered, licensed or enrolled vessels are those whose transfers are required to be recorded by the act in question.⁶ The authorities do not agree as to the place where such conveyances should be recorded.⁷ The object of the

not such possession as to render the mortgagee liable to the master for wages. *Fisher v. Willing*, 8 S. & R. (Pa.) 118.

1. *Brewer v. McLarren*, 51 Me. 402.

2. *Milton v. Mosher*, 7 Met. (Mass.)

244.

3. *The Lottawanna*, 21 Wall. (U. S.) 578; *White's Bank v. Smith*, 7 Wall. (U. S.) 656; *Aldrich v. Aetna Ins. Co.*, 8 Wall. (U. S.) 491; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 3; *Sinnot v. Davenport*, 22 How. (U. S.) 227; *Shaw v. McCandless*, 36 Miss. 296; *The Martha Washington*, 25 L. R. 22.

4. *Aldrich v. Aetna Co.*, 8 Wall. (U. S.) 491. See *NAVIGATION*, vol. 16, p. 272; *PILOTS*, vol. 18, p. 444; *supra*, this title, *Shipping Regulations*.

The statutes of *Alabama* requiring the registration of mortgages, deeds of trusts, etc., on personal property, do not apply to vessels for the navigation of the ocean. The evidence of title in them is to be looked for in their ship-papers and registration, according to the act of Congress. *Fontaine v. Beers*, 19 Ala. 422.

5. 1 *Parsons Shipp. & Adm.* 62; *Veazie v. Somerby*, 5 Allen (Mass.) 280; *Best v. Staple*, 61 N. Y. 71.

A canal boat or scow is not a "vessel of the United States" within the meaning of the act of Congress declaring that no bill of sale, mortgage, etc., of any vessel, or part of a vessel, of the United States, shall be valid, unless the same shall be recorded in the

office of the collector of customs where such vessel is registered and enrolled. *Hicks v. Williams*, 17 Barb. (N. Y.) 523.

6. U. S. Stat. 1850, ch. 27.

7. The following cases hold that a bill of sale in order to be valid need not be enrolled in the customhouse; the enrollment secures the privileges of an American vessel. *Hozey v. Buchanan*, 16 Pet. (U. S.) 215; *Wendover v. Hogeboom*, 7 Johns. (N. Y.) 308; *Ring v. Franklin*, 2 Hall (N. Y.) 1; *Weston v. Penniman*, 1 Mason (U. S.) 306.

But in *Potter v. Irish*, 10 Gray (Mass.) 416, it is held that the record must be made in the customhouse in the district of the last registry and enrollment, though not the home port of the vessel. See *Chadwick v. Baker*, 54 Me. 9.

So according to *Lawrence v. Hodges*, 92 N. Car. 672; 53 Am. Rep. 436, a vessel, although used wholly within the navigable waters of a single State, if enrolled, is within the provision of the Federal statute requiring a mortgage on her to be recorded in the customhouse.

In *The Martha Washington*, 25 L. R. 22, it is held that conveyances must be recorded at the home port of the vessel.

So in *Foster v. Chamberlain*, 41 Ala. 158, it is held that a mortgage of a vessel, to be valid against a subsequent purchaser or creditor of the mortga-

statute requiring sales and mortgages to be recorded is for the purpose of giving notice to other parties than those connected with the transaction. The mortgage of a vessel of the United States is not, therefore, as against the parties and such persons as have actual notice thereof, rendered invalid by the failure to record it.¹

V. MARITIME LIENS.—See MARITIME LIENS, vol. 14, pp. 410-456.

VI. BOTTOMRY.—See BOTTOMRY, vol. 2, pp. 483-493; RESPON-
DENTIA, vol. 21, p. 287.

VII. CARRIERS OF GOODS—1. Who Are Common Carriers.—See CARRIERS OF GOODS, vol. 3, p. 781.

2. **Reciprocal Rights.**—When the owner of a ship undertakes the carriage of goods, there is an implied warranty on his part that the ship is seaworthy in all respects,² and that it has a sufficient master and crew.³ If the goods are injured or lessened in their value by reason of any defect in the vessel, whether latent or visible, known or unknown, the owner is answerable to the shipper.⁴ The shipper of the goods may even enforce a lien on the vessel itself to indemnify him against loss.⁵ So if the goods are carried safely, the shipper in turn is bound to pay to the owner of the ship the freight earned by the carriage, and the shipowner has a lien on the goods to enforce his rights against

gor, without actual notice, must be recorded in the office of the collector of customs where the vessel is registered or enrolled.

1. The W. B. Cole, 49 Fed. Rep. 587; Moore v. Simonds, 100 U. S. 145; The Parker Mills v. Jacot, 8 Bosw. (N. Y.) 161; Hobbs v. The Interchange, 1 W. Va. 57; Cape Fear Steamboat Co. v. Conner, 3 Rich. (S. Car.) 335; Calais Steamboat Co. v. Van Pelt, 2 Black (U. S.) 372; Fontaine v. Beers, 19 Ala. 722.

2. Bowring v. Thebaud, 42 Fed. Rep. 794; The Rover, 33 Fed. Rep. 516; The Lillie Hamilton, 18 Fed. Rep. 327; The Sarah, 2 Sprague (U. S.) 31; Putnam v. Wood, 3 Mass. 481; 3 Am. Dec. 181; Sumner v. Caswell, 20 Fed. Rep. 249. Compare Forbes v. Rice, 2 Brev. (S. Car.) 363; 4 Am. Dec. 589.

But not such seaworthiness as implied in the contract of insurance. Pearce v. Smith, 2 Brev. (S. Car.) 360; 4 Am. Dec. 588.

The fact that a vessel is not a common carrier, does not relieve her from the warranty implied in the contract of affreightment that she is seaworthy. The Planter, 2 Woods (U. S.) 490.

What Constitutes Seaworthiness.—To constitute seaworthiness, the hull of the vessel should be so tight, staunch,

and strong as to resist the ordinary action of the sea during the voyage without loss or damage to the cargo. The Lillie Hamilton, 18 Fed. Rep. 327; The Northern Belle, 9 Wall. (U. S.) 526.

3. Parsons Shipp. & Adm. 171.

A vessel is not seaworthy if there be a failure to provide a proper crew. Holland v. Seven Hundred and Twenty-five tons of Coal, 36 Fed. Rep. 787.

In The Planter, 2 Woodb. (U. S.) 490, it is held, however, that no recovery can be had against her on that account for a loss that was not attributable to such deficiency.

4. Putnam v. Wood, 3 Mass. 481; 3 Am. Dec. 181; Cameron v. Rich, 4 Strobb. (S. Car.) 168; 53 Am. Dec. 670.

5. **Lien for Loss of Goods.**—Where the goods are injured or lessened in value to the owner by reason of the unseaworthiness of the vessel, the vessel itself is subjected to a lien of the shipper, which may be enforced in admiralty by process *in rem*. The Gold Hunter, B. & H. Adm. 300; The Boston, B. & H. Adm. 309; The Volunteer, 1 Sumn. (U. S.) 551; Rich v. Lambert, 12 How. (U. S.) 347; Clark v. Barnwell, 12 How. (U. S.) 272; The Casco, 1 Davies (U. S.) 184; The Waldo,

them.¹ In all contracts for the carriage of goods the obligations of the owner and the shipper are mutual and reciprocal; the merchandise is bound to the vessel for freight and charges,² and the vessel to the cargo for the due performance of the contract.³

3. Delivery of Goods to the Vessel.—The liability of the vessel for the safe carriage and delivery of goods, commences when they are received by the master or by any person authorized to receive them on board the ship or at the wharf near the ship for the purpose of carriage thereon.⁴ When the captain and the owners employ a stevedore to load their vessel they are liable for his acts.⁵ So when lightermen are employed by the captain to convey the cargo in lighters to the vessel, delivery to them is delivery to the vessel, but if they are employed by the owner of the goods, the goods are not delivered until put on board of the vessel.⁶ In the first instance the responsibility of the vessel

² *Davies* (U. S.) 161; *The Rebecca*, 1 Ware (U. S.) 188; *The Grafton, Olc. Adm.* 43; 1 *Blatchf.* (U. S.) 173.

¹ See *MARITIME LIENS*, vol. 14, p. 438.

² *The Freeman v. Buckingham*, 18 How. (U. S.) 182; *The Gold Hunter*, B. & H. Adm. 308; *Vanderwater v. Mills*, 19 How. (U. S.) 82; *Dupont v. Vance*, 19 How. (U. S.) 169; *Rich v. Parrott*, 1 Cliff. (U. S.) 62; *Kimball v. The Anna Kimball*, 2 Cliff. (U. S.) 15; *Knox v. Ninetta, Crabbe* (U. S.) 538; *Reed v. Canfield*, 1 Sumn. (U. S.) 195; *The Panama, Olc. Adm.* 343; *The Packet*, 3 Mason (U. S.) 255; *The Leonidas, Olc. Adm.* 15; *The Rebecca*, 1 Ware (U. S.) 188; *The Reeside*, 2 Sumn. (U. S.) 567; *The Phebe*, 1 Ware (U. S.) 263; *The Waldo*, 2 Ware (U. S.) 161; *Certain Logs of Mahogany*, 2 Sumn. (U. S.) 589; *Arayo v. Currel*, 1 La. 528; 20 Am. Dec. 286; *The Williams*, 1 Brown Adm. 220; *The Flash, Abb. Adm.* 67; *The Aberfoyle, Abb. Adm.* 256; *The Planter*, 2 Woods (U. S.) 493; *The Keokuk*, 9 Wall. (U. S.) 517; *Hale v. Washington Ins. Co.*, 2 Story (U. S.) 187; *The Paragon*, 1 Ware (U. S.) 322.

³ *The Bird of Paradise*, 5 Wall. (U. S.) 545; *The Eddy*, 5 Wall. (U. S.) 481; *The Maggie Hammond*, 9 Wall. (U. S.) 450; *The Delaware*, 14 Wall. (U. S.) 596; *Bulkley v. The Naumkeag Steam Cotton Co.*, 24 How. (U. S.) 386; *The Pauline*, 1 Biss. (U. S.) 397; *Swain v. The Franklin, Crabbe* (U. S.) 210; *Knox v. The Ninetta, Crabbe* (U. S.) 538; *House v. The Lexington*, 2 N. Y. Leg. Obs. 4; *Malpica v. McKown*, 1 La. 248; 20 Am. Dec. 279; *The Vol-*

unteer, 1 Sumn. (U. S.) 551; *Foster v. Colby*, 3 H. & N. 704; *Alsager v. St. Katharine's Dock Co.*, 14 M. & W. 794; *The Williams*, 1 Brown Adm. 224; *The Druid*, 1 W. Rob. 391; *The Bold Buccleugh*, 3 W. Rob. 220; *The Panama, Olc. Adm.* 362.

⁴ 1 *Parson's Shipp. & Adm.* 83; *Faulkner v. Wright*, 1 Rice (S. Car.) 107; *Clark v. Needles*, 25 Pa. St. 338; *Greenwood v. Cooper*, 10 La. Ann. 796; *Snow v. Carruth*, 1 Sprague (U. S.) 324; *The Frances*, 8 Cranch (U. S.) 335.

The mere fact that goods were delivered to the deck-hands of a steamboat, is not sufficient to charge the owners as common carriers, unless it is shown that such persons were authorized to receive freight, or that the same was delivered to them in pursuance of some special contract or usage. *Ford v. Mitchell*, 21 Ind. 54.

Where wheat was weighed by the warehousemen in the elevator, into cars drawn by horses to the edge of the dock, and discharged through a spout into the ship, the upper end tended by the warehousemen and the lower by the crew, although each car was tallied by an officer of the ship, in the elevator, held, that there was no delivery to the shipmaster of any wheat which failed to pass over the rail of the ship. *Glass v. Goldsmith*, 22 Wis. 488.

⁵ *Rochereau v. Hausa*, 14 La. Ann. 433.

⁶ *Bulkley v. Naumkeag Steam Cotton Co.*, 24 How. (U. S.) 386; and see *The City of Alexandria*, 28 Fed. Rep. 202.

commences when the goods are delivered to the lightermen, and in the second when the goods are received on board by the master or any person authorized to receive them. The lightermen are answerable only to those who employ them. Their responsibility ceases as a general rule when the cargo is properly placed on the slings and hooked to the tackle.¹

4. **Bill of Lading.**—See BILL OF LADING, vol 2, pp. 223-244.

5. **Delivery of Goods by the Vessel.**—The manner of delivering goods and the period at which the responsibility of the master and owners will cease, depend upon the custom of particular places and the usages of particular trades.² The general rule is that the goods must be delivered at the wharf to some person authorized to receive them, or due previous notice given to the consignee of the time and place of delivery.³ If the consignee

Where, pursuant to a contract for affreightment, the master of the ship had taken part of the cargo into his custody at Mobile and conveyed it a distance of several miles in a steam lighter to his ship, but it was destroyed by the bursting of the boiler while alongside and before it was taken on board, held, that the owner of the goods was entitled to recover for the damage sustained and had a lien therefor upon the ship. *The Edwin*, 1 Sprague (U. S.) 477.

1. *The Cordillera*, 5 Blatchf. (U. S.) 518.

2. *The Port Adelaide*, 38 Fed. Rep. 753; *Abb. on Shipp.* 378; 3 Kent's Com. 215; *Wardell v. Mourillyam*, 2 Esp. 693; *Sleade v. Payne*, 14 La. Ann. 457.

3. *Bonanno v. The Boskenna Bay*, 36 Fed. Rep. 697; *The Nail City*, 22 Fed. Rep. 537; *Chickering v. Fowler*, 4 Pick. (Mass.) 371; *Clark v. Masters*, 1 Bosw. (N. Y.) 177; *Hyde v. Trent*, etc., Nav. Co., 5 T. R. 389; *Sleade v. Payne*, 14 La. Ann. 457; *Golden v. Manning*, 3 Wils. 429; *Labar v. Taber*, 35 Barb. (N. Y.) 305; *Stone v. Rice*, 58 Ala. 95; *The E. M. Wright*, 1 Mackey (D. C.) 24; *The Mary Washington*, Chase Dec. (U. S.) 125.

Notice must be given of the arrival of the goods. *The Nail City*, 22 Fed. Rep. 537; *Salmon Falls Mfg. Co. v. The Tangier*, 1 Cliff. (U. S.) 401; *Ostrander v. Brown*, 15 Johns. (N. Y.) 39; *The Peytona*, 1 Ware (U. S.) 541; *The Ship Middlesex*, 21 L. R. 14; *Price v. Powell*, 3 N. Y. 322; *Gatliffe v. Bourne*, 4 Bing. N. Cas. 314; 35 E. C. L. 364; *House v. Lexington*, 1 N. Y. Leg. Obs. 4; *The Grafton*, Olc. Adm. 46; *Gibson v. Culver*, 17 Wend.

(N. Y.) 305; 31 Am. Dec. 297; *Chickering v. Fowler*, 4 Pick. (Mass.) 371; *Merwin v. Butler*, 17 Conn. 138; *The Ben Adams*, 2 Ben. (U. S.) 695; *Kennedy v. Roman*, 19 La. Ann. 519; *Segura v. Reed*, 3 La. Ann. 395; *Hurkness v. Church*, 10 La. Ann. 64; *Cope v. Cordova*, 1 Rawle (Pa.) 203.

Notice in the newspapers of the time or place of landing goods from a vessel, is not such a notice as places goods at the risk of the consignee, unless knowledge of that notice be brought home to him. *Kohn v. Packard*, 3 La. 224; *Caruana v. British*, etc., Steam Packet Co., 6 Ben. (U. S.) 517.

Where goods were put on board the vessel of the defendant to be carried to Albany, and on arriving there, were, by the defendant's direction, put on the wharf—held that this was not a delivery to the consignee, although the goods were taken away (without the direction of the consignee) by a carter usually employed to transport his goods, and the greater part actually received by the consignee; and that the defendant was liable for the goods not actually delivered. *Ostrander v. Brown*, 15 Johns. (N. Y.) 39.

A delivery of a cargo on the wharf in New York, with notice to the owners of the time and place of unloading, places the goods at their risk, and discharges the ship from liability. *The Grafton*, Olc. Adm. 43.

Delivery Into Customhouse.—The shipowners agreed to deliver the cargo at the ship's tackles at Rio. Held, that a delivery into the customhouse there under the order of the officers, and the payment of duties by the consignees, was not enough; that the bill

is not ready to receive them and the carrier's vessel is destroyed while waiting for an opportunity to discharge her cargo,¹ or if the consignee is unable to receive them by reason of the action or prohibition of the government, the shipowner is entitled to freight.² But if the ship is obliged by perils of the sea to put back to her port of departure and it is there found that the cargo has been rendered worthless,³ or if the ship is prevented from arriving at its place of destination by blockade or any similar

of lading contemplated a delivery into the power and possession of the consignees, and therefore that the ship was responsible for a seizure by the Brazilian customhouse officers by reason of the imperfect manifest made by the master, it appearing that the error arose from the inattention of the master who was informed of the law by the officers. *Howland v. Greenway*, 22 How. (U. S.) 491.

Leaving goods on the wharf, although according to the usual course of business and in a part of the wharf appropriated to goods awaiting inspection by the customhouse officers and suitably fenced and protected—held, no sufficient delivery to the consignees. *The Ville de Paris*, 3 Ben. (U. S.) 276.

Delivery to Wharf-master.—Though a wharf-boat is the customary place for discharging a cargo, yet a delivery to the wharf-master is not a delivery to the consignee, unless there is a special authority in the former, or a ratification of his receipt of the goods, express or implied. Nor can a local custom, which would substitute another contract for that of the bill of lading, and make the wharf-master consignee of all freight landed at the port, overrule the law nor be heeded. *Harkness v. Church*, 10 La. Ann. 64.

Delivery to Agent of Consignee.—If the consignee sends a person to take care of the goods at his own expense, and he neglects to do so, the master is not responsible for any damage arising from sending them on shore. *Rice v. Clendinning*, 3 Johns. Cas. (N. Y.) 183.

When Notice Not Necessary.—Where the contract in terms or as affected by the usage of trade, is to deliver the goods at the wharf, notice to the consignee of their arrival is not necessary. *Ely v. New Haven S. Co.*, 53 Barb. (N. Y.) 207; *The Boskenna Bay*, 40 Fed. Rep. 91.

Where a bill of lading provides that

the consignee is bound to be ready to receive his goods on ship's readiness to discharge, otherwise that they may be landed without notice, and at his risk, after they leave the deck of the ship, and the consignee is not ready to receive on ship's readiness to discharge, the ship may land the goods, without notice; and if landed in suitable weather, with opportunity to remove them without injury, the vessel is absolved from all further liability. *The Surrey*, 40 Fed. Rep. 90, *reversing* 26 Fed. Rep. 791.

1. *Clendaniel v. Tuckerman*, 17 Barb. (N. Y.) 184.

A canal boat being bound to deliver a cargo "alongside" a certain pier, sank at the pier after the consignee had been notified to remove the coal, but before he had had a reasonable time within which to remove it. *Held*, that no freight was earned. *McKee v. Hecksher*, 10 Daly (N. Y.) 393.

2. *Morgan v. Ins. Co. of North America*, 4 Dall. (U. S.) 455; *Bradstreet v. Heron*, Abb. Adm. 209.

Vessels Quarantined.—Where a vessel, on her arrival in port, is ordered to perform quarantine, and the cargo is landed and stored at the quarantine grounds, the shipper or consignee of the goods is bound to pay the expense of landing and storing. *Rice v. Clendinning*, 3 Johns. Cas. (N. Y.) 183.

3. *Lord v. Neptune Ins. Co.*, 10 Gray (Mass.) 109; *Richardson v. Young*, 38 Pa. St. 169.

A shipped goods on board a vessel, the captain undertaking, by the bill of lading (the dangers of the sea only excepted), to deliver them at a designated place, for which freight was to be paid at stipulated prices. The vessel, having received damage from a gale, put into a port short of the port of destination, where, upon examination, it was found that a portion of the goods were damaged, which were then sold for the benefit of the owners. In an action by the captain against the

cause, no claim for freight can be maintained by the shipowner against the shipper.¹ The owner or his agent may, however, waive a completion or a further prosecution of the voyage by accepting the goods at any other port than that from which they were shipped.² If the owner is forced to pay damages for goods lost by stress of weather, it is the same as if they had been delivered, and he is entitled to a recovery of his freight.³ If, after notice of the arrival of the goods, the consignee refuses to receive them, it is the duty of the carrier to take care of them for the owner.⁴ If the carrier, upon due and diligent inquiry, is unable to find any consignee, or person representing the owner, to whom he can deliver the goods or give notice of their arrival, he is not obliged to take them again on board his vessel or retain them in

shipper, to recover the balance due for freight, held that it could not be recovered, the goods not having been delivered at their port of destination. *Halwerson v. Cole*, 1 Spears (S. Car.) 321; 40 Am. Dec. 603.

Where a vessel puts in at an intermediate port in distress, and it is there found that a portion of the cargo has been rendered worthless by perils of the sea, while the residue is not of sufficient value to warrant continuing the voyage, and such portion is therefore sold by the master, and the voyage broken up, no claim for freight, either in full or *pro rata*, or upon a *quantum meruit*, can be maintained by the shipowner against the shipper. *The Ann D. Richardson*, Abb. Adm. 499.

Where hogsheads of sugar were shipped, and, during the voyage, the ship leaked, owing to tempestuous weather, and the sugar was washed out of some of the hogsheads, which arrived empty, held that no freight was due on the empty casks. *Frith v. Barker*, 2 Johns. (N. Y.) 327.

1. *Stoughton v. Rapallo*, 3 S. & R. (Pa.) 559; *Palmer v. Lorillard*, 16 Johns. (N. Y.) 348; *Richardson v. Maine Ins. Co.*, 6 Mass. 102; 4 Am. Dec. 92; *Baylies v. Fettyplace*, 7 Mass. 325; *Burrell v. Cleeman*, 17 Johns. (N. Y.) 72; *Lorillard v. Palmer*, 15 Johns. (N. Y.) 14; *Scott v. Libby*, 2 Johns. (N. Y.) 336; 3 Am. Dec. 431; *Hadley v. Clarke*, 8 T. R. 259; *Tirrell v. Gage*, 4 Allen (Mass.) 245; *Ogden v. Barker*, 18 Johns. (N. Y.) 87; *Portland Bank v. Stubbs*, 6 Mass. 422; 4 Am. Dec. 151.

Where a vessel has been captured on her voyage, and condemned at an intermediate port, and a part of the cargo has been restored and sold at

the same port, no freight is due for the part so restored. *Sampayo v. Salter*, 1 Mason (U. S.) 43.

A merchantman having letters of marque, and having taken goods on freight, may chase an enemy in sight, but cannot cruise out of her course to look for one. If, therefore, she is injured in an action with an enemy in sight whom she chased, by which she is forced into a port different from that of her destination, she is entitled to freight. But if the goods are not afterwards sent to the port of delivery, she is entitled only to freight *pro rata itineris*, unless prevented from sending them by the freighter. *Hooe v. Mason*, 1 Wash. (Va.) 207.

2. *Hurtin v. Union Ins. Co.*, 1 Wash. (U. S.) 53; *The Nathaniel Hooper*, 3 Sumn. (U. S.) 542; *Bork v. Norton*, 2 McLean (U. S.) 422; *Brown v. Ralston*, 4 Rand. (Va.) 504; *Jordan v. Warren Ins. Co.*, 1 Story (U. S.) 342; *Pawson v. Donnell*, 1 Gill & J. (Md.) 1; 19 Am. Dec. 213.

Where goods have been delivered at the request of the shipper at some point short of that mentioned in the bill of lading, he is liable for the freight on them. *Ellis v. Willard*, 9 N. Y. 529. If a vessel is damaged during the voyage, and puts into a port of distress, and is capable of being repaired so as to complete the voyage, the shipper has no right to intervene and demand the goods at such intermediate port, without paying the full freight for the voyage. *Merchants' Mut. Ins. Co. v. Butler*, 20 Md. 41.

3. *Hammond v. M'Clures*, 1 Bay (S. Car.) 101.

4. *The Captain John*, 33 Fed. Rep. 927; *Chickering v. Fowler*, 4 Pick. (Mass.) 371; *Ostrander v. Brown*, 15

his own possession and at his own risk and charge for an unlimited period. But he may, after a reasonable time has expired, store the goods for the owner with some suitable and responsible warehouseman and thereby discharge himself from further liability.¹

When the bill of lading is silent as to the place and mode of delivery intended, the consignees of goods have a right to expect a delivery according to the established custom and usage of the port, and in that part of the port customarily used for the discharge of such goods, and the vessel is bound and has a right to make delivery accordingly.² If she goes elsewhere, she must make good the additional expense thereby caused to the consignees.³ But the customary discharge of goods by a carrier at its own wharf, however, imports no obligation to discharge there

Johns. (N. Y.) 39; *Arthur v. The Cassius*, 2 Story (U. S.) 81; *Steamboat Keystone v. Moies*, 28 Mo. 243; *Alabama, etc., R. v. Kidd*, 35 Ala. 209; *Crawford v. Clark*, 15 Ill. 561.

A cargo of corn was unloaded as soon as practicable at the only elevator in the port, the delay resulting from the vessel having to wait her turn. There was no stipulation in the charter-party that the unloading should be effected with quick dispatch, nor in any designated time. *Held*, that the owner must be presumed to have been aware of the custom of the port, and that no demurrage was recoverable. *Finney v. Grand Trunk R. Co.*, 14 Fed. Rep. 171.

So also where the goods were destroyed on the pier by fire, without negligence on the part of the ship-owners, and after the goods should have been removed. *De Grau v. Wilson*, 17 Fed. Rep. 698; *Strauss v. Wilson*, 17 Fed. Rep. 701.

1. *Hamilton v. Nickerson*, 11 Allen (Mass.) 308; *Fisk v. Newton*, 1 Den. (N. Y.) 45; 43 Am. Dec. 649; *Thomson v. Liverpool, etc., Steam Co.*, 44 N. Y. Super. Ct. 407.

If a consignee refuses to receive the goods, the carrier may deposit them at the place of delivery with a warehouseman with directions to deliver to the owner on payment of charges. *The Eddy*, 5 Wall. (U. S.) 495; *The Defiance*, 6 Ben. (U. S.) 162; *The Santee*, 7 Blatchf. (U. S.) 186; *Richardson v. Goddard*, 23 How. (U. S.) 28; *Brittan v. Barnaby*, 21 How. (U. S.) 527; *Hyde v. Trent, etc., Nav. Co.*, 5 T. R. 380.

Where the master, by his agreement

with the shipper, was to deliver the cargo at a certain port but, upon his arriving there, the consignee refused to receive—held, that the cargo not being of a perishable nature, the master was bound to land it at the port and store it for the benefit of the shippers, and could not carry it to another port, nor sell it, although it could not be sold at the original port of delivery. *Arthur v. The Cassius*, 2 Story (U. S.) 81.

In *England*, the practice is to send such goods as are not required to be landed at any particular dock, to a public wharf and order the wharfinger not to part with them until the freight and other charges are paid. *Abb. on Shipp.* 378.

2. *The Port Adelaide*, 38 Fed. Rep. 753; *Devato v. 823 Barrels of Plumbago*, 20 Fed. Rep. 516; *Irzo v. Perkins*, 10 Fed. Rep. 779.

The usage as to the delivery of similar cargoes at the port of discharge governs the delivery. *Higgins v. U. S. Mail S. S. Co.*, 3 Blatchf. (U. S.) 282.

3. See *The Cervin*, 17 Fed. Rep. 462. A vessel arrived with a cargo of tea, to be delivered to numerous consignees, at the "port of New York." It had long been the custom to deliver teas on the New York side between piers 16 and 47, East River. The vessel might have obtained a berth at pier 47 on the following day. For her convenience and on promise of indemnity by warehousemen in Brooklyn, she discharged her cargo in Brooklyn, against the protest of many consignees. *Held*, that the latter should recover their extra expense of cartage, freightage, etc., from Brooklyn to New York.

if the dock is full or there be other good reason to discharge elsewhere.¹

The wharf on which the goods are delivered must be fit and safe for the deposit of them, and they must be discharged with all proper care and skill.² If the cargo is not safely unladen in a safe and proper place, the vessel is liable for damage which may be sustained by reason of the insufficiency of the wharf.³ Where the consignee is authorized to select a wharf, and one is selected by his agent, the ship is not answerable for a loss caused by its breaking down, unless the loss arises from some unreasonable or improper use of the wharf.⁴ If the cargo consists of a number of consignments, it must be put upon the wharf in such a way as to render, as far as possible, the different consignments accessible to their respective owners.⁵ And if by the negligence of the captain the goods are confused so that an excess is delivered to one consignee at the expense of another, the ship is liable.⁶ So where the bill of lading does not specify any time for the delivery of the goods at the port of destination, the delivery must be made within a reasonable time and with reasonable expedition.⁷ The consignees are entitled to a reasonable opportunity to ascertain whether goods delivered to them correspond in quantity and condition with the description given in the shipping documents, and the liability of the master and owner remains undischarged during such period.⁸ The owner of the vessel takes the risk of working weather during the time required for the unloading of the cargo.⁹ The consignee takes the risk of roads and means of transportation from the dock, and is bound to take the cargo as delivered to him at the vessel's side and to remove it as fast as the vessel can be reasonably discharged.¹⁰ The cargo must be discharged at a suitable time. A discharge at a time when, for want of notice, the goods cannot be removed by the consignee before they would be destroyed by frost, is not a discharge at a suitable time.¹¹ A holiday will not, however, interfere with the continuation or completion of the discharge of cargo, where the

The Port Adelaide, 38 Fed. Rep. 753.

1. Arnold v. National S. S. Co., 29 Fed. Rep. 184.

2. Vose v. Allen, 3 Blatchf. (U. S.) 289.

3. Kennedy v. Dodge, 1 Ben. (U. S.) 311.

4. Young v. Lehmann, 27 Fed. Rep. 383.

5. The Huntress, 2 Davies (U. S.) 82. See The Pietro G., 38 Fed. Rep. 148.

6. The Nora, 14 Fed. Rep. 429.

7. Bennett v. Bryam, 38 Miss. 17; 75 Am. Dec. 90; Barstow v. Murison, 14 La. Ann. 334; Williamson v. Dolson, 15 La. Ann. 94.

8. Bradstreet v. Heron, Abb. Adm. 209.

9. Sprague v. West, Abb. Adm. 548.

10. Sprague v. West, Abb. Adm. 548; The Alesia, 35 Fed. Rep. 531.

11. The Surrey, 26 Fed. Rep. 792.

Where the work of unloading a vessel was not completed until one o'clock, which was the usual hour for dinner of the truckmen engaged in receiving the goods, and at two o'clock an accidental fire consumed them, held, that the unloading was not at an improper time, so as to make the ship liable for the loss of the goods. Salmon Falls Mfg. Co. v. Tangier, 1 Cliff. (U. S.) 396.

work was commenced prior to the occurrence of that day and there is no statute or general usage to the contrary.¹

6. Forwarding by Other Carriers.—When a cargo is once shipped on board, the carrier has a right to carry it to its destination.² The shipper cannot intervene and demand the goods at any intermediate port without paying the full freight for the voyage, even though circumstances may occur which will cause great delay and perhaps great diminution of value.³ But the carrier must, however, transship goods in cases of necessity.⁴ Where no damage to the cargo is to be reasonably apprehended from remaining on board during the probable delay of a few days, the vessel is not required to transship.⁵ When a vessel is driven into port for repairs, the books are not very definite as to the time allowable to the master to repair and go on with the voyage.⁶ But if the ship is capable of being repaired in a reasonable time, the owner ought to repair her, and continue his voyage, so as to claim his freight.⁷ If it is a perishable cargo which may be a total loss by reason of the delay, it has been held to be the imperative duty of the master to forward the cargo in another vessel.⁸ Where there is no necessity for transshipping goods, the carrier is liable for all loss.⁹

1. *Pierson v. Richardson*, 1 Cliff. (U. S.) 183; *Richardson v. Goddard*, 23 How. (U. S.) 28.

2. See *McGaw v. Ocean Ins. Co.*, 23 Pick. (Mass.) 405; *Lord v. Neptune Ins. Co.*, 10 Gray (Mass.) 109; *Clemson v. Davidson*, 5 Binn. (Pa.) 392; *Tindal v. Taylor*, 4 E. & B. 219; 82 E. C. L. 218; 20 Eng. L. & Eq. 210.

3. *Merchants Mut. Ins. Co. v. Butler*, 20 Md. 41.

4. *Cox v. Foscue*, 1 Ala. Sel. Cas. 419; 37 Ala. 505; 79 Am. Dec. 69; *Hugg v. Baltimore, etc., Smelting, etc., Co.*, 35 Md. 414; 6 Am. Rep. 425; *Mina v. H. V. Florio S. S. Co.*, 23 Fed. Rep. 915.

The grounding of a steamboat on a river whence she could have been removed by temporarily landing a part of her cargo, is not such a case of necessity as will justify a transshipment. *Cox v. Foscue*, 1 Ala. Sel. Cas. 419; 37 Ala. 505; 79 Am. Dec. 69.

5. *The Bohemia*, 38 Fed. Rep. 756.
6. *Clark v. Massachusetts, etc., Ins. Co.*, 2 Pick. (Mass.) 104; 13 Am. Dec. 400. See *Naylor v. Baltzell*, Taney's Dec. (U. S.) 55.

What would be a reasonable time for the merchant to wait for repairs cannot be defined and must be governed by the facts applicable to the place and time, and to the nature and

condition of the cargo. *Adams v. Haught*, 14 Tex. 243.

7. *Griswold v. New York Ins. Co.*, 3 Johns. (N. Y.) 321; 3 Am. Dec. 490.

8. *Rogers v. Murray*, 3 Bosw. (N. Y.) 357; *Searle v. Scovell*, 4 Johns. Ch. (N. Y.) 218; *Schieffelin v. New York Ins. Co.*, 9 Johns. (N. Y.) 21; *Saltus v. Ocean Ins. Co.*, 12 Johns. (N. Y.) 107; 7 Am. Dec. 290; *Treadwell v. Union Ins. Co.*, 6 Cow. (N. Y.) 270; *Adams v. Haught*, 14 Tex. 243; *Bryant v. Commonwealth Ins. Co.*, 6 Pick. (Mass.) 130; *Hugg v. Augusta Ins., etc., Co.*, 7 How. (U. S.) 595. See *Lemont v. Lord*, 52 Me. 365; *Thwing v. Washington Ins. Co.*, 10 Gray (Mass.) 443.

The steamship *M* put into Halifax in distress, where she was detained for repairs from October until February. The consignee of glycerine on board of her, hearing of her probable detention, demanded delivery of the glycerine at Halifax, offering to pay full freight under the bill of lading, with all incidental expenses, and to sign a general average bond. This was refused, and on delivery of the cargo in New York the glycerine was found damaged. *Held*, that the vessel was liable. *The Martha*, 35 Fed. Rep. 313.

9. *Cox v. Foscue*, 1 Ala. Sel. Cas. 419; 37 Ala. 505; 79 Am. Dec. 69;

The master of a ship driven into an intermediate port by stress of weather should take a bill of lading of the goods transferred to another vessel, for their delivery to the original consignee.¹ The owner of the cargo will be liable for any increased freight arising from the hire of another vessel.² But he cannot be held answerable both for the whole freight originally contracted for and the freight paid on the transshipped goods.³ If the master refuses to hire another vessel or refuses to forward the goods, the shipper is entitled to receive them without making any payment of freight.⁴

7. Transshipment of Goods.—Where goods are shipped on one line to be transferred to another, the owner is chargeable with the responsibility of a common carrier for goods transshipped.⁵ He does not lessen his liability by reshipping, but is responsible for the delivery of the goods unless they are lost or so injured as to prevent their delivery by unavoidable accidents.⁶

8. Liability for Loss or Injury to Goods.—Vessels are liable for the safe custody, due transport, and right delivery of the goods or merchandise which they receive and undertake to transport.⁷ If the goods are stolen,⁸ or lost during the

Trott v. Wood, 1 Gall. (U. S.) 443. See *The Gold Hunter*, B. & H. Adm. 300.

If the owner of a vessel, who receives goods for transportation, transships them without necessity, he is answerable for a loss of them by capture by public enemies. *Trott v. Wood*, 1 Gall. (U. S.) 443.

1. *Everett v. Saltus*, 15 Wend. (N. Y.) 474; 20 Wend. (N. Y.) 267.

2. *Hugg v. Augusta Ins., etc., Co.*, 7 How. (U. S.) 595. See *Rosetto v. Gurney*, 11 C. B. 176; 73 E. C. L. 176; 7 Eng. L. & Eq. 461; *Shipton v. Thornton*, 9 A. & E. 314; 36 E. C. L. 150; *Munford v. Commercial Ins. Co.*, 5 Johns. (N. Y.) 262; *Searle v. Scovell*, 4 Johns. Ch. (N. Y.) 218; *American Ins. Co. v. Center*, 4 Wend. (N. Y.) 45; *Lemont v. Lord*, 52 Me. 365; *Thwing v. Washington Ins. Co.*, 10 Gray (Mass.) 443.

The shipper cannot recover, as damages, the premium paid by him for insurance upon the goods, while the vessel was lying in a port to which she was driven for repairs, by reason of her unseaworthiness. The carrier in such a case becomes the insurer. *Murrell v. Dixey*, 14 La. Ann. 298.

3. *Hugg v. Baltimore, etc., Smelting, etc., Co.*, 35 Md. 414; 6 Am. Rep. 425.

4. *Adams v. Haight*, 14 Tex. 243; *Portland Bank v. Stubbs*, 6 Mass. 422;

4 Am. Dec. 151. See *Welch v. Hicks*, 6 Cow. (N. Y.) 504; 16 Am. Dec. 443; *Hunter v. Prinesep*, 10 East 378.

5. *The Gold Hunter*, B. & H. Adm. 300.

6. *Dunseth v. Wade*, 3 Ill. 285.

The privilege of reshipping reserved in a bill of lading does not discharge the boat from any liability not excepted in the contract, and though the right is secured of transshipping on another boat, the liability continues until the goods are safely delivered at the port of destination, if under like circumstances the carrier would be liable had the loss occurred on his own boat. *Carr v. The Michigan*, 27 Mo. 196; 72 Am. Dec. 257.

7. *The Commander in Chief*, 1 Wall. (U. S.) 43; *Letchford v. The Golden Eagle*, 17 La. Ann. 9. See *Richards v. Gilbert*, 5 Day (Conn.) 415; *Costigan v. Michael Transp. Co.*, 33 Mo. App. 269.

A vessel chartered to transport a specific cargo only is not a common carrier, and hence is not an insurer of the safe delivery of the cargo, and can be held for damages to cargo only on proof of negligence. *The Dan*, 40 Fed. Rep. 691.

8. *Schieffelin v. Harvey*, 6 Johns. (N. Y.) 170; 5 Am. Dec. 206; *The Belfast v. Boon*, 41 Ala. 50; *Kemp v. Coughtry*, 11 Johns. (N. Y.) 107.

The owner of a vessel as well as the

voyage,¹ or damaged by reason of bad stowage,² by the unseaworthiness of the vessel,³ or by defects in her construction and

master are responsible for goods which they have undertaken to carry if stolen or embezzled by the crew or any person, though there is no fault or negligence imputed to them. *Schieffelin v. Harvey*, 6 Johns. (N. Y.) 170; 5 Am. Dec. 206.

Money was shipped on freight which was afterwards delivered up to prevent the capture or burning of the vessel and cargo, and the shipper recovered against the vessel and owners. *Hunter v. The Hannah*, Bee Adm. 154.

A box of jewelry taken in charge by the master of a vessel engaged chiefly in carrying naval stores between a port in North Carolina and the city of New York was stolen from the cabin where it was locked up in his chest. The box was not included in the bill of lading and there was no contract as to the price for carrying it. *Held*, that he was only liable as an ordinary bailee and not as a common carrier; and that having been violently robbed of the property with his own in the night time, he was not guilty of negligence and not liable for the value of it. *Pender v. Robbins*, 6 Jones (N. Car.) 207.

A box marked "J P, Little Falls," was delivered, at New York, on board a towboat plying between New York and Albany, but interested in no boats west of Albany, with no specific directions as to its delivery. The towboat delivered the box at Albany to a regular canal boat, going west. On board the canal boat, the box was opened and robbed. *Held*, that the liability of the towboat as a carrier ceased at Albany, on delivery to the canal boat. At Albany it became a forwarder. *Van Santvoord v. St. John*, 6 Hill (N. Y.) 158.

1. *Cox v. Peterson*, 30 Ala. 608; 68 Am. Dec. 145; *Cogs v. Bonner*, 1 Sm. L. Cas. (ed. 1855) 283; *McClenaghan v. Brock*, 5 Rich. (S. Car.) 17; *Friend v. Woods*, 6 Gratt. (Va.) 189; 52 Am. Dec. 119; *New Jersey Steam, etc., Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *Bissel v. Terrell*, 18 La. Ann. 45; *Porterfield v. Humphreys*, 8 Humph. (Tenn.) 497.

Loss by Fire.—Carriers of vessels are responsible for losses resulting, before delivery, by fire. *Cox v. Peterson*, 30 Ala. 608; 68 Am. Dec. 145; *Patton v. McGarth*, *Dudley* (S. Car.) 159; *Hibler*

v. McCartney, 31 Ala. 501; *Grey v. Mobile Trade Co.*, 55 Ala. 387; 28 Am. Rep. 729.

Goods bought in Connecticut and delivered by the vendor on board a vessel at New York to be carried to England, were receipted for, the receipt specifying the price of freight; but before bills of lading were executed, and before the ship sailed, she was burnt with the goods on board without any actual negligence on the defendants' part. *Held*, that they were liable as common carriers for the loss of the goods. *Lake-man v. Grinnell*, 5 Bosw. (N. Y.) 625.

The proprietor of a steamboat is liable for cotton carried by him, which is destroyed by fire on board his boat, unless he can show a well-known, recognized and established usage to exempt such carriers from such liability, except in cases where a higher rate of freight is paid, or unless a general and well-understood notice to that effect has been given by this particular carrier, so as to constitute a part of the implied contract; and even in those cases the carrier should be held to strict proof of diligence and care. *Singleton v. Hilliard*, 1 Strobb. (S. Car.) 203.

Loss by Collisions.—A common carrier by water is not liable for the loss of cargo by collision at sea. *The New Jersey*, Olc. Adm. 415.

The owners of a steamboat, being a common carrier, are liable for a shipment on board of her, lost by means of a collision with another vessel at sea, without fault imputable to either, where there was no express stipulation between the owners of the steamboat and the owners of the goods exempting them from the perils of the sea. *Plaisted v. Boston, etc.*, Nav. Co., 27 Me. 132; 46 Am. Dec. 587.

2. See *infra*, this title, *Improper Stowage*.

3. *Smith v. The Saugerties*, 44 Fed. Rep. 625; *Holland v. Seven Hundred and Twenty Tons of Coal*, 36 Fed. Rep. 787; *Bowring v. Thebaud*, 42 Fed. Rep. 794; *Bell v. Reed*, 4 Binn. (Pa.) 127; 5 Am. Dec. 398; *Backhouse v. Sneed*, 1 Murph. (N. Car.) 173. See *The Thomas Melville*, 31 Fed. Rep. 486; *The Rover*, 33 Fed. Rep. 515; *Chadwick v. Dennison*, 41 Fed. Rep. 58; *West v. The Berlin*, 3 Iowa 532;

repairs, the carriers are liable.¹ They are liable for goods that are misdelivered,² or injured at the port of lading or unloading,³

The Edwin I. Morrison, 27 Fed. Rep. 136; The Sloga, 10 Ben. (U. S.) 315; Kellogg v. La Crosse, etc., Packet Co., 3 Biss. (U. S.) 496; Day v. Ridley, 16 Vt. 48; 42 Am. Dec. 489.

The owner of a vessel is liable for the loss of goods caused by defects in her, though such defects are latent and the vessel recently put in what was supposed to be complete repair. Backhouse v. Sneed, 1 Murph. (N. Car.) 173.

When casks of wine are injured by grease washed up from the ship's hold which is attributed to her defective condition, she will be liable for the damage caused thereby. Tennessee v. Tardos, 7 La. Ann. 28.

Where the master of a coasting vessel anchored in a harbor, consented to the absence of the crew, and he alone remained on board and the vessel was stranded on a ledge by a gale, which arose after the crew left, held that the vessel was liable for the damage done by the stranding of the cargo, the absence of the crew rendering the vessel unseaworthy. The Sarah, 2 Sprague (U. S.) 31.

Where a ship, on inspection, has been found seaworthy, the presumption is that the damage to a cargo arose rather from other causes than from unseaworthiness. The Piskataqua, 35 Fed. Rep. 622.

1. The Hadji, 16 Fed. Rep. 861; 20 Fed. Rep. 875. See Gerke v. California Steam Nav. Co., 9 Cal. 251; 70 Am. Dec. 650; The Bergenseren, 36 Fed. Rep. 700.

2. Schultz v. Pietro G., 38 Fed. Rep. 148; The Chadwicke, 29 Fed. Rep. 521; Boney v. The Huntress, 4 Hunt's Mer. Mag. 83; 4 West. L. J. 38.

If a wrong delivery is made through any want of reasonable caution on the part of the carrier or his servants, he is liable for the loss occasioned thereby. Boney v. The Huntress, 4 West. L. J. 38; 4 Hunt's Mer. Mag. 83; The Ben Adams, 2 Ben. (U. S.) 445.

A vessel shipped two consignments of scrap iron. The master apprehended shortage in weight but did not keep the lots distinct, and discharging in the inverse order of receiving, delivered first to one consignee his exact weight, leaving a large shortage to fall on the other. Held, that it was the master's duty to have kept the lots

separate or else to have taken security before delivering the whole weight to the first consignee, that he would make good his proportion of any deficiency in the whole bulk, and that the ship was liable as for a misdelivery in delivering to the first consignee more than his proportion of the whole weight shipped. Schultz v. The Pietro G., 38 Fed. Rep. 148.

A vessel had a consignment of iron rails for two several consignees. The discharge was made direct from the ship into cars of a railroad company, authorized by the consignees to accept delivery, the master indicating respondents' rails as they were put on the cars, but by a mistake, in which respondents' agent participated, one carload was forwarded to the wrong consignee. Held, that it was not the duty of the master to act as forwarder, and as the vessel properly delivered the rails, she was entitled to freight without rebate. Eaton v. Neumark, 33 Fed. Rep. 891.

The measure of damages for a wrong delivery is the value of the goods less the freight and charges, although the freight has not been earned. The Boston, 1 Low. (U. S.) 464.

3. The Boskenna Bay, 22 Fed. Rep. 612; The Surrey, 26 Fed. Rep. 791.

The steamship A arrived in New York in February with one hold filled with green fruit, and general merchandise in the others. The 16th was a warm day, and the ship commenced to discharge the fruit, but stopped by request of certain consignees, with the assent of the libellant. All the fruit could have been discharged that day. The following three days were cold, and no fruit was discharged until the 20th and 21st, when, the weather having moderated, the discharge was completed and the fruit transferred to a warehouse. It was afterwards found to be frozen. The bill of lading excepted liability for damage to the fruit by frost, unless caused by negligence of the ship. Held, that opening the hatches on the 16th was not negligence, and that the fruit was frozen in the vessel, and not in the warehouse or on the passage thereto, and from such liability the vessel was protected by the exceptions in her bills of lading. The Alesia, 35 Fed. Rep. 531.

and for injuries caused by the negligence of servants who handle the goods¹ or navigate the ship.²

Bills of lading ordinarily contain stipulations as to the carriage of the goods, the manner of delivery, and exceptions from certain liabilities. Clauses exempting from liability for loss caused by "perils of the sea,"³ "unavoidable dangers of

1. *White v. McDonough*, 3 Sawy. (U. S.) 111. See *Hettie Ellis*, 20 Fed. Rep. 393.

A delay of the master to present to the customhouse officers at the port of consignment, a proper manifest, by which delay the owner of the goods shipped on board is enabled to pass them through the customhouse, is a neglect of his duty as a master for which the vessel is responsible. *The Zenobia*, Abb. Adm. 48.

Goods were shipped from New York to Rio Janeiro but not delivered to consignee because, through the neglect of the master of the vessel, they were not entered on the manifest or declared at the time of the delivery of the manifest to the customhouse officers, and were seized by the Brazilian government and forfeited for such omission. *Held*, that the vessel was liable for the value of the goods to the consignee. *The Griffin*, 4 Blatchf. (U. S.) 203.

The owners of a vessel are not liable for damages occasioned by the negligence of stevedores employed for a gross sum by the consignees of the charterers, in unloading the cargo. *Linton v. Smith*, 8 Gray (Mass.) 147.

2. *The Fred H. Rice*, 40 Fed. Rep. 690; *The John Cottrell*, 34 Fed. Rep. 907; *The Costa Rica*, 3 Sawy. (U. S.) 538; *Sun Mut. Ins. Co. v. Mississippi Valley Transp. Co.*, 14 Fed. Rep. 699; 17 Fed. Rep. 919; *The Montana*, 17 Fed. Rep. 377; *Fergusson v. Brent*, 12 Md. 9. Compare *Malone v. Western Transp. Co.*, 5 Biss. (U. S.) 315.

In a contract by a common carrier by water, he impliedly undertakes that he has a competent knowledge of the navigation, and he will be liable for a loss occasioned by a want of such knowledge. *Morel v. Roe*, R. M. Charl. (Ga.) 19.

A steamship running past Old Providence Island in mild weather had the land in sight for forty minutes. A slight haze rendered distances deceptive, and the master supposed himself some seven miles off shore. No soundings were taken and no calculations made to

verify the supposed distance. In fact, the vessel was within a mile and a half of the shore, and afterwards struck upon a coral reef located on the charts with which the vessel was provided. *Held*, that such navigation was negligent. *In re The City of Para*, 44 Fed. Rep. 689.

In an action against the owner of a steamboat to recover the value of a span of horses which were lost by the sinking of the vessel in the river while being transported from Albany to New York, it appeared that the immediate cause of the accident and loss was the contact of the steamboat with the mast of a sloop which had been sunk in a squall two days before, which mast was out of the water 15 or 16 feet at low water, and was visible the day before and the same day of the accident. *Held*, that the loss was not caused by the inevitable accident, or act of God, but might have been avoided. *Merritt v. Earle*, 29 N. Y. 115; 86 Am. Dec. 292.

Where the boat of a common carrier upon a river is stranded upon a recently formed bar, of which he was ignorant, he will be liable for damage thereby caused to the goods. *Friend v. Woods*, 6 Gratt. (Va.) 189; 52 Am. Dec. 119.

3. *Fowler v. The Bertram L. Townsend*, 35 Fed. Rep. 797; *The City of Alexandria*, 23 Fed. Rep. 826; *Letchford v. The Golden Eagle*, 17 La. Ann. 9; *The Commander in Chief*, 1 Wall. (U. S.) 43; see *The Piskataqua*, 35 Fed. Rep. 622; *The Fern Holme*, 24 Fed. Rep. 502; *The Aline*, 19 Fed. Rep. 875; *Evans v. Spreckles*, 45 Fed. Rep. 265; *Bradley Fertilizing Co. v. The Edwin I. Morrison*, 40 Fed. Rep. 509; *The Nith*, 36 Fed. Rep. 86; *Christie v. The Craigton*, 41 Fed. Rep. 62.

The following have been held injuries occasioned by perils of the sea:

Damages directly resulting from a tidal wave and flood, *Pierce v. The Thomas Newton*, 41 Fed. Rep. 106.

Damages to the cargo occasioned by violent gales, *Cochran v. The Cleopatra*, 17 La. Ann. 270; *Medina v. Ansen*, 17 Fed. Rep. 290.

By storm in which the decks were

navigation,"¹ "by thieves or robbers,"² "by rust,"³ "by fire, breakage, leakage, accidents from machinery and boilers" and the like, are valid, and exempt the carrier from liability for damages coming within such exceptions.⁴

Stipulations as to the time of sailing⁵ and the time of discharging the goods are also binding.⁶ If the steamer's arrival is delayed by an accident to her machinery, so that the shipper has to employ another vessel, he is released from his contract to deliver certain freight on a given day, unless he has voluntarily continued it and has waived his right to a release by demanding that the steamer comply therewith.⁷ If damages to goods are caused by negligence, the liability extends not only to the vessel itself⁸ but the master and owner may be personally responsible.⁹ Exceptions in the bill of lading will not excuse negligence or want of care on the part of the carrier.¹⁰ But it must in most cases be actually proved to render him liable.¹¹ Where neither party is in actual fault, the loss must fall on him who, from the

flooded and the mastcoat broken, *The Nith*, 36 Fed. Rep. 86.

A steamer snagged in a river, *Boyce v. Welch*, 5 La. Ann. 623. See *Bradley Fertilizing Co. v. The Edwin I. Morrison*, 40 Fed. Rep. 501.

A vessel, during a long and stormy voyage, shipped large quantities of water to the injury of a lot of nitrate of soda. The vessel was well dunnaged in the usual manner, and there was no evidence of her unseaworthiness when she started. *Held*, that the loss resulted from a "peril of the sea." *The Chasca*, 23 Fed. Rep. 156.

The mere fact that a vessel encountered storms of no more than ordinary severity does not show that a loss of cargo was caused by a peril of the seas, it not appearing that the vessel was strained or injured. *The Mangalore*, 23 Fed. Rep. 462; 9 Sawy. (U. S.) 17.

The act of God which excuses a common carrier from liability for the loss of goods in his care must be something which operates without any aid or interference from man, and it must be the sole and immediate cause of the loss. *Merritt v. Earle*, 29 N. Y. 115; 86 Am. Dec. 292.

1. *The Morning Mail*, 17 Fed. Rep. 545.

2. *The Saratoga*, 20 Fed. Rep. 869.

3. *Wolff v. The Vaderland*, 18 Fed. Rep. 733.

4. *Scott v. Baltimore, etc., Steamboat Co.*, 19 Fed. Rep. 56.

5. *Bennett v. Lingham*, 31 Fed. Rep. 85.

6. *The Aline*, 19 Fed. Rep. 875.

7. *La Compagnie Commerciale, etc., v. Gomila*, 36 La. Ann. 280.

8. *The Waldo*, 2 Ware (U. S.) 161.

9. *White v. McDonough*, 3 Sawy. (U. S.) 311.

10. *Dedekam v. Vose*, 3 Blatchf. (U. S.) 47; *The Isabella*, 8 Ben. (U. S.) 139.

The steamship B delivered in the port of New York certain macaroni which had been damaged during the voyage by the fumes of heated and decaying green fruit, which had been stowed in the same compartment. The bills of lading excepted "damage from other goods by sweating or otherwise." *Held*, that, though the exception covered this damage, the vessel was liable for her negligence in stowing the two articles in the same compartment. *Paturzo v. Compagnie Française*, 31 Fed. Rep. 611.

11. *The Barracouta*, 39 Fed. Rep. 288; *The Dan*, 40 Fed. Rep. 691. See *The George Heaton*, 20 Fed. Rep. 323.

A quantity of Brazil nuts were shipped from Para to New York under a bill of lading which excepted liability from "damages arising from sweating, heat, steam, etc." On discharge at New York, the nuts were found damaged by heat and sweat, the evidence indicating that the nuts were stowed in the customary manner; that they belonged to that portion of the crop especially liable to become heated; that they were carefully watched and ventilated on the voyage, and that tempestuous weather necessitated

relation he bears to the transaction, is supposed to be possessed of the necessary knowledge to have avoided the difficulty.¹ But if the loss was attributable to both parties, it may be equally divided between them.² The measure of care against accidents which carriers in vessels must take to avoid responsibility is that which a person of ordinary prudence and caution would use if his own interests were to be affected and the whole risk were his own.³ As to the cargo delivered at its destination but injured through negligence, the measure of damages is the difference of the market price there in sound and in damaged condition.⁴

Carriers by water are required to remain by the ship in case it is captured or seized until a condemnation or all hope of recovery is gone.⁵ If the cargo is seized by failure of the carrier to give prompt notice of an attachment to the consignees, or to take legal means to secure the consignee's interests, he will be liable to the consignor for non-delivery.⁶ It is proper to give notice of an auction sale of damaged goods, but the failure to do so will not preclude the owner from recovering, when the proof of damage is corroborated by independent testimony, and there is no pretense of any bad faith or sacrifice of the goods, which have been sold by a duly licensed auctioneer.⁷

a. LOSS BY IMPROPER STOWAGE.—Carriers are liable for losses arising from a failure to exercise reasonable care, skill, and diligence in the stowage of the cargo.⁸ They must stow securely,

keeping on the hatches during the last three days of the voyage. *Held*, that the burden was on those who owned the cargo, to show negligence in the vessel, and without such proof the ship was protected from liability by the exceptions of her bill of lading. *The Portuense*, 35 Fed. Rep. 670.

Crates of crockery were shipped from Liverpool to New Orleans, where they arrived in apparently good order; but on being opened many articles, the paper in which they were packed being wet with salt water, were found broken. They had been well stowed in a part of the vessel where damage from leakage was impossible; there had been no stress of weather; the vessel had shipped no water, and by regular pumping had been kept clear of ordinary leakage. The casks, four in number and all of one mark, were, out of the whole cargo, all the rest of which was uninjured, the only portion damaged. *Held*, that the ship was liable. *Whitney v. Gauche*, 11 La. Ann. 432.

1. *Parrott v. Bonner*, 1 Sawy. (U. S.) 452.

2. *Stillwell v. The J. D. Hall*, 34 Fed. Rep. 904; *Desty's Shipp. & Adm.*, § 252;

Snow v. Carruth, 1 Sprague (U. S.)

334. See *Dowas v. Pioneer Tow Line*, 2 Sawy. (U. S.) 27.

An old and weak canal boat, unable to withstand ice, was cut through and sunk by ice, while waiting for wharf accommodations, which the consignee should have furnished promptly without compelling her to wait. *Held*, a case for the division of damages. *Ulrichs v. Phoenix Horseshoe Co.*, 35 Fed. Rep. 308.

3. *The Nitro-Glycerine Case*, 15 Wall. (U. S.) 524. See *Nichols v. De Wolf*, 1 R. I. 282.

4. *The Surrey*, 30 Fed. Rep. 223.

5. *Willard v. Dorr*, 3 Mason (U. S.) 166.

6. *The N. M. Chase*, 37 Fed. Rep. 708.

7. *Greenwood v. Cooper*, 10 La. Ann. 796.

8. *The Maggie M.*, 30 Fed. Rep. 692; *The Keystone*, 31 Fed. Rep. 412; *The Bitterne*, 35 Fed. Rep. 927; *Marx v. The Britannia*, 34 Fed. Rep. 906. See *Mephams v. Bissel*, 9 Wall. (U. S.) 370; *The Colonel Ledyard*, 1 Sprague (U. S.) 530; *The Adrian v. The Live Yankee*, 33 Hunt's Mer. Mag. 703; *Ire-*

quist v. Norwood, 39 Hunt's Mer. Mag.

and, so far as possible, keep goods well separated that are likely to injure each other through accident in severe weather.¹ Where there is a notorious custom in a particular branch of commerce of stowing goods of a particular description on shipboard in a certain way, shippers who consider such mode of stowage hazardous must notify the carrier of their wish to have a different manner adopted, or they will not be entitled to charge the latter with injuries received in consequence of its adoption.² Where shippers apparently acquiesce in a certain custom of stowing, the vessel will be held only for negligence.³

b. BY BREAKAGE AND LEAKAGE.—Exceptions in a bill of lading against breakage and leakage will not relieve a carrier from liability⁴ when caused by his negligence.⁵ He is responsi-

76; *The Rebecca*, 1 Ware (U. S.) 188; *The Paragon*, 1 Ware (U. S.) 322; *Waring v. Morse*, 7 Ala. 343; *Joliet S. S. Co. v. Yeaton*, 29 Fed. Rep. 331; *The Excellent*, 16 Fed. Rep. 148; *The Kate Irving*, 5 Hughes (U. S.) 253; *The Toming*, 16 Fed. Rep. 601; *Ast-rup v. Lewy*, 19 Fed. Rep. 536; *The John P. Best*, 14 Phila. (Pa.) 527; *The St. Patrick*, 14 Phila. (Pa.) 596; *The Invincible*, 3 Sawy. (U. S.) 176.

Insufficient Dunnage.—Insufficient dunnage amounts to bad stowage. *The Sloga*, 10 Ben. (U. S.) 315.

A ship must be dunnaged so as to protect the cargo even in rainy weather. If the vessel sustains no serious leak and if her construction with a centerboard is such that the cargo lying next to it is liable to be damaged in rainy weather by water oozing in through the seams of the centerboard, but without springing any serious leak, the dunnage against and around the centerboard must be sufficient to protect it. *Endicott v. Renauld*, 10 Ben. (U. S.) 582. See DUNNAGE, vol. 6, p. 55.

1. *The Maggie M.*, 30 Fed. Rep. 692; *Paturzo v. Compagnie Française*, 31 Fed. Rep. 611.

Salt should never be stowed over iron where there is any chance that water may go through from above into the salt. *The Nith*, 36 Fed. Rep. 86.

Where sheet-iron is stowed in such proximity to salt as to be rusted and injured thereby, the vessel is responsible for the damage. *Marsh v. Switzerland*, 5 La. Ann. 111.

Where the cargo is thus stored, even though a rent in the mastcoat by which water went into the hold, causing the iron to rust was a peril of the sea, the carrier is liable for the injury. *The Nith*, 36 Fed. Rep. 383.

Where damage to hemp constituting part of the cargo is occasioned by oil which had escaped from casks in the hold, and the escaping of the oil was not caused by the danger of the seas, the carrier was held liable for such damage to the hemp. *Bearse v. Ropes*, 1 Sprague (U. S.) 331.

Where flour was stowed upon a vessel, either improperly, or in such proximity to an offensive and injurious oil as to suffer damage, and it was shown that the common carrier had been put on his guard as to the danger from such oil to the flour—held that he was responsible for the damage sustained by the flour. *Cranwell v. The Fanny Fosdick*, 15 La. Ann. 436; 77 Am. Dec. 190.

So where filberts were stowed in bags against a movable wooden bulkhead, separating the compartments from the coal bunkers through which an extraordinary amount of coal dust penetrated and injured the nuts, the coal dust was held not a sea peril and the ship liable for the damage. *Hills v. Mackill*, 36 Fed. Rep. 702.

But no recovery can be had for damage by coal dust not resulting from improper stowage. *The Thomas Melville*, 36 Fed. Rep. 708.

2. *Baxter v. Leland*, Abb. Adm. 348.

3. *The Dan*, 40 Fed. Rep. 691.

4. *Richards v. Hansen*, 1 Fed. Rep. 54; *The Jefferson*, 31 Fed. Rep. 489.

5. *The Invincible*, 1. Low. (U. S.) 225; *The Colon*, 9 Ben. (U. S.) 354; *The Delhi*, 1 Ben. (U. S.) 345.

Chlorides having been shipped in barrels, instead of the usual carboys, on their arrival a part was found lost by leakage. The bill of lading excepted liability for leakage. Held, that negligence in the ship must be shown to

ble for leakage caused by defective storage,¹ or by the unseaworthiness of the ship.² But not when the leakage was by reason of secret defects in the packages,³ nor by causes connected with the nature of the article.⁴ He is not liable for loss caused by the tendency of certain liquors to effervesce,⁵ or for damage caused by the effect of humidity and dampness in the ship by what is generally called sweat.⁶ The burden of proof of negligence in case of loss by leakage or breakage is on the ship.⁷ If the carrier introduce evidence leading to the inference that the loss was caused by a latent defect in the casks which existed before shipment, the burden is thrown upon the consignees or other parties in interest to show that the leakage and loss might still have been avoided by the exercise of reasonable skill, diligence and attention on the part of the carrier.⁸ If the injury is caused by a leakage through the deck, the carrier must show that a peril of the sea caused the leak.⁹ If a leak originates through

render the vessel liable for the loss, and the cargo appearing to be well stowed, and no actual negligence proved, the libel was dismissed. *The Barracouta*, 39 Fed. Rep. 288.

1. *Baxter v. Leland*, Abb. Adm. 348; *The Newark*, 1 Blatchf. (U. S.) 203; *The Invincible*, 3 Sawy. (U. S.) 176.

In *Nelson v. Woodruff*, 1 Black (U. S.) 156, lard was shipped at New Orleans for New York in July. On arrival much of it had leaked out. It appeared in evidence that the lard when liquified expanded and loosened the hoops on casks and thus occasioned leakage. *Held*, that the carrier was not liable.

Glycerine was stowed on a British ship at Genoa, Italy, and brought to this country under a bill of lading, which, besides the ordinary exception of perils of the sea, contained an exception against liability for loss occasioned by leakage or stowage, or by negligence of any person in the service of the ship. This latter exception is valid both by English and by Italian law. The vessel had a very long and boisterous passage, and out of 116 drums 5 were delivered damaged by cuts, with some consequent loss of glycerine by leakage. *Held*, the foreign law governed as to any negligence within the foreign jurisdiction, and whether the damage was occasioned by perils of the sea or by negligent stowage at Genoa, the libellant could not recover, there being no negligence shown or presumed in this country nor from

acts committed on the high seas. *The Trinacria*, 42 Fed. Rep. 863.

2. *The Compta*, 4 Sawy. (U. S.) 335; *Harvey v. The Vivid*, 14 Int. Rev. Rec. 163. See *The Howard v. Wissman*, 18 How. (U. S.) 231; *Lowe v. Moss*, 12 Ill. 477; *The Gwallia's Cargo*, 26 Fed. Rep. 919.

Where a libel was filed *in rem* and *in personam* for damages sustained by consignee in consequence of the schooner's springing a leak by reason of her unseaworthiness, it was held that the owner could not protect himself against the *in personam* proceedings by surrendering his interest in the schooner. *In re Sinclair*, 8 Am. L. Reg. 206.

3. *Clark v. Barnwell*, 12 How. (U. S.) 272; *Oriflamme*, 1 Sawy. (U. S.) 181; *Nelson v. Woodruff*, 1 Black (U. S.) 156; *Warden v. Greer*, 6 Watts (Pa.) 424; *The Live Yankee, Deady* (U. S.) 420. See *The Keystone*, 31 Fed. Rep. 412; *The Howard v. Wissman*, 18 How. (U. S.) 221; *Lamb v. Parkman*, 1 Sprague (U. S.) 343.

4. *Nelson v. Woodruff*, 1 Black (U. S.) 156; *Desty on Shipp. & Adm.*, § 254; *Brown v. Clayton*, 12 Ga. 564.

5. *Warden v. Greer*, 6 Watts (Pa.) 424.

6. *Clark v. Barnwell*, 12 How. (U. S.) 272.

7. *The David and Caroline*, 5 Blatchf. (U. S.) 266; *The Delta*, 4 Ben. (U. S.) 467; *Vaughan v. 630 Casks of Sherry Wine*, 7 Ben. (U. S.) 509; *Dedekam v. Vose*, 3 Blatchf. (U. S.) 44.

8. *The Olbers*, 3 Ben. (U. S.) 148.

9. *The Compta*, 4 Sawy. (U. S.) 375.

a peril of the sea, the vessel will be liable on the ground of negligence for injuries caused to the cargo, if proper means are not taken to control it.¹

c. BY JETTISON.—Where a jettison of cargo becomes necessary for the safety of the vessel, the owner and vessel are liable for the loss, if the peril of the ship is directly attributable to the want of diligence or skill upon the part of the master or crew.² On the question of whether a jettison was necessary, the court will determine whether the owner appointed a competent master, and whether he exercised reasonable skill and judgment.³ See JETTISON, vol. 11, p. 970.

d. DELAY IN DELIVERY.—A vessel is liable for the loss of a market,⁴ or diminution in value of the goods during a period of negligent delay after they have been taken on board.⁵ If a vessel is compelled to stop at an intermediate port to repair, the owner will be responsible for any damage from the delay in the delivery of freight where she is kept much longer than is necessary.⁶ But where the damage is caused by a delay coming within the exceptions in the bill of lading, the vessel is not liable if the delay is not caused by negligence.⁷ Nor will a vessel be liable for occupying double the time it ordinarily takes to make a voyage without some evidence showing culpable negligence on the part of the master or owner.⁸ If the consignee offers to receive goods at an intermediate port and tenders payment of full freight together

1. *The Shand*, 10 Ben. (U. S.) 294.

2. *The Jenny Jones*, Deady (U. S.) 82.

3. *The Hettie Ellis*, 22 Fed. Rep. 350.

4. *The Suffolk*, 31 Fed. Rep. 835; *The Guilio*, 34 Fed. Rep. 911. See *The Success*, 7 Blatchf. (U. S.) 551; *Cunshaw v. Pearce*, 43 Fed. Rep. 803.

5. *The Guilio*, 34 Fed. Rep. 909; *The Golden Rule*, 9 Fed. Rep. 334; *The City of Dublin*, 1 Ben. (U. S.) 46; *Page v. Munro*, Holmes (U. S.) 233. See *Morrison v. I. & V. Florio S. S. Co.*, 36 Fed. Rep. 569; *Holland v. Seven Hundred and Twenty Five Tons of Coal*, 36 Fed. Rep. 789.

Vessels are liable for a loss on a shipment from improper delay in not sailing at the appointed time. *Hart v. The Jane Ross*, 5 La. Ann. 264.

It is admissible to show that, before starting, the plaintiff consented to a delay, if necessary. *Johnson v. Lightsey*, 34 Ala. 169; 73 Am. Dec. 450.

A steamboat is responsible to the consignees for the damage to goods shipped for transportation to them on board the steamboat and which became nearly valueless by the delay in transportation. *Mahan v. The Olive Branch*, 20 La. Ann. 257.

The master of a steamboat contracted with the plaintiff to transport merchandise from A to B within a reasonable time after its delivery at A. Owing to a fall of the river Missouri, the master could not navigate it with his own boat the space of two months, during which time merchandise was delivered at A. The river, in the meantime, was navigable by smaller boats. *Held*, that the master was not excused for delaying to transport the merchandise until the river was navigable by his own boat. *Collier v. Swinney*, 16 Mo. 484.

Where a ship trading between two ports is loaded with reference to the ordinary condition of the entrance of the port of destination this is all that can be demanded, and her owners are not liable for her detention on account of exceptional and unusual circumstances which render her draft of water too great for her to cross the bar. *Lewis v. The Success*, 18 La. Ann. 1.

6. *Rathbone v. Neal*, 4 La. Ann. 563; 50 Am. Dec. 579. See *Mina v. I. & V. Florio S. S. Co.*, 23 Fed. Rep. 915; *The Julia Smith*, Newb. Adm. 61.

7. *The Bohemia*, 38 Fed. Rep. 756; *The Sidonian*, 34 Fed. Rep. 805.

8. *The Gentleman*, Olc. Adm. 110.

with all incidental expenses, and the shipowner without a reasonable excuse, refuses to make such delivery, but, on the contrary, holds the goods in the ship until her arrival at the port of destination, the ship will be liable for all damages caused by reason of the detention.¹ The difference in the market value at the time of the delivery and the time when the goods should have been delivered, is the measure of damages for delay.²

c. NON-DELIVERY.—A carrier is *prima facie* liable for the non-delivery of goods.³ But in order to charge him, some evidence must be given on the part of the shipper or owner, of the non-delivery of the goods according to the requirement of the bill of lading.⁴ Very slight evidence will be sufficient to throw upon the carrier the burden of showing that the goods have been delivered.⁵ The master of a vessel may lawfully refuse to deliver goods to the consignee which, having been attached on his vessel, are carried to the port of consignment under an agreement with the sheriff that they should be returned.⁶ The rule of damages in cases where the shipper's goods are lost is that the carrier shall pay for the goods not delivered their net value at the port of delivery.⁷ He is not liable for any speculation or possible profits

1. *The Martha*, 35 Fed. Rep. 313.

2. *Holland v. Seven Hundred and Twenty Five Tons of Coal*, 36 Fed. Rep. 792; *The Success*, 7 Blatchf. (U. S.) 551; *Page v. Munro*, Holmes (U. S.) 253.

In ascertaining the amount of damage sustained by a cargo of fruit, the best method, in the absence of direct evidence, is by a comparison of the price brought by the damaged fruit at a fair sale, with the market value of sound fruit of the same brands, sold at the same time; or if that is not obtainable, then by a comparison of the price brought by the damaged goods with the prices brought within a week before or after by other brands of the same invoice value at the place of export as the damaged fruit; or next, proof of the value abroad would be competent, with additions for differences in market. *In re The Boskenna Bay*, 31 Fed. Rep. 612.

3. *Desty's Shipp. & Adm.*, § 255; *New Jersey Steam, etc., Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *Watkinson v. Langton*, 8 Johns. (N. Y.) 213; *Colt v. McMechem*, 6 Johns. (N. Y.) 160; 5 Am. Dec. 200; *Morse v. Slue*, 1 Vent. 190; *The Huntress*, 2 Ware (U. S.) 82; 4 West L. J. 38; *The Matilda A. Lewis*, 5 Blatchf. (U. S.) 520; *The Zenobia*, Abb. Adm. 48; *Brooke v. Pickwick*, 4 Bing. 218; 13 E. C. L. 404; 12 J. B. Mon. 447.

4. *Griffiths v. Lee*, 1 C. & P. 110; 11 E. C. L. 333; *Gilbart v. Dale*, 5 A. & E. 543; 31 E. C. L. 393.

5. *The Falcon*, 3 Blatchf. (U. S.) 64.

6. *The Lord*, Chase Dec. (U. S.) 527.

7. *The Nith*, 36 Fed. Rep. 86; *Boland v. Northwestern Fuel Co.*, 34 Fed. Rep. 523; *In re The Boskenna*, 31 Fed. Rep. 612.

Where plaintiff had a contract to transport coal by water for defendant at an agreed price, the coal to be delivered to him by defendant at a designated point, and defendant failed to deliver it, plaintiff's measure of damages is the difference between the cost of transportation and the contract price. *Boland v. Northwestern Fuel Co.*, 31 Fed. Rep. 523.

If the owners of a vessel send her to a foreign port for a cargo, which the master procures by barter, the damages for a loss of the cargo are what the master paid for it to the person of whom he bought, and not what it cost the owners, on the whole, to obtain it by the adventure. To this may be added an allowance in the nature of freight for the voyage from the port, which has increased the value of the goods, and has been destroyed by the collision. *The Glaucus*, 1 Low. (U. S.) 366.

Where a vessel upset a cargo of iron into the water, and the owner of the

which the owner might have anticipated in his particular business.¹

f. PRESUMPTION IN CASE OF LOSS OR DAMAGE.—When goods in the custody of a common carrier are lost or damaged after their reception and before their delivery, the *prima facie* presumption is that the loss or injury is occasioned by the default of the carrier, and the burden is upon him to prove that it arose from a cause for which he was not responsible.² When he cannot make good his defense on some of the exceptions to his liability, he must pay the loss though chargeable with no negligence, and even when he has exercised every possible diligence to prevent it.³ If it appears that the injury is caused by the dangers of navigation or some cause within the exception of the bill of lading, then it devolves upon the shipper to make out that the damage might have been avoided

vessel refusing, after demand and notice, to get up the iron, the shipper raised it, the owner was held liable for the expense of the raising, in an action to recover for the non-delivery of the iron. *The Sunswick*, 5 Blatchf. (U. S.) 280.

1. *Bazin v. The Liverpool, etc.*, S. S. Co., 5 Am. L. Reg. 459.

A vessel having on board a cargo of flour for transportation, capsized at her wharf before sailing, and the cargo was much damaged. The carriers might easily have communicated with the owners of the cargo, and sought instructions as to the disposal of it; but they neglected to do so and sold the cargo upon their own authority at auction; after which the vessel sailed, and in due time arrived at the port of delivery. *Held*, that the owners of the cargo were entitled to recover the value of the cargo at the port of delivery, deducting freight and charges, and adding interest on the balance. *The Joshua Barker*, Abb. Adm. 215.

2. *The Giglio v. The Britannia*, 31 Fed. Rep. 432; *Bond v. Frost*, 8 La. Ann. 297; *Petrie v. Heller*, 35 Fed. Rep. 310; *The Maggie M.*, 30 Fed. Rep. 692; *The Samuel E. Spring*, 29 Fed. Rep. 397; *Choate v. Crowninshield*, 3 Cliff. (U. S.) 187; *The Wilhelmina*, 3 Ben. (U. S.) 110; *Hunt v. Cleveland*, 6 McLean (U. S.) 76; *Clark v. Barnwell*, 12 How. (U. S.) 272; *Nelson v. Woodruff*, 1 Black (U. S.) 156; *Bearse v. Ropes*, 1 Sprague (U. S.) 331; *Hastings v. Pepper*, 11 Pick. (Mass.) 43; *Kerr v. The Norman*, Newb. Adm. 525; *Hoggs v. Bernard*, 2 Ld. Raym. 901; *Dawson v. Chauncey*, 2 Q. B. 164; *Chickopee Bank v. Philadelphia Bank*, 8 Wall. (U.

S.) 650; *Day v. Ridley*, 16 Vt. 48; 42 Am. Dec. 489; *Mahon v. The Olive Branch*, 18 La. Ann. 107; *Zerega v. Poppe*, 1 Abb. Adm. 397; *The Emma Johnson*, 1 Sprague (U. S.) 527.

After proof of loss and failure to deliver, the burden of proof is on him to bring such loss and failure within the exception. *Alden v. Pearson*, 3 Gray (Mass.) 342. They will not be excused by showing that the navigation was difficult or dangerous, or that skillful and competent persons were employed to conduct the boat; but must discharge themselves from liability by showing that the loss occurred in a manner and from a cause that will acquit them. *Hill v. Sturgeon*, 28 Mo. 323.

3. *Brousseau v. Hudson*, 11 La. Ann. 427.

Where gold dust is received at San Francisco by a common carrier from that place to the city of New York, to be delivered by him at the latter place, and on receiving it he delivers to the shipper a bill of lading, which states that it is received on the *Antelope* at San Francisco, and that "on arrival at Panama the same is to be forwarded across the isthmus, and to be reshipped by one of the United States Mail Steamboat Company's ships to New York . . . and to be delivered in like good order and condition at the port of New York, dangers of the seas (land carriage and river navigation, thieves and robbers) excepted," and the gold dust is not delivered, the carrier is liable unless he shows that he was prevented from delivering it by some of these causes. *Simmons v. Law*, 8 Bosw. (N. Y.) 213.

by the exercise of reasonable care and skill upon the part of the carrier.¹

Merchandise will be presumed properly packed unless there is something in the appearance or condition of the goods on their being opened after delivery affording ground for reasonable inference that they were packed in an unfit state for transportation, or some evidence is given to that effect.² So, where goods are shipped under a common bill of lading, it will be presumed that they will be stowed in the ordinary mode unless there is a positive agreement to the contrary, or circumstances from which this may be inferred.³ If the bill of lading contains a clause "not accountable for leakage, dust, or breakage, if properly stowed," the burden of proof is upon the carrier to show proper stowage.⁴

Proof that some part of the cargo endured the voyage without damage does not raise the presumption that damage to another part of the same cargo during the same voyage was occasioned by bad stowage. Motion of the ship sufficient to account for the damage being proved to have occurred during the voyage, the presumption in absence of other proof is that such motion caused the damage and when the motion of the ship is shown to have been caused by the sea, the exception of the bill of lading exempts

1. *The Barracouta*, 39 Fed. Rep. 288; *The Jefferson*, 31 Fed. Rep. 489; *The Charles J. Willard*, 38 Fed. Rep. 759; *Choate v. Crowninshield*, 3 Cliff. (U. S.) 187; *Nelson v. Woodruff*, 1 Black (U. S.) 156; *Clark v. Barnwell*, 12 How. (U. S.) 280; *Hunt v. Cleveland*, Newb. Adm. 221; 6 McLean (U. S.) 77; *The David and Caroline*, 5 Blatchf. (U. S.) 266; *Dedekam v. Vose*, 3 Blatchf. (U. S.) 44; *The Colonel Ledyard*, 1 Sprague (U. S.) 530; *Lamb v. Parkman*, 1 Sprague (U. S.) 354; *Union Ins. Co. v. Shaw*, 2 Dill. (U. S.) 23; *Western Transp. Co. v. Downer*, 11 Wall. (U. S.) 129; *Turner v. The Black Warrior*, 1 McAll. (U. S.) 181; *The Rocket*, 1 Biss. (U. S.) 354; *The Delhi*, 1 Ben. (U. S.) 345; *Vaughan v. 630 Casks of Sherry Wine*, 7 Ben. (U. S.) 506; *Hart v. Allen*, 2 Watts (Pa.) 114; *Price v. The Uriel*, 10 La. Ann. 413.

2. *English v. The Ocean Steam Nav. Co.*, 2 Blatchf. (U. S.) 425. See *The Maggie M.*, 30 Fed. Rep. 692; *The Counaught*, 32 Fed. Rep. 640; *The Burgundia*, 29 Fed. Rep. 464.

Where goods stowed near the deck are more liable to the sweating of the hold than those stowed low, and the goods in question, the character of which was known to the master, are peculiarly susceptible of injury from that cause, while others of the same kind on the same voyage and vessel are

received uninjured, it will be presumed that the injury was caused by bad stowage, and the vessel, having receipted for the goods in good condition, will be liable. *Montgomery v. The Abby Platt*, 6 La. Ann. 410.

Where the shipper of goods took a bill of lading with the indorsement on the margin, "Weight and contents unknown," and on the arrival of the vessel at New Orleans they were condemned by the portwarden to be sold as damaged—held, that, under such a bill of lading, the common carrier had complied with his contract when he had delivered the box in externally good order and condition; and that the burden of proof rested on the consignor to show that the contents of the box were in good order and condition at the time of the shipment. *Wentworth v. The Bealm*, 16 La. Ann. 18.

If sufficiently heavy weather is experienced by a vessel to account for damage to cargo by motion of the ship, the presumption is that the damage was so caused, and not by bad stowage; and the fact that part of a cargo endures the voyage without damage raises no presumption that damage to other parts was caused by bad stowage. *The Polynesia*, 30 Fed. Rep. 210.

3. *The Peytona*, 2 Curt. (U. S.) 21.

4. *Edwards v. The Cahawba*, 14 La. Ann. 220.

the ship unless bad stowage be proved.¹ When goods shipped in good order and condition are damaged by sea-water, it is for the ship to show that the damage was occasioned "by the perils of the sea."²

9. **Demurrage.**—See DEMURRAGE, vol. 5, p. 542.

VIII. CARRIERS OF PASSENGERS.—All who offer are entitled to passage on board a ship engaged in the carriage of passengers.³ But this right is subject to such reasonable regulations as the proprietors may prescribe. They are not bound to admit passengers on board who refuse to obey these regulations of the ship, or who are guilty of gross and vulgar habits, or whose characters are doubtful or dissolute or suspicious.⁴ Nor are they bound to admit passengers on board whose object is to interfere with the interests or patronage of the proprietors so as to make the business less lucrative to them.⁵ A refusal, however, should precede the sailing of the ship. After the ship has started upon its voyage, it is too late to take exceptions to the character of the passenger or to his peculiar business, provided he violates no flexible rule of the vessel in getting on board.⁶ The master cannot lawfully remove from his vessel a passenger whose behavior is proper, and who has tendered his fare.⁷

Where a common carrier gives public notice that he will receive passengers for transportation, he contracts an engagement with the public which his duty as a common carrier binds him to perform.⁸ Thus, where by public notice or established usage a common carrier by water has a place of starting, the hour of starting, the course to be pursued, etc., damages arising from a non-compliance with such regulations cannot be excused by stress of weather.⁹ If the weather prevent

1. *The Polynesia*, 30 Fed. Rep. 210.

2. *The Lydian Monarch*, 23 Fed. Rep. 298; *The Thomas Melville*, 31 Fed. Rep. 486.

3. *Jencks v. Coleman*, 2 Sumn. (U. S.) 222; *Day v. Owen*, 5 Mich. 520; 72 Am. Dec. 62.

4. *Jencks v. Coleman*, 2 Sumn. (U. S.) 224.

5. A person who had, on board of a steamboat which was a common carrier, pursued against the remonstrance of the carrier, the business of an express agent on board of such steamboat, came on board of her again for that purpose, having purchased a ticket for a passage and refused to desist from such business when requested by the officer of the boat, and was removed from the boat by such officer without unnecessary force—held, that the removal was justifiable. *The D. R. Martin*, 11 Blatchf. (U. S.) 233.

6. *Pearson v. Duane*, 4 Wall. (U. S.)

605; *Coppin v. Braithwaite*, 8 Jur. 875.

7. *Pearson v. Duane*, 4 Wall. (U. S.) 605.

8. *Heirn v. M'Caughan*, 32 Miss. 17; 66 Am. Dec. 588; *The Aberfoyle*, 1 Blatchf. (U. S.) 360. See *The Canadian*, 1 Brown Adm. 11.

In admiralty, an action *in personam* for breach of the contract of a passenger ticket may be brought by the transferee of the ticket in his own name. *Cobb v. Howard*, 3 Blatchf. (U. S.) 524.

9. *The Pacific*, 1 Blatchf. (U. S.) 569; *Sunday v. Gordon*, B. & H. Adm. 569.

The owner of a ship bound from New York to California, agreed with C, at New York, to take him as a cabin passenger, with his luggage, at \$300; not more than fifty cabin passengers to be received, for which reason the fare was raised from \$250, the usual charge;

a vessel from arriving at a port where she has contracted to be at a specified time to receive passengers, a carrier may be required to return the passage money.¹ The carrier may be liable for damages arising from unreasonable delay along the route, occasioned by the fault or neglect of those legitimately engaged in the line of transportation.² If the performance of the engagement is rendered impossible by reason of stress of weather or other cause, the passenger cannot be called upon to pay his passage money if not already paid. If he has paid it, he can recover it back from the master or shipowner.³

state-rooms to be fitted up between decks on each side, with a free passage between, disincumbered with freight, for ventilation and exercise; and the vessel to sail on the 5th of January. C paid his passage money on the 2d. He lived in Massachusetts, and prepared for the voyage at considerable expense, and went to New York at the time appointed for sailing, when he found that the state-rooms had no space between them for ventilation or exercise, in consequence of the increased number of them, and that 72 cabin passengers had been engaged, many at \$275 each, so that the vessel was overcrowded with passengers and cargo, and incommmodious, and dangerous to health. C refused to embark, and demanded back his passage money, which was refused. He then, on the 20th of January, filed a libel *in rem* against the ship, for the return of the passage money and for his damages. *Held*, that the admiralty had jurisdiction of the case, and that the ship was liable. *The Pacific*, 1 Blatchf. (U. S.) 569.

Libelant purchased a passage ticket on steamer Chateau Margaux from New York to Bordeaux. The ticket, like the company's prospectus, expressly stated that the passage would be direct. After the sale of the ticket, the steamer took cargo for Santander, Spain, and sailed direct for that port, without notice to libelant, and was consequently six days longer in reaching Bordeaux. Libelant proved no special damage arising from the delay, except loss of time and the annoyance incident thereto. *Held*, on suit brought to recover damages for the delay, that the deviation was a breach of the contract, and that libelant should recover the amount of passage money paid. *De Colange v. The Chateau Margaux*, 37 Fed. Rep. 157.

If a boat expressly contracts to land a passenger at a particular place, with

knowledge of the danger attending it, such danger will be no defense to an action for damages for non-fulfillment of the contract. *Porter v. The New England*, 17 Mo. 290.

1. *Cobb v. Howard*, 3 Blatchf. (U. S.) 524; *Williams v. Vanderbilt*, 29 Barb. (N. Y.) 491; *Cope v. Dodd*, 13 Pa. St. 33.

Where carriers agree to transport a passenger to a particular place, in a particular vessel, which was lost at the time, though not known to either party, the carriers' only obligation is to return the money paid with interest, because the condition on which it had been paid had wholly failed; and if the plaintiff set forth such a contract and alleges for a breach that he was not carried in that vessel, and does not aver an obligation on the carriers to provide a substitute, and does not claim damage for their neglect to provide such substitute, he is confined to the particular breach alleged, and cannot recover on other grounds. *Briggs v. Vanderbilt*, 19 Barb. (N. Y.) 222.

Where the passengers by their own acts deprive the captain of an election to repair and continue the voyage, commenced but interrupted by perils of the sea, the owner may retain the passage money advanced. *Marks v. Nashville Co.*, 6 La. Ann. 126.

2. *Van Buskirk v. Roberts*, 31 N. Y. 661; *Quimby v. Vanderbilt*, 17 N. Y. 306; 72 Am. Dec. 469.

3. *Briggs v. Vanderbilt*, 19 Barb. (N. Y.) 222; *Howard v. Astor, etc., Ins. Co.*, 5 Bosw. (N. Y.) 38; *Brown v. Harris*, 2 Gray (Mass.) 359; *Cope v. Dodd*, 13 Pa. St. 33; *The Zenobia*, Abb. Adm. 48.

Where an agreement is entered into between the master of a vessel and a passenger for the transportation of the latter, if his baggage and passage money is paid in advance, and the agreement is not performed through the fault of

1. Loss of Baggage and Other Property.—The master of a vessel engaged in carrying passengers for hire is responsible as a common carrier for their baggage if lost.¹ He will not, however, incur this responsibility unless the baggage is delivered to him or his servants.² If delivered to his servant, it must be to such servant as is intrusted to receive the goods and not to one engaged in other duties.³ What shall be deemed baggage within the rule of the carrier's liability is not clearly defined.⁴ It ordinarily includes such things as the traveler usually has with him as part of his baggage,⁵ wearing apparel and bed and bedding.⁶

the master, the ship is liable in specie to refund the passage money and to pay damages for any failure to deliver the goods shipped. *The Zenobia*, Abb. Adm. 48.

Plaintiff took his passage on board a vessel with board and accommodations and paid freight in advance. The vessel was compelled to put into an intermediate port from necessity where the owner had a better vessel provided in which he offered to take the passengers, but the plaintiff without making any objection to the change did not proceed in the vessel substituted. *Held*, that there could be no apportionment of the freight, and the plaintiff was not entitled to recover back any part of the money which he had paid. *Detouches v. Peck*, 9 Johns. (N. Y.) 210.

Where a steamboat was enjoined from landing at the only dock at S, her destination—held, that she was under no obligation to her charterers to take passengers to S, and leave the charterers to provide a way of getting them on shore. *Post v. Koch*, 30 Fed. Rep. 208.

1. *Prickett v. New Orleans Anchor Line*, 13 Mo. App. 436; *Blanchard v. Isaacs*, 3 Barb. (N. Y.) 318; *Walsh v. The H. M. Wright*, Newb. Adm. 494; *The Elvira Harbeck*, 2 Blatchf. (U. S.) 336; *The State of New York*, 7 Ben. (U. S.) 450.

2. *The Crystal Palace v. Vanderpool*, 16 B. Mon. (Ky.) 302; *Packard v. Getman*, 6 Cow. (N. Y.) 757; 16 Am. Dec. 475; *Tower v. Utica, etc., R. Co.*, 7 Hill (N. Y.) 47; 42 Am. Dec. 36; *Macillin v. New Jersey S. Co.*, 9 Am. L. Reg. N. S. 237; *Epps v. Hinds*, 27 Miss. 657; 61 Am. Dec. 528; *The R. E. Lee*, 2 Abb. (U. S.) 51; *Forbes v. Davis*, 18 Tex. 268.

An American passenger in the defendant's ship on a voyage from Liverpool to New York, took exclusive possession of his trunk, taking it into the

steerage, placing it under his bed and fastening it to his berth with ropes. During the voyage it was stolen. *Held*, that the owners of the ship are not liable for its value. *Cohert v. Frost*, 2 Duer (N. Y.) 335.

The deposit of a trunk in the usual place for passengers' baggage, on a steamboat, is not a sufficient delivery unless the owner takes passage also. *Wright v. Caldwell*, 3 Mich. 51.

If the trunk is dropped into the water while being carried from the wharf on board the vessel by persons in the employ of the managers of the vessel, the steamship is responsible for injury to its contents. *Moore v. The Evening Star*, 20 La. Ann. 402.

3. *Blanchard v. Isaacs*, 3 Barb. (N. Y.) 389; *Forbes v. Davis*, 18 Tex. 268.

A notice, posted in a carrier steamboat, to the effect that the carrier will not be liable for the loss of baggage, unless the same has been checked, if it have any effect, will not prevent a person, who gave his baggage to the boat agent, and demanded a check, but failed to receive one, because the person whose duty it was to give them was not present, from recovering its value. *Freeman v. Newton*, 3 E. D. Smith (N. Y.) 246.

4. *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 69.

5. *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 69; *The H. M. Wright*, Newb. Adm. 494; *Pardee v. Drew*, 25 Wend. (N. Y.) 459.

6. *U. S. v. 129 Packages*, 2 Am. L. Reg. 421.

Jewelry.—A gold watch and chain, gold ornaments for presents, and American coin are not baggage as between the passengers and the carrier of such passengers. *The Ionic*, 5 Blatchf. (U. S.) 538.

Where jewelry was worn by two lady passengers upon a steamboat as part of their apparel, and was left by

A vessel may be held responsible for money or jewelry deposited by travelers with the captain, when the deposit is a necessary one.¹ But where the property is taken from a stateroom or stolen from the pocket of a passenger, in the absence of proof that the robbery was committed by one of the employés, the ship will not be liable.² If a passenger loses his ticket while on board a steamboat which requires passengers to buy tickets before going on board and to deliver them up on landing, the loss falls on himself and not on the carriers, and it is his duty on landing to pay the amount of his fare.³

2. Injuries and Wrongs to Passengers.—A vessel is liable for injuries to passengers resulting from the acts of the owner or any of his servants while acting within the scope of their employment.⁴ If a passenger is injured through negligence of those in charge

them in their state room, in a carpet bag with other articles of personal use and was stolen while they were at supper, held that the steamship was not liable therefor. *The R. E. Lee*, 2 Abb. (U. S.) 49.

For the loss of a valise, placed under a passenger's berth, containing a gold watch, gold spectacles, and \$11 in money, the boat was held liable. *The H. M. Wright*, 1 Newb. Adm. 494.

Merchandise.—The owners of a steamboat are not liable for trunks containing nothing but merchandise. *Pardee v. Drew*, 25 Wend. (N. Y.) 459.

1. Dunn v. Branner, 13 La. Ann. 452.

The owners are responsible as common carriers, for specie received on board by the master, on proof either that he received it as freight to be transported and delivered at the port of destination, or that he received it and afterwards applied it to the payment of the expenses of the vessel on the trip. *Sulakowski v. Flint*, 22 La. Ann. 6.

2. Abbott v. Bradstreet, 55 Me. 530; *McKee v. Owen*, 15 Mich. 115; *Clark v. Burns*, 118 Mass. 275.

A passenger on board a steamboat, a common carrier of passengers, occupied a state room with a fellow-passenger, a stranger, which was assigned to them by the officers of the boat. The state-room window was broken, and the attention of the stewardess was called to it. When the first passenger retired for the night, she rolled up her dress, in the pocket of which were about \$30, and a gold chain, and placed it at the foot of the upper berth. Early in the morning she found the dress unrolled, that the money and chain had disap-

peared, and that a pillow which had been placed in the window was not in it. She testified that the woman with her could not have taken the property without awakening her, as they occupied the same berth. *Held*, that the owners of the boat were not liable for the loss, because the money and chain were not in their custody. *McKee v. Owen*, 15 Mich. 115.

3. Standish v. Narragansett Steamship Co., 111 Mass. 512; 15 Am. Rep. 66.

4. Best v. The Uncle Sam, 1 McAll. (U. S.) 510; *McGuire v. Golden Gate*, 1 McAll. (U. S.) 105. See *The Rebecca*, 1 Ware (U. S.) 188; *The Phebe*, 1 Ware (U. S.) 263; *Sherwood v. Hall*, 3 Sumn. (U. S.) 127; *Dean v. The Eangus*, Bee Adm. 369; *The New World v. King*, 16 How. (U. S.) 469; *Waring v. Clark*, 5 How. (U. S.) 44; *Sherlock v. Alling*, 93 U. S. 99; *Northwestern Union Packet Co. v. Clough*, 20 Wall. (U. S.) 528; *Simmons v. New Bedford, etc., Steamboat Co.*, 100 Mass. 34.

A ship is liable for injuries inflicted by the bite of a dog, on board by consent of the master and owners, upon a person lawfully on board, and entitled to be carried safely. *The Lord Derby*, 17 Fed. Rep. 265.

Where a passenger was injured by an explosion of a boiler, the steamboat proprietors were held liable for damages, although the inspector, exercising his office in pursuance of the above act, had certified that the conditions of the act were complied with. *Swart-hout v. New Jersey, etc., Co.*, 46 Barb. (N. Y.) 222.

In an action by T against a steamboat company, to recover for personal

the vessel is liable.¹ The fact that no fare is paid will not free the owner from the obligations of a carrier of passengers.² In case the life of a passenger is lost by reason of the negligence of those in charge, the vessel is liable in damages.³ But a vessel is not liable if the injury happens from sheer accident or misfortune, where there is no negligence or fault, or where no reasonable caution, foresight, or judgment of those in charge would have prevented the injury.⁴ Nor is a ship responsible for any injury resulting from a latent defect in the machinery which could not have been avoided by the exercise of the highest degree of care.⁵ Nor is a ship liable where the passenger's negligence contributes to the injury.⁶ The passengers are also entitled to respectable treatment from those in charge, and there is an implied stipula-

injuries from being struck by the handle of a loaded box of coal, while he was a passenger on a boat which was then stopping at a point on the Mississippi River two hours, which point was not his destination, there was evidence that the servants bringing coal on board, came on the forward staging and went off on the after staging placed near; that T, while following servants thus going off, was struck by such handle in the hands of servants rushing on; and that T used ordinary care. There was no proof of any rule or regulation requiring passengers to a more distant point to remain in the cabin, and not go on the staging. *Held*, that the company was liable for the injury. *Keokuk Northern Line Packet Co. v. True*, 88 Ill. 608.

1. *The Nederland*, 15 Fed. Rep. 63. A custom to permit persons usually employed on steamboats to go free of charge from place to place is a reasonable one, and the master has power to act under it and bind the owner, and a person of this description who had obtained a free passage on a steamboat by the master's permission was lawfully on board under this custom, and the owners of the boat were liable to him for any damage by a want of proper care on the part of themselves or their agents. *The New World v. King*, 16 How. (U. S.) 469.

2. *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306.

3. *Ladd v. Foster*, 31 Fed. Rep. 827; *Hrebrik v. Carr*, 29 Fed. Rep. 298; *The City of Brussels*, 6 Ben. (U. S.) 371; *The Aberfoyle*, Abb. Adm. 242. See *The Highland Light*, Chase Dec. (U. S.) 151; *American Steamboat Co. v. Chase*, 16 Wall. (U. S.) 532; *The Platina*, 11 Law Rep. N. S. 397.

4. *The Pilot Boy*, 23 Fed. Rep. 103.

A child three years old was left to itself by its nurse when on board a steamship, and, wandering to a part where it had no right to be, was injured by the rudder chain which ran in an open box on the main deck. *Held*, that the ship was not liable. *The Burgundia*, 29 Fed. Rep. 465.

Libelant, a steerage passenger on the steamship F, in coming down from the deck to go to his quarters, fell through the fore hatch in the lower between-decks, breaking his leg. The hatch was ordinarily kept covered, and the passengers were in the habit of walking over it. It had probably been opened to bring up provisions, but there was no light to enable libelant to see whether it was open, nor was there any rail or guard around it. Libelant testified that he had never seen the hatch open, and did not know that it was liable to be open. No caution had even been given to the passengers in regard to it. *Held*, that the vessel was liable for libelant's injury, his damages being fixed at \$1,600. *Behrens v. the Furnessia*, 35 Fed. Rep. 798.

Where there was an open doorway from which steep stairs descended to the hold which was in such a location that it was liable to be mistaken by a passenger for the stairs which ascended to the upper deck, held that the owners of the boat were guilty of negligence in not having it so effectually lighted as to warrant a passenger making such a mistake as soon as he faced and was about to step into the opening. *The Pilot Boy*, 23 Fed. Rep. 103.

5. *The Nederland*, 14 Phil. (Pa.) 601.

6. *Bartlett v. New York, etc., Co.*, 8 N. Y. Supp. 309.

tion that female passengers shall be protected against obscene conduct, lascivious behavior and every immodest approach.¹ The utmost vigilance and care must be exercised in maintaining order on board a ship, in guarding the passengers against violence from whatever source arising which might reasonably be anticipated and naturally be expected to occur in view of all the circumstances and of the number and character of the persons on board.² Reasonable means and opportunity of leaving the boat must also be provided.³ These duties which the law imposes in relation to the treatment and accommodation of passengers during the voyage necessarily ceases on the termination of the voyage. If during the voyage a contagious disease breaks out in the vessel, and on her arrival in port the city authorities find it necessary, in order to prevent the spreading of the infection, to have her sick passengers sent to the hospital to be treated, the owners of the vessel cannot be made liable for the expenses incurred thereby.⁴

IX. FREIGHT—1. In General.—The general rule is that freight for the entire voyage can only be earned by due performance of the voyage.⁵ Where there is no default or inability of the carrier-ship to perform the voyage and the shipowner is ready

1. *Nieto v. Clark*, 1 Cliff. (U. S.) 145; *Flint v. Norwich, etc.*, Transp. Co., 6 Blatchf. (U. S.) 158.

The owners of a steamboat, who undertake to transport passengers, are bound to take such precautions as will protect their passengers from the violence which may reasonably be expected from disorderly persons on board, even though such disorderly persons are soldiers, and are carried by compulsion. *Flint v. Norwich, etc.*, Transp. Co., 6 Blatchf. (U. S.) 158.

Liability for Assault and Battery.—A passenger, assaulted and beaten by the master, may recover damages therefor of the owner of the ship; but actual damages only, not punitive, should be allowed. *McGuire v. The Golden Gate*, 1 McAll. (U. S.) 104; *Loy v. The F. K. Aubury*, 28 Ill. 412; 81 Am. Dec. 792.

When the master assaults a passenger and turns him out of the cabin into the steerage, compelling him to remain there during the voyage, and permitting him to be robbed and treated with indignity by the other passengers, he will be responsible not only for the actual loss, but also the mental and bodily suffering to which the passenger has been exposed. *Block v. Bannerman*, 10 La. Ann. 1.

A rule or custom of a steamboat requiring persons of color who are pas-

sengers thereon to be excluded from the regular table, and take their meals upon the guards of the boat or in the pantry, is not a reasonable one, and cannot be enforced in *Iowa*. In this case, the officers of the boat were held liable for assault and battery for forcibly removing from the table a quadroon who had embarked at Burlington to be transported to Quincy, Ill., where she was engaged as teacher. *Coger v. North Western Union Packet Co.*, 37 Iowa 145.

The officers of a steamship have a right to reserve a table in the dinner cabin for their own use, and to cause an intruder thereat to be removed by force, so far as force may be necessary. *Ellis v. Narragansett Steamship Co.*, 111 Mass. 146.

2. *Flint v. Norwich, etc.*, Transp. Co., 34 Conn. 554.

3. *Keokuk Packet Co. v. Henry*, 50 Ill. 264.

4. *New Orleans v. Windermere*, 12 La. Ann. 84.

5. *The Ship Nathaniel Hooper*, 3 Sumn. (U. S.) 542; 2 L. R. 133; *Sampayo v. Salter*, 1 Mason (U. S.) 43; *Donohoe v. Kettell*, 1 Cliff. (U. S.) 143; *Hurtin v. Union Ins. Co.*, 1 Wash. (U. S.) 530; *Simonds v. Union Ins. Co.*, 1 Wash. (U. S.) 443; *The Saratoga*, 2 Gall. (U. S.) 164; *Howland v. The Lavinia*, 1 Pet. Adm. 123; *Weston*

to forward them but there is a default on the part of the owner of the cargo or he waives a further prosecution of the voyage, full freight will be due.¹ But where the vessel is driven into an intermediate port by stress of weather and is unable to proceed, the owner is bound to repair his vessel in the mean time, or procure another vessel to convey the goods; if he fails in this, he is not entitled to freight.² No freight is earned where goods are delivered to the wrong person.³ But where the misdelivery is not occasioned by any fault on the part of the ship, she will be entitled to freight.⁴ Stipulations in a bill of lading for extra freight are valid,⁵ but they will not be enforced where the consignees have suffered injury by tardy delivery.⁶ The capture of a neutral ship does not operate a dissolution of a contract of

v. Minot, 3 Woodb. & M. (U. S.) 443; *Blanchard v. Buckman*, 3 Me. 1; *The Erie*, 3 Ware (U. S.) 252; *Vlierboom v. Chapman*, 13 M. & W. 230; *Caze v. Baltimore Ins. Co.*, 7 C. R. 358; *Western Transp. Co. v. Hoyt*, 69 N. Y. 230; *Brittan v. Barnaby*, 21 How. (U. S.) 527; *Arthur v. The Cassius*, 2 Story (U. S.) 81; *The Ann D. Richardson*, Abb. Adm. 499; *Adams v. Haught*, 14 Tex. 243; *Thibault v. Russel*, 5 Harr. (Del.) 293.

1. *The Ship Nathaniel Hooper*, 3 Sumn. (U. S.) 542; *Hart v. Shaw*, 1 Cliff. (U. S.) 358; *Weston v. Minot*, 3 Woodb. & M. (U. S.) 444; *Bork v. Norton*, 3 McLean (U. S.) 426; *Giles v. The Cynthia*, 1 Pet. Adm. 203; *The Angerona*, 1 Dod. (U. S.) 382; *Kleine v. Catara*, 2 Gall. (U. S.) 61; *Clark v. Crabtree*, 2 Curt. (U. S.) 87; *Clen-daniel v. Tuckerman*, 17 Barb. (N. Y.) 184; *Bradhurst v. Columbian Ins. Co.*, 9 Johns. (N. Y.) 17. See *Two Hundred and Thirteen Tons of Coal*, 7 Ben. (U. S.) 15.

2. *Bork v. Horton*, 2 McLean (U. S.) 422.

If the cargo is received by the owner at the intermediate port upon compulsion, no freight is earned or due. *Hurtin v. Union Ins. Co.*, 1 Wash. (U. S.) 530; *Simonds v. Union Ins. Co.*, 1 Wash. (U. S.) 443.

But if a cargo is necessarily unloaded at an intermediate point, and the owner sells it there, though the vessel might have carried it in the spring, the carrier has earned his freight. *Murray v. Aetna Ins. Co.*, 4 Biss. (U. S.) 417.

3. *The Boston*, 1 Low. (U. S.) 464.

4. *Eaton v. Neumark*, 33 Fed. Rep. 892.

5. *The North German Lloyd v.*

Heule, 44 Fed. Rep. 100. See *Hart v. Pennsylvania R. Co.*, 112 U. S. 331; *The Denmark*, 27 Fed. Rep. 141; *The Bermuda*, 29 Fed. Rep. 399; *Liverpool, etc., Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397.

A bill of lading recited that additional freight should be payable on the total value of certain precious stones, should their real value be discovered to be greater than was declared in the bill of lading; and the consignee received the goods and paid the freight according to the value stated in the bill of lading, and entered them at the customhouse under the bill of lading, and under an invoice that stated their value at a much greater sum than that made in the bill of lading. *Held*, that the stipulation for additional freight upon the actual value was valid, and that the consignee was liable for the additional freight, though he was but an agent employed by the shipper to sell the goods on commission. *North-German Lloyd v. Heule*, 44 Fed. Rep. 100.

6. *Holland v. Seven Hundred and Twenty-five Tons of Coal*, 36 Fed. Rep. 784.

Owing to a quarrel between the master of a canal boat and stevedores employed on a ship, caused by the improper discharge of iron ore into the canal boat from the ship, two days were lost in the discharge of the ore. By the loss of this time all the ore could not be forwarded on canal boats before the canal closed, and this action was brought against the owner of the vessel by the owner of the ore to recover the extra freight paid. *Held*, that the ship was liable for the misconduct of the stevedore's men, as its agents, in the improper discharge; and the libellant was also at fault through the delay of the boatman,

affreightment. At most it only suspends it, and when restitution takes place, the parties are also restored to their antecedent rights.¹ If no restitution is made, the captor acquires all the rights of the owner, and among them, the right to freight; but on the same conditions, that is, by completing the voyage, safe delivery, etc.²

2. Freight Pro Rata.—If a ship on her way is disabled by the perils of the sea or is prevented by any other cause from further proceeding, the master may tender the goods to the shipper at an intermediate port; and if the shipper is willing to receive them, the ship is entitled to freight *pro rata itineris*.³ Acceptance of part of the property at the end of the voyage, the other part being lost, will also entitle the ship to freight *pro rata*.⁴ But the acceptance must be voluntary.⁵ If the master refuses to repair his vessel and send on the goods or to procure other

its agent, in securing a proper adjustment of the difficulty; that the libellant, therefore, should recover half its damages, each side looking for further indemnity to the respective agents employed. *Kalion Chemical Co. v. The Iroquois*, 38 Fed. Rep. 151.

1. *The Ship Nathaniel Hooper*, 3 Sumn. (U. S.) 559.

2. *The Diana*, 5 Rob. Adm. 67. See *The Fortuna*, 4 Rob. Adm. 278; *The Fortuna*, Edw. Adm. 56; *The Vrouw Anna Catherina*, 6 Rob. Adm. 269.

The captors are entitled to freight if the property or its proceeds be ultimately destined to the place where the captors carried the ship. *The Ann Green*, 1 Gall. (U. S.) 274.

It has been held that the captors are entitled to freight if the cargo has been brought to the country but not to the port of destination. *The Vrouw Henrietta*, 5 Rob. Adm. 75; *The Race Horse*, 3 Rob. Adm. 101; compare *The Wilhelmina v. Eleonora*, 3 Rob. Adm. 234.

3. *Bork v. Morton*, 2 McLean (U. S.) 423; *Robinson v. Marine Ins. Co.*, 2 Johns. (N. Y.) 323; *Post v. Robertson*, 1 Johns. (N. Y.) 24; *Rossiter v. Chester*, 1 Dougl. (Mich.) 154; *Adams v. Haught*, 14 Tex. 243; *Hunt v. Haskell*, 24 Me. 339; 41 Am. Dec. 387; *Parsons v. Hardy*, 14 Wend. (N. Y.) 215; 28 Am. Dec. 521; *Forbes v. Rice*, 2 Brev. (S. Car.) 363; 4 Am. Dec. 589; *Bass v. Upton*, 1 Minn. 408; *Luke v. Lyde*, 2 Burr. 882; *Bennett v. Byram*, 38 Miss. 17; 75 Am. Dec. 90; *M'Gaw v. Ocean Ins. Co.*, 23 Pick. (Mass.) 409.

4. *Hinsdell v. Weed*, 5 Den. (N. Y.) 172.

5. *Caze v. Baltimore Ins. Co.*, 7 Cranch (U. S.) 358; *The Nathaniel Hooper*, 3 Sumn. (U. S.) 542; *Marine Ins. Co. v. U. S. Ins. Co.*, 9 Johns. (N. Y.) 186; *Kinsman v. New York, etc. Co.*, 5 Bosw. (N. Y.) 460; *Lorent v. Kentring*, 1 Nott & M. (S. Car.) 132; *Scott v. Libby*, 2 Johns. (N. Y.) 363; 3 Am. Dec. 431; *Whitney v. Rogers*, 2 Disney (Ohio) 421; *Coffin v. Storer*, 5 Mass. 252; 4 Am. Dec. 54; *Dorr v. New England Ins. Co.*, 4 Mass. 221; *Pinto v. Atwater*, 1 Day (Conn.) 193; *Adams v. Haught*, 14 Tex. 243; *Rossiter v. Chester*, 1 Dougl. (Mich.) 154; *Hooe v. Mason*, 1 Wash. (Va.) 207; *Sampayo v. Salter*, 1 Mason (U. S.) 43; *Hurtin v. Union Ins. Co.*, 1 Wash. (U. S.) 530; *Armroyd v. Union Ins. Co.*, 3 Binn. (Pa.) 437; *Welch v. Hicks*, 6 Cow. (N. Y.) 504; 16 Am. Dec. 443; *Vlierboom v. Chaplin*, 13 M. & W. 230; *Muloy v. Backer*, 5 East 316; *Cook v. Jennings*, 7 T. R. 381; *Liddard v. Lopes*, 10 East 526.

Freight *pro rata itineris* is not earned where, from necessity, cargo is accepted before arrival at the port of destination. *The Joseph Farwell*, 31 Fed. Rep. 844.

Acceptance May be Inferred.—Where the consent of the consignee to accept his goods at an intermediate port may be inferred from his actions, freight *pro rata* is due. *Gray v. Waln*, 2 S. & R. (Pa.) 229; 7 Am. Dec. 642.

Acceptance by Insurers.—Where there has been a voluntary acceptance by the insurers of a damaged cargo, at an intermediate place before its arrival at the place of destination, the master is entitled to freight *pro rata itineris*. *The Mohawk*, 8 Wall. (U. S.) 153.

vessels for that purpose and the owner of the goods then receives them, this is not such a voluntary acceptance as will render him liable for freight *pro rata*.¹ A claim of the proceeds of the sale of the cargo by the master does not amount to a voluntary acceptance.² So when, by capture, the owner of the vessel has been incapable of performing the voyage and the shipper has been compelled to receive his goods at the hands of the admiralty, freight *pro rata* is not due.³ And where an entire freight is payable for an entire cargo and a part is destroyed during the course of the voyage, a refusal by the consignee to receive the part offered to him will free the consignor from the obligation to pay freight *pro rata*.⁴

3. Liability for Freight.—Where goods are shipped by the consignor under a contract or for his benefit, he is originally liable for freight.⁵ But whenever the consignee engages to pay it, he also may become responsible. It is usual for bills of lading to state that the goods are to be delivered to the consignee or to his

1. Welch v. Hicks, 5 Cow. (N. Y.) 504; 16 Am. Dec. 443; Atlantic, etc., Ins. Co. v. Bird, 2 Bosw. (N. Y.) 195.

2. Sampayo v. Salter, 1 Mason (U. S.) 43; Armroyd v. Union Ins. Co., 3 Binn. (Pa.) 437; Hurttin v. Union Ins. Co., 1 Wash. (U. S.) 530.

Goods shipped on freight to a certain port, but carried to a different port where they were taken and sold by a stranger, who remitted the proceeds to the shipper—held that the acceptance of such proceeds was not equivalent to a voluntary acceptance of the goods so as to render him liable for proportional freight. Escopiniche v. Stewart, 2 Conn. 391.

3. Sampayo v. Salter, 1 Mason (U. S.) 43; Escopiniche v. Stewart, 2 Conn. 391.

4. Sayward v. Stevens, 3 Gray (Mass.) 97.

Where a vessel was captured and carried into Halifax, and libeled, and A in Halifax obtained an appraisal of the vessel and cargo, and, on giving a bond for the amount, received the property, which he sent consigned to his agent in New York, with directions to deliver the cargo to the owner on his indemnifying A for his bond and all expenses, but which the owner refused to do, held, that no *pro rata* freight was due. Marine Ins. Co. v. United Ins. Co., 9 Johns. (N. Y.) 186.

The owner of a vessel, immediately after her capture, abandoned her to the insurers, and claimed for a total loss, which was paid to him. The vessel and cargo were afterwards restored, and freight was paid to the under-

writers. Held, that the freight, before and after the capture, was susceptible of apportionment, and that the owner was entitled to all the freight earned to the time of the capture. Kennedy v. Baltimore Ins. Co., 3 Har. & J. (Md.) 367.

A neutral vessel was chartered to take on board a cargo in the river Thames, and deliver it at Amelia Island, freight free, and there to take on board a return cargo for which a sum specified in the charter-party was to be paid as freight, which exceeded the freight which would have been paid on the return cargo alone, had it been totally unconnected with the outward voyage. The vessel was captured on the outward voyage, and the cargo condemned as enemy's property. Held, the freight *pro rata itineris* should be allowed on the outward voyage as on a *quantum meruit*. The Société, 9 Cranch (U. S.) 209.

5. Holt v. Westcott, 43 Me. 445; 69 Am. Dec. 74; Hayward v. Middleton, 3 McCord (S. Car.) 121; 15 Am. Dec. 615.

The original shipper, unless he appears to act as agent for others, is bound, by the ordinary bill of lading, to pay the freight money. This is the original bargain made, and does not cease to bind the shipper until it is discharged by actual payment, where freight is once earned and becomes due. Gilson v. Madden, 1 Lans. (N. Y.) 172.

The shipper, being the owner of goods sent by a generalship, is liable for the freight at all events, independ-

assigns, "he or they paying the freight," in which case the consignee and his assigns, by accepting the goods, become by implication bound to pay the freight.¹ The carrier need not deliver the goods until the freight is paid.² The clause in bills of lading that the cargo is to be delivered to the person named or his assignees, "he or they paying the freight," is only inserted as a recognition or assertion of the right of the master to retain the goods carried until his lien is satisfied by payment of the freight, but it imposes no obligation on him to insist on payment before delivery of the cargo. If he sees fit to waive his right of lien and to deliver the goods without payment of the freight, his right to resort to the shipper for compensation still remains.³ The consignee has a right to examine the goods and see that the obligations of the bill of lading have been fulfilled by the

ently of the bill of lading; and it is immaterial whether the ownership appears on the bill of lading, or not. *Grant v. Wood*, 21 N. J. L. 292; 47 Am. Dec. 162.

1. *Gates v. Ryan*, 37 Fed. Rep. 154; *Philadelphia, etc., R. Co. v. Barnard*, 3 Ben. (U. S.) 59; *Hayward v. Middleton*, 3 McCord (S. Car.) 121; 15 Am. Dec. 615; *Seaman v. Adler*, 37 Fed. Rep. 268.

Consignees of a cargo are liable for freight upon delivery, though but agents to sell. *Gates v. Ryan*, 37 Fed. Rep. 154.

They are liable, though without fault of the ship's crew it has, by exposure to severe weather before shipment, become worthless at the time of the delivery. *Seaman v. Adler*, 37 Fed. Rep. 268.

A consignee is liable for the freight of goods carried, delivered and accepted, although the master has receipted in the bill of lading for a larger amount of goods than was actually put on board; especially if it appears that the consignee has an agreement with the shippers, by which he is only to pay them for what he received, unless he can recover of the master the difference between this amount and the amount named in the bill of lading. *Ryder v. Hall*, 7 Allen (Mass.) 456.

If a consignee have notice that the freight is payable to the master and not the charterer, he is bound thereby. *Shaw v. Thompson*, Olc. Adm. 144.

A consignee is not liable for the freight of property never delivered to him, where it is not shown that he ever accepted the consignment, or authorized its entry at the customhouse by

the consignor who took possession of it. *Perret v. Sauvinet*, 2 La. Ann. 559.

Assignees.—Under an ordinary bill of lading, the assignee of the bill of lading is bound to pay the freight. *Trask v. Duvall*, 4 Wash. (U. S.) 181; *Merian v. Funck*, 4 Den. (N. Y.) 110. He is bound to pay it unless the assignee has bound himself by an express agreement to pay it as surety for the assignor. *Trask v. Duvall*, 4 Wash. (U. S.) 181.

If the assignee of a bill of lading, in his capacity of assignee, receives goods, he is liable for the freight upon them, even though the assignment to him was made after the goods had been sent to a public warehouse under the general delivery order. *New York, etc., Nav. Co. v. Young*, 3 E. D. Smith (N. Y.) 187.

A person to whom a bill of lading is assigned as security for the payment of the price of goods purchased of him by the shipper of such goods under such bill of lading, is not liable to the shipowner for the freight. *Swett v. Black*, 2 Sprague (U. S.) 49.

2. *Brittan v. Barnaby*, 21 How. (U. S.) 527.

3. *Wooster v. Tarr*, 8 Allen (Mass.) 270.

If goods shipped, by a general ship, by bill of lading, to be delivered to a specified consignee, "he paying the freight," are delivered by the captain to the consignee without payment of the freight, the owner who shipped the goods is not thereby discharged from his liability to pay freight. *Holt v. Westcott*, 43 Me. 445; 69 Am. Dec. 74; *Spencer v. White*, 1 Ired. (N. Car.) 236.

shipper.¹ If there are any losses properly chargeable to the carrier, the consignee of the property may recoup from the freight earned.² If part of the goods are destroyed or damaged during the voyage, the carrier will be entitled to full freight by delivering the part uninjured and paying for the rest, provided the consignee receives the part delivered.³

If all the goods are lost and the carrier pays their full value, he will be entitled to have his freight deducted.⁴ If the vessel is prevented from commencing her voyage, and the goods are never delivered, no freight can be claimed.⁵ But after the voyage is begun any delay by perils of the sea, and without any default of the master, will not defeat a claim for freight if the vessel finally arrives and delivers the cargo.⁶

If the goods are so injured as to have lost their mercantile value when they reach the port of destination, the shipper cannot abandon them to the master and pay no freight. Freight must be paid though the goods are rendered worthless.⁷ He may, however, be held responsible for the loss where the damage is caused by his negligence.⁸ If the abandonment occurs at an intermediate port where the voyage is broken up by the stranding

1. *Certain Logs of Mahogany*, 2 Sumn. (U. S.) 589; *Brittan v. Barnaby*, 21 How. (U. S.) 527.

2. *Strong v. Grand Trunk R. Co.*, 15 Mich. 206; 93 Am. Dec. 184; *The Tangier*, 32 Fed. Rep. 230; *Sumner v. Caswell*, 20 Fed. Rep. 249; *Ewart v. Kerr*, 2 McMull. (S. Car.) 141.

Where goods are shipped for half the profits, in lieu of freight money, if, on account of the loss of a part of the goods, there is no profit on the whole adventure, the owner of the vessel is not entitled to any part of the particular profits from the goods not lost. *Pearce v. Phillips*, 4 Mass. 672; *Putnam v. Wood*, 3 Mass. 481; 3 Am. Dec. 179.

3. *Hammond v. M'Clures*, 1 Bay. (S. Car.) 101.

A carrier received for transportation and delivery three thousand seven hundred and eighty-three bushels of wheat; he, in fact, only delivered three thousand six hundred and seventy bushels. On the consignee refusing to pay the freight on the wheat delivered unless the value of the wheat not accounted for shall be deducted, an action was brought against him to recover freight on the three thousand six hundred and seventy bushels. *Held*, that the action did not lie. *Davis v. Pattison*, 24 N. Y. 316.

4. *Bazin v. Denisson*, 20 Law Rep. 129; 5 Am. L. Reg. 460; *Luke v. Lyde*, 2 Burr. 882; *Arthur v. The Cassius*, 2

Story (U. S.) 81; *Knox v. The NINETTE*, *Crabbe* (U. S.) 534.

5. *Curling v. Long*, 1 B. & P. 634.

Where a vessel before she breaks ground for a voyage, is so injured by fire that the cost of her repairs would exceed her value when repaired, and she is rendered unseaworthy and incapable of earning freight, a contract of affreightment for carrying cotton to a foreign port, evidenced by a bill of lading, containing the usual and customary exceptions, and providing for the payment of the freight money on the delivery of the cotton at that port, is dissolved, and the shipper is not liable for any part of the freight money, nor for any of the expenses paid by the vessel for compressing and stowing the cotton. *The Tornado*, 108 U. S. 342; *Ellis v. Atlantic Mut. Ins. Co.*, 108 U. S. 342.

6. *Beale v. Thompson*, 3 B. & P. 420; *Davidson v. Gwynne*, 13 East 381; *Moorsom v. Greaves*, 2 Camp. 627; *The Racehorse*, 3 Rob. Adm. 101; *The Hoffnung*, 6 Rob. Adm. 231; *Havelock v. Geddes*, 10 East 555; *Ripley v. Scaife*, 5 B. & C. 167; 11 E. C. L. 188; *Bergstrom v. Mills*, 3 Esp. 36; *Hadley v. Clarke*, 8 T. R. 259; *Baylies v. Fettyplace*, 7 Mass. 325; *M'Bride v. Marine Ins. Co.*, 5 Johns. (N. Y.) 308.

7. *Jordan v. Warren Ins. Co.*, 1 *Story* (U. S.) 342. See *M'Gaw v. Ocean Ins. Co.*, 23 Pick. (Mass.) 405.

8. 1 *Parson's Shipp. & Adm.* 218.

or wrecking of the vessel, *pro rata* freight may be recovered by the shipper.¹

4. **Recovering Back Freight.**—Freight paid in advance may be recovered back by the shipper,² unless the goods are taken on condition that the carrier may retain the money advanced in case they do not reach their destined port.³ Where money has been paid by the shipper of goods on freight to liberate his goods retained by the master to enforce payment of a groundless claim, it may be recovered back.⁴ So one who purchases a ship without notice of its being captured for a violation of our neutrality laws and restored by our courts to the original owners, is entitled to be repaid the freight paid by him on the goods captured.⁵

5. **Counterclaims.**—Damages for a loss to the goods caused by the negligence of the carrier during transportation, may be used to offset a claim for freight.⁶ But shortage cannot be interposed

1. *Van Norden v. Littlejohn*, Term (N. Car.) 16.

The abandonment to underwriters of goods sunk *in transitu*, and a receipt of the sum insured as for a total loss, followed by the underwriters' taking possession of the goods, the carriers being ready and willing to complete the transportation, may be found by the jury to be an acceptance of the goods by the owner at the place of loss, entitling the carriers to freight *pro rata*. *McKibbin v. Peck*, 39 N. Y. 262.

2. *Pitman v. Hooper*, 3 Sumn. (U. S.) 50; 1 *Parsons' Shipp. & Adm.* 211; *Watson v. Duykinck*, 3 Johns. (N. Y.) 335; *Mansfield v. Maitland*, 4 B. & Ald. 582; 6 E. C. L. 610; *Griggs v. Austin*, 3 Pick. (Mass.) 20; 15 Am. Dec. 175; *Brown v. Harris*, 2 Gray (Mass.) 359; *Leman v. Gordon*, 8 C. & P. 392; 34 E. C. L. 444; *Minturn v. Warren Ins. Co.*, 2 Allen (Mass.) 86; *Benner v. Equitable Saftey Ins. Co.*, 6 Allen (Mass.) 222; *Cope v. Dodd*, 13 Pa. St. 33; *Phelps v. Williamson*, 5 Sandf. (N. Y.) 578; *The Zenobia*, Abb. Adm. 48; *Giles v. The Cynthia*, 1 Pet. Adm. 203; *Howland v. The Lavinia*, 1 Pet. Adm. 123; *The Panama*, Olc. Adm. 343; *Gillan v. Simpkin*, 4 Camp. 241; *Muloy v. Backer*, 5 East 316.

Advanced freight can be recovered back by the charterer, in case of the loss of the ship, or non-performance of the voyage, whether by the fault of the master or not. And this is the rule in *England* as well as in this country. *Lawson v. Worms*, 6 Cal. 365.

3. 1 *Parsons' Shipp. & Adm.* 211.

Chase v. Alliance Ins. Co., 9 Allen (Mass.) 311; *Griggs v. Austin*, 3 Pick. (Mass.) 20; 15 Am. Dec. 175; *Atwell v. Miller*, 11 Md. 348; 69 Am. Dec. 206; *Hagedorn v. St. Louis Perpetual Ins. Co.*, 2 La. Ann. 1005; *Bradley v. Nashville Ins. Co.*, 3 La. Ann. 709; 48 Am. Dec. 465; *Lee v. Barrada*, 16 Md. 190; *Phelps v. Williamson*, 5 Sandf. (N. Y.) 578; *Emery v. Dunbar*, 1 Daly (N. Y.) 408.

Whether the master or owner has a right to retain money thus paid in advance is held to be a question of law. *Wirgman v. Mactier*, 1 Gill & J. (Md.) 150.

An authority of the master of the vessel to receive a partial payment in advance for the freight may be inferred from subsequent payments made to him on that account with the approbation of the owner. *Drummond v. Winslow*, 38 Me. 208.

4. *Chamberlain v. Reed*, 13 Me. 357; 29 Am. Dec. 506; *Geraldes v. Donison*, Holt 346; *Brown v. North*, 8 Exch. 1; 16 Eng. L. & Eq. 486.

5. *The Fannie*, 9 Wheat. (U. S.) 658.

6. *Dedekam v. Vose*, 3 Blatchf. (U. S.) 44; *Holyoke v. Depew*, 2 Ben. (U. S.) 334; *Snow v. Carruth*, 1 Sprague (U. S.) 324; *Kennedy v. Dodge*, 1 Ben. (U. S.) 315; *Bearse v. Ropes*, 1 Sprague (U. S.) 331; *Thatcher v. McCulloh*, Olc. Adm. 365; *Bradstreet v. Heron*, Abb. Adm. 209; 9 Blatchf. (U. S.) 116; *Zerega v. Poppe*, Abb. Adm. 397.

Libellant contracted to transport a cargo of lumber in a canal boat to pier 4, East River. Through the mis-

Definition.

SHOCK—SHOOTING.

Definition.

to offset freight unless it be strictly proved.¹ Nor can a claim for demurrage offset freight without proof of a positive delay of delivery.²

X. CHARTER PARTY.—See CHARTER PARTY, vol. 3, p. 155.

XI. GENERAL AVERAGE.—See GENERAL AVERAGE, vol. 8, pp. 1203, 1308.

XII. STOPPAGE IN TRANSITU.—See STOPPAGE IN TRANSITU.

XIII. COLLISIONS.—See NAVIGATION, vol. 16, pp. 207, 270.

XIV. MASTER.—See MASTER OF A VESSEL, vol. 14, pp. 958, 976.

XV. SEAMEN.—See SEAMEN, vol. 21, p. 915.

XVI. PILOTS.—See PILOTS, vol. 18, p. 443.

XVII. TOWAGE.—See TOWAGE.

XVIII. WHARFAGE.—See WHARVES AND WHARFAGE.

XIX. SALVAGE.—See SALVAGE, vol. 21, p. 469.

XX. ADMIRALTY JURISDICTION AND PROCEDURE.—See ADMIRALTY, vol. 1, p. 193.

SHOCK.—See note 3.

SHOES.—See note 4.

SHOOT—SHOOTING.—(See also ASSAULT, vol. 1, p. 778; GAME AND GAME LAWS, vol. 8, p. 1023; HOMICIDE, vol. 9, p. 529).—See note 5.

take of the shipper, no consignee appeared, and finally the claimant, at the request of the shipper, agreed to take the cargo for his account, and with his own tug towed the canal boat to the Erie basin, where his yards were situated. *Held*, that claimant could not recoup against the claim for freight, the cost of towage. Libellant's contract was complete when the boat arrived at Pier 4. *Martin v. 182.259 Feet of Hemlock Lumber*, 37 Fed. Rep. 415.

1. *Kerbuish v. Havermeyer, etc., Refining Co.*, 42 Fed. Rep. 511.

2. *Petrie v. Heller*, 35 Fed. Rep. 310; *Page v. Munro, Holmes (U. S.)* 232.

3. An indictment for burning "stacks" of wheat is not supported by evidence of burning "shocks" of wheat. *Denbow v. State*, 18 Ohio 11.

4. An indictment alleged the embezzlement of "1,320 pairs of shoes." It was contended for the defendant that this description of the subject of the alleged embezzlement was too indefinite, as "shoes" might mean bars of iron for the hoofs of beasts, bars of iron under the runners of sleighs, etc. It was held that the description was sufficient. "The word 'shoes' must be

taken to mean shoes for the feet of human beings." *Com. v. Shaw*, 145 Mass. 349. See generally EMBEZZLEMENT, vol. 6, p. 498e.

5. **Shooting at a Mark.**—The defendants went into a field in proximity to certain roads and houses, taking with them a rifle which would be deadly at a mile, and set up a mark at which they all fired shots from a distance of about a hundred yards. No precautions of any kind were taken to prevent danger from such firing. One of the shots thus fired killed a boy in a tree at a distance of three hundred and ninety-three yards from the firing point. *Held*, that the defendants had been guilty of a breach of duty in firing at the spot in question without taking proper precautions to prevent injury to others, and that they were guilty of manslaughter. *Reg. v. Salmon*, 6 Q. B. Div. 79; 29 Moak's Rep. 503.

"Shooting at a mark is lawful but not necessary, and may be dangerous, and the law requires extraordinary care to prevent injury to others; and if the act is done where there are objects from which the balls may glance and endanger others, the act is wanton, reckless, without due care, and grossly negligent." *Welch v. Durand*, 36 Conn.

SHOP—(See also EXPOSURE OF PERSON, vol. 7, p. 535; STORE).—A building¹ in which goods, wares or merchandise are sold at retail;² or in which mechanics labor and sometimes keep their manufactures for sale.³

SHORE—(See also ACCRETION, vol. 1, p. 136; BEACH, vol. 2, p. 159; BOUNDARIES, vol. 2, p. 495; WATERS).—Shore is that space of land on the borders of the sea which is alternately covered and left dry by the rising and falling of the tide; or, in other words, that space between high and low water mark.⁴

185; 45 Am. Rep. 55. See also HOMICIDE, vol. 9, p. 588.

1. "Shop" is the building itself as distinguished from a place of sale which is open like a 'stall.'" Richards v. Washington, etc., Ins. Co., 60 Mich. 426. "In order to constitute a 'shop,' there must be some structure of a more or less permanent character." Hooper v. Kenshole, L. R., 2 Q. B. Div. 127. See also Pope v. Whalley, 6 B. & S. 303; 118 E. C. L. 300.

2. Com. v. Riggs, 14 Gray (Mass.) 378; 77 Am. Dec. 333; Rex v. Chapman, 7 J. P. 132. A "shop" is a place where goods are sold by retail, and a "store" a place where goods are deposited; but in this country, shops for the sale of goods are frequently called stores. Com. v. Annis, 15 Gray (Mass.) 199. See also STORE.

3. "A 'shop,' in the sense of the statute (one defining arson) implies a house or building in which small quantities of goods, wares, or drugs and the like are sold, or in which mechanics labor and sometimes keep their manufactures for sale." State v. Morgan, 98 N. Car. 643. See also ARSON, vol. 1, p. 763. See also Reg. v. Carter, 1 C. & K. 173; 47 E. C. L. 173.

An act which made it a felony to break and enter into a dwelling, shop, warehouse, or countinghouse, was held not to include a workshop, but only that kind of shop which has some analogy with a warehouse; that is, one for the sale of goods. Reg. v. Saunders, 9 C. & P. 79; 38 E. C. L. 42.

Examples.—An *English Market* act provided that "every person, other than a licensed hawker, who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling place or shop, any articles in respect of which tolls are by the special act authorized to be taken in the market, shall, for every such offense, be liable to a penalty." "Shop,"

within this exception, has been held to include a wooden shed affixed to a house and supported on wooden posts. Ashworth v. Heyworth, 10 B. & S. 309. It does not include a vessel moored in a canal. Wiltshire v. Baker, 31 L. J. P. C. 10, note 1; 5 L. T. N. S. 355. See also Wiltshire v. Willett, 11 C. B. N. S. 240; 103 E. C. L. 240; Pope v. Whalley, 6 B. & S. 303; 118 E. C. L. 300; Llandiff v. Lyndon, 8 C. B. N. S. 515; 98 E. C. L. 512; Fearon v. Mitchell, L. R., 7 Q. B. 690.

If a photographer takes a private house and on the ground floor displays and sells photographs, albums, etc., he converts the dwelling into a "shop." Wilkinson v. Rogers, 2 DeG. J. & S. 62.

A tavern is not a "shop." Coombs v. Cook, Cab. & El. 75.

A banking house is a store, shop, or warehouse, within the *Connecticut* statute against the offense of burglariously breaking into and entering a "shop, store, or warehouse." Wilson v. State, 24 Conn. 57.

4. Church v. Meeker, 34 Conn. 424; quoting Bouv. L. Dict.

The seashore must be understood to be the margin of the sea in its usual and ordinary state. Thus, when the tide is out, the low-water mark is the margin of the sea; when the sea is full, the margin is the high-water mark. The seashore is, therefore, all the ground between the ordinary high-water mark and low-water mark. Storer v. Freeman, 6 Mass. 439; 4 Am. Dec. 155; Niles v. Patch, 13 Gray (Mass.) 257; Doane v. Willcutt, 5 Gray (Mass.) 335; 66 Am. Dec. 369; Hathaway v. Wilson, 123 Mass. 361.

The shore comprises "lands adjacent to navigable waters where the tide flows and re-flows, which at high tides are submerged and at low tides are bare." Bell v. Gough, 23 N. J. L. 683. See also People v. Morrill, 26 Cal. 354; Galveston v. Menard, 23 Tex. 358;

Definition.

SHORT—SHORT ENTRY.

Definition.

A river, in which the tide does not ebb and flow, or other non-tidal water, has no shores in the technical sense of that term. But the expression, when applied to such river or water, means those portions of the bank which touch the margin or edge of the stream at low water.¹

SHORT.—See GAMBLING CONTRACTS, vol. 8, pp. 1004, 1011.

SHORT ENTRY.—See ENTRY, vol. 6, p. 649.

U. S. v. Pacheco, 2 Wall. (U. S.) 587; Cutts v. Hussey, 15 Me. 241.

More Extended Meanings.—But in Matthew v. Chaplin, 40 Conn. 400, where defendant contended that the word "shore" has a definite and inflexible meaning in law, denoting the space between ordinary high and low water mark, it was said: "It is true that the word 'shore' is now generally used in treatises on navigable waters in that sense; but Lord Hale says there be three kinds of shore (Hale's De Jure Maris, ch. 6). One of these three kinds is a space between high and low water mark. Both the other kinds embrace portions of the land above ordinary high-water mark. Webster, in his dictionary, defines 'shore' thus: 'The coast or land adjacent to the ocean, sea, or a large lake or river.' He says we use the word to express the land near the border of the sea or of a great lake for an indefinite extent; as, when we say 'a town stands on the shore.' Bouvier defines 'shore' as 'land on the side of the sea, or a lake or a river.' He gives to the compound word 'seashore' the more limited meaning of land between high and low water mark." And it was held accordingly, where a deed of land reserved the privilege "of piling up seaweed on the shore," that the word "shore" was not used in the strict sense contended for by the defendant, and that the right was reserved to pile seaweed upon the adjoining upland. See also People v. Jones, 112 N. Y. 605.

The westerly terminus of a tunnel was defined in a certificate filed under the *New Jersey* general railroad law to be on the "western shore of the Hudson River and within or near Jersey City or Hoboken." It was held that the word "shore" was "not used in its strictest sense to mean the land between the limits of ordinary high and low water, but in the more extended and popular sense. In the latter signification of the word, Jersey City is built upon the western shore of

the Hudson River." State v. Hudson River Tunnel R. Co., 38 N. J. L. 548. See also Lacy v. Green, 84 Pa. St. 519.

Ordinary Tides—Greatest Tide.—Although it appears from the above cases that by the common-law definition the "shore" is the "ground between the ordinary high-water mark and low-water mark," the definition of the civil law is "all that tract of land over which the greatest water flood extends itself." Morgan v. Negodish, 40 La. Ann. 246; Galveston v. Menard, 23 Tex. 358. And see also upon the common-law definition, Lacy v. Green, 84 Pa. St. 519.

"In a conveyance, when a line of 'shore' is used as an abuttal unexplained by circumstances, it may be ambiguous, leaving it doubtful whether the seaside or the land side of the shore is intended. In general, it will appear by the context which." Doane v. Willcutt, 5 Gray (Mass.) 335; 66 Am. Dec. 369. But in general the boundary is the land side. See BOUNDARIES, vol. 2, p. 504; Long Beach Land, etc., Co. v. Richardson, 70 Cal. 206; More v. Massini, 37 Cal. 432; U. S. v. Pacheco, 2 Wall. (U. S.) 587. Compare Hathaway v. Wilson, 123 Mass. 359.

Shore and beach may be deemed equivalent words, in a description of a boundary of lands conveyed; each signifying lands washed by the sea. East Hampton v. Kirk, 68 N. Y. 459.

See also Cutts v. Hussey, 15 Me. 241; BEACH, vol. 2, p. 159.

On the Shore.—See ON, vol. 17, p. 188.

1. Child v. Starr, 4 Hill (N. Y.) 369. See also Bainbridge v. Sherlock, 29 Ind. 364; 95 Am. Dec. 644; Lacy v. Green, 84 Pa. St. 514. Compare Starr v. Child, 20 Wend. (N. Y.) 149.

"The shores of a river border on the water's edge." Handly v. Anthony, 5 Wheat. (U. S.) 374.

"The bank of a stream is the continuous margin where vegetation ceases; and the shore is the pebbly, sandy, or rocky space between that and

Definition.

SHORTHAND—SIDE-BAR RULE.

Definition.

SHORTHAND.—See STENOGRAPHERS.

SHORT-HAUL.—See FREIGHT, vol. 8, p. 931.

SHOULD.—Compare MAY, vol. 14, p. 979; STATUTES, and references under those titles.

SHOW.—See note 1.

SHYSTER.—(See also PETTIFOGGING, vol. 18, p. 413).—The word “shyster”—defined in Webster to mean a “trickish knave, one who carries on any business, especially a legal business, in a dishonest way”—is evidently capable of having reference to the professional character and standing of a lawyer.²

SICK; SICKNESS.—(See also BAIL, vol. 2, p. 10; DISEASE, vol. 5, p. 682; LIFE INSURANCE, vol. 13, p. 634).—“Sick” is defined to be: 1. Affected with or attended by nausea, inclined or inclining to vomit; as, sick at the stomach, a sick headache. 2. Having a strong dislike, disgust with, of: as, to be sick of flat-tery, to be sick of a country life. 3. Affected with diseases of any kind; ill, indisposed; not in health.

“Sickness” is defined to be: 1. The state of being sick or diseased. 2. A disease or malady.³

SIDE.—See note 4.

SIDE-BAR RULE.—See RULE OF COURSE, vol. 21, p. 439.

low-water mark.” McCullough v. Wainright, 14 Pa. St. 174.

1. **Distinguished from Indicate.**—“Although the words ‘show’ and ‘indicate’ are sometimes interchangeable in popular use, they are not always so. The present ordinary use of the words discloses a difference in signification, and that difference is perhaps more recognizable when these terms are applied to the law, or to medical science. To ‘show’ is to make apparent or clear by evidence, to prove, whilst an indication may be merely a symptom, that which points to, or gives direction to the mind.” Coyle v. Com., 104 Pa. St. 133.

Show Forth in Evidence.—See FORTH, vol. 8, p. 565.

“**Show**” in the sense of an Exhibition—(See also THEATER).—A United States statute provided for the taxing of plays, performances, musical entertainments, “feats of horsemanship, acrobatic sports, or other shows.” It was held that horse-races could not be taxed under the statute. This construction was given to the statute by applying the *ejusdem generis* principle to the words “other shows.” U. S. v. Buffalo Park, 16 Blatchf. (U. S.) 189.

2. Gribble v. Pioneer Press Co., 34 Minn. 343. See also Gribble v. Pioneer Press Co., 37 Minn. 277.

3. Kelly v. Ancient Order of Hibernians, 9 Daly (N. Y.) 291. In that case it was held that a permanent injury to a limb did not constitute sickness.

Insanity is “sickness,” and where a mutual benefit association agrees to pay benefits to members disabled by “sickness,” a member who becomes a lunatic is entitled to benefits. McCullough v. Expressmen’s Mut. Ben. Assoc. (Pa. 1890), 19 Atl. Rep. 355; Burton v. Eyden, L. R., 8 Q. B. 295; Pellazzino v. Society, 16 Weekly Cincinnati L. Bul. 27. See also Kelly v. Ancient Order of Hibernians, 9 Daly (N. Y.) 291.

Last Sickness.—See LAST, vol. 12, p. 907; NUNCUPATIVE WILLS, vol. 16, p. 1006.

4. **Side.**—“No doubt in a certain context the word ‘side’ might be so used as to be shown, by that context, to be contradistinguished from the top, or bottom, or end of a subject of quadrilateral or any other figure. But for this purpose a determining context is necessary. In the absence of such a context it is accurate, both in scientific

Definition.

SIDEWALK—SIGNATURE.

Definition.

SIDEWALK.—See **STREETS**.

SIGN—SIGNATURE—(See also **ATTESTATION**, vol. 1, p. 938; **FORGERY**, vol. 8, p. 452; **HAND**, vol. 9, p. 262; **HANDWRITING**, vol. 9, p. 263; **MARK**, vol. 14, p. 457; **SEALS**, vol. 21, p. 882; **SUBSCRIBE**; **WRITING**; **WRITTEN INSTRUMENTS**).—Webster defines to sign as “to affix a signature to; to ratify by hand or seal; to subscribe in one’s own handwriting;” and signature as “a sign, stamp, or mark impressed; . . . especially the name of any person written with his own hand employed to signify that the writing which precedes accords with his wishes or intentions; a sign manual.”¹

In the note will be found many references to specific titles for cases deciding what are valid signatures to particular instru-

and in ordinary language, to say that a quadrilateral table has four sides.” *Ridsdale v. Clifton*, 2 P. D. 341.

Bounded by the Side of a Road, Lane, etc.—See **BOUNDARIES**, vol. 2, p. 507. See also note to 39 Am. Rep. 305; *Mott v. Mott*, 68 N. Y. 246; *Kings Co. F. Ins. Co. v. Stevens*, 87 N. Y. 287; 41 Am. Rep. 361.

Sides of a Railroad.—“Sides,” as used in a *Missouri* statute requiring fences to be erected on the sides of a railroad, means the vacant spaces between the roadbed and the outer lines of the company’s land—not necessarily the dividing line itself. *Marshall v. St. Louis, etc., R. Co.*, 51 Mo. 138.

“The side or sides of any carriage-way or cartway,” § 51, 27 & 28 Vict., ch. 101, means any land forming part of the highway, though not part of the metaled road; but does not include land not part of the highway, though by the side of the road. *Easton v. Richmond, L. R.*, 7 Q. B. 69.

Imports Proximity.—To speak of a thing being on the side of some other thing, “contemplates some degree of proximity.” “It is doubtful, to say no more, whether a building 300 or 400 yards distant from another building can be said to be on one side of it,” within § 3, 51 & 52 Vict., ch. 52, which prohibits the bringing forward of a building beyond the front main wall of the house or building “on either side” of it. *Ravensthorpe v. Hinchcliffe*, 59 L. J. M. C. 22.

1. *Knox’s Estate*, 131 Pa. St. 230.

“In the primary sense of the word, a person signs a document when he writes or marks something on it in token of his intention to be bound by its contents. In the case of an ordinary

person, signature is commonly performed by subscribing his name to the document, and, hence, ‘signature,’ is frequently used as equivalent to ‘subscription;’ but any mark is sufficient if it shows an intention to be bound by the document. Illiterate persons commonly sign by making a cross.” *Sweet’s L. Dict.*

“A signature consists both of the act of writing a party’s name, and of the intention of thereby finally authenticating the instrument. It is not necessary that a testator should write his entire name. His mark is now held sufficient. And if the signature is made by another guiding his hand with his consent, it is held sufficient.” 2 Greenl. Ev. 674, followed in *Watson v. Pipes*, 32 Miss. 466; *Vines v. Clingfost*, 21 Ark. 312. See also **WILLS**.

Signature Includes a Mark—(See also **MARK**, vol. 14, p. 457).—All the definitions include a mark, and no dictionary limits a signature to a written name. *BAIL*, vol. 2, p. 21; *BILLS AND NOTES*, vol. 2, p. 318; *FRAUDS, STATUTE OF*, vol. 8, p. 717. *Knox’s Estate*, 131 Pa. St. 230; *Zacharie v. Franklin*, 12 Pet. (U. S.) 161; *Shank v. Butsch*, 28 Ind. 19; *Bickley v. Keenan*, 60 Ala. 295; *Baker v. Denning*, 8 A. & E. 94; 35 E. C. L. 335, and in the last case it was held that the fact that the person signing by a mark could write would not weaken the force of a mark as his signature.

Initials.—In *Origet v. U. S.*, 125 U. S. 240, it was held that the initials of a judge were not his signature, within a statute requiring a bill of exceptions to be authenticated by the signature of the presiding judge. But initials have in many cases been held to constitute

ments. These references should all be consulted, as it is obvious that authorities upon the signature of a deed may apply as well to wills, to the memorandum in writing required by the Statute of Frauds, etc., etc.

SIGNING JUDGMENT—I. IN ENGLISH PRACTICE.—Judgments, like the pleadings, were formerly pronounced in open court, and are still always supposed to be so; and they are consequently always considered as taking place in term time. But, by a relaxation of practice, there is now in general, except in the case of an issue at law, no actual delivery of judgment, either in court or elsewhere. The plaintiff or defendant, when the cause is in such a state that by the course of practice he is entitled to

a valid signature. See BAIL, vol. 2, p. 21; BILLS AND NOTES, vol. 2, p. 318; FRAUDS, STATUTE OF, vol. 8, p. 717.

Christian name held a sufficient signature to a will. *Knox's Estate*, 131 Pa. St. 220.

Indorsement Upon a Promissory Note.—Within the meaning of a statute, making it a crime to obtain "the signature of any person to any written instrument" by false tokens or pretenses, an indorsement to a negotiable promissory note was held to be a "signature to a written instrument." *People v. Chapman*, 4 Park. Cr. Rep. (N. Y.) 58.

Obtaining a Signature by False Pretenses.—See FALSE PRETENSES, vol. 7, p. 742.

Signature Not Necessarily at the End of an Instrument—Signed Distinguished from Subscribed.—(See also SUBSCRIBE).—"The word 'signed' in reference to a contract or other instrument in writing, is generally understood as a writing of the name at the bottom; yet now, neither in its ordinary nor legal use, is it confined to that office; but the word 'subscribed' in its habitual use, and according both to its popular and literary signification, is limited to a signature at the end of a printed or written instrument." *James v. Patten*, 6 N. Y. 13; 55 Am. Dec. 376; *People v. Murray*, 5 Hill (N. Y.) 468; *Miller v. Pelletier*, 4 Edw. (N. Y.) 102; *Clason v. Bailey*, 14 Johns. (N. Y.) 484; FRAUDS, STATUTE OF, vol. 8, p. 717; WILLS.

Printed Signature.—In general where a signature is required, the party's name printed upon the instrument with his sanction will suffice. *Mezchen v. More*, 54 Wis. 214; *Barnard v. Heydrick*, 49 Barb. (N. Y.) 62; *Schneider v. Norris*, 2 M. & S. 286; *Brown v. Butchers'*, etc., *Bank*, 6 Hill (N. Y.)

443; 41 Am. Dec. 755; FRAUDS, STATUTE OF, vol. 8, p. 717.

An indictment is sufficiently "signed" by the prosecuting attorney, when his name with his official title is printed at the bottom with his sanction. *Hamilton v. State*, 103 Ind. 96; 53 Am. Rep. 491.

Signatures of Public Officers.—See PUBLIC OFFICERS, vol. 19, p. 378; PROCESS, vol. 19, p. 222.

Countersign (see also COUNTERSIGN, vol. 4, p. 342) means to sign what has already been signed by a superior; to authenticate by an additional signature. *Gurnee v. Chicago*, 40 Ill. 167. In that case it was held, where the signatures of several city officers were required by statute to a warrant, that the prefix "countersign" placed before one of the names did not invalidate the signature.

"Signed, Sealed and Delivered" Equivalent to "Executed."—See ACKNOWLEDGMENT, vol. 1, p. 153.

"Signed" Equivalent to "Executed."—See EXECUTE, vol. 7, p. 117.

Proof of Signature.—See HANDWRITING, vol. 9, p. 263; WILLS; WRITTEN INSTRUMENTS.

Who Determines Genuineness.—See QUESTIONS OF LAW AND FACT, vol. 19, p. 598.

Signatures to Bills or Notes.—See BILLS AND NOTES, vol. 2, p. 318.

To Indictments.—See INDICTMENTS, vol. 10, p. 505, *et seq.*

To the Memoranda Required by the Statute of Frauds.—See FRAUDS, STATUTE OF, vol. 8, p. 717, *et seq.*

To Deeds.—See DEEDS, vol. 5, p. 440.

To Bonds.—See BONDS, vol. 2, pp. 455-458.

To Bail Bonds.—See BAIL, vol. 2, p. 20.

To Process.—See SERVICE OF PROCESS.

Definition.

SILVER PLATE—SIMILITUDE.

Definition.

judgment, obtains the signature or allowance of the proper officer of the court, expressing generally that judgment is given in his favor, and this is called signing judgment, and stands in the place of its actual delivery by the judges themselves.¹

II. IN AMERICAN PRACTICE.—Signing judgment is an actual signing of the judgment on the record, by the judge or other officer duly authorized.²

SILVER PLATE.—See note 3.

SIMILAR.—(*Compare* SIMILITUDE).—The word “similar” is often used to denote a partial resemblance only, but it is also often used to denote sameness in all essential particulars.⁴

SIMILITER.—In pleading, likewise; the like; the name of the short formula used either at the end of pleadings, or by itself, expressive of the acceptance of an issue of fact tendered by the opposing party; otherwise termed a joinder in issue.⁵

SIMILITUDE.—See note 6.

To Summons.—See SUMMONS.

To Wills.—See WILLS.

1. Stephen on Pleading (3d Am. ed.) 137.

2. Bouv. L. Dict. See also JUDGMENTS, vol. 12, p. 71.

3. See PLATE, vol. 18, p. 466; *Atwater v. Woodbridge*, 6 Conn. 223; 16 Am. Dec. 50.

4. *Com. v. Fontain*, 127 Mass. 452. In *Rhode Island Trust, etc., Co. v. Onley*, 16 R. I. 184, it was held, where a testator after making bequests to particular charitable institutions by name, provided for the accumulation of a trust fund, one-fourth of the income of which was to go to “charitable institutions similar to those mentioned,” that the institutions named were not “similar,” and were not entitled to take any part of the trust income.

Similar Jurisdiction.—See JURISDICTION, vol. 12, p. 316.

5. Burr. L. Dict. “The acceptance of the issue in case of a conclusion to the country—*i. e.*, of trial by jury—is called the *similiter*, that word, when the pleadings were in Latin, being a prominent one in the formula. . . . As the party has no option in accepting the issue when well tendered, and as the *similiter* may, in that case, be added for him, the acceptance of the issue, when well tendered, is so much a matter of form that by the statute of *jeofails*, the omission of the *similiter* is, as we have seen, after verdict, cured (*Virginia Code* 1873, ch. 177, § 3);

and perhaps it is so at common law independently of any statute. (*Bennett v. Holbech*, 3 Saund. 319a, n. (6); *Sayer v. Pocock*, Cowp. 407; *Grundy v. Mell*, 1 B. & P. 28; *Nadenbousch v. McRae*, Gilmer (Va.) 230). . . .

It will be observed that the rule expresses that the issue must be accepted only when it is well tendered. For if the opposite party thinks the traverse bad in substance or in form, or objects to the mode of trial proposed, in either case he is not obliged to add the *similiter* but may demur. (Stephen Pl. 238.) The *similiter* serves a twofold purpose. It not only marks the acceptance of the question itself, but also of the mode of trial proposed. It seems to have been introduced originally with a view to the latter point only; for in ancient times, the resort to a jury could in general be had only by the mutual consent of each party, and the *similiter* imported that consent. Accordingly, no *similiter*, or other acceptance of issue, is necessary when recourse is had to any of the other modes of trial, and the rule in question does not extend to these.” 4 Minor’s Ins. (2d ed.) 924.

6. **Similar Distinguished from “in the Similitude of.”**—In *State v. McKenzie*, 42 Me. 392, it was held that the word “similar” was not equivalent to “in the similitude of” within the meaning of a statute respecting counterfeit money. The court, by Tenney, J., said: “The word ‘similitude’ is derived from the Latin *similitudo*, which is translated ‘similitude, likeness, resemblance.’ It

Definition. SIMPLE CONTRACT—SIMPLE TRUSTS. Definition.

SIMPLE CONTRACT—(See also **CONTRACT**, vol. 3, pp. 825, 830).—A contract which is not under seal nor of record; not a specialty.

SIMPLE LARCENY—(See also **LARCENY**, vol. 12, pp. 791, 793).—Simple larceny is plain theft, without any circumstances of aggravation, as opposed to compound, usually termed aggravated larceny, or larceny accompanied by circumstances which tend to increase the heinousness of the offense, as larceny from the person, larceny from a house,—taking property from under the protection of a person or house being justly considered as indicating a greater degree of depravity in the thief than the taking of the same article when not under such protection.¹

SIMPLE TRUSTS—(See also **TRUSTS**).—A simple trust, sometimes called a passive trust, corresponds with the ancient use and is where property is simply vested in one person for the use of another, and the nature of the trust, not being qualified by the settler, is left to the construction of law.²

is manifest from the same section of the statute that the word 'similitude' was designed to be used as synonymous with the word 'forge' or 'counterfeit.' The meaning given to the words 'to forge,' is 'to make in the likeness of something else;' and 'to counterfeit' is 'to make in imitation of something else, with a view to defraud, by passing the false copy for genuine or original.' Webster's Dict." See generally **COUNTERFEITING**, vol. 4, p. 333; **FORGERY**, vol. 8, p. 452; *Brown v. Com.*, 8 Mass. 59.

A United States statute (§ 4557 of the Rev. Sts., as amended by the act of January 16, 1887) enacts that every person who falsely makes, forges, or counterfeits any coin "in resemblance or similitude" of the silver coins of the United States, shall be guilty of a felony. In *U. S. v. Otey*, 31 Fed. Rep. 68, it was held that an indictment under this statute might omit the words "in resemblance or similitude." The court, by Deady, J., said: "The words of the statute, 'in resemblance or similitude,' are a mere variation or exposition of the principal and preceding words thereof, 'falsely make, forge, or counterfeit,' each of which means to make something in the resemblance or similitude of another. If they were dropped out of the statute, its legal signification and effect would not be modified or restrained. To falsely make, forge, or counterfeit a silver coin of the coinage of the United States is to make something in the

'resemblance or similitude' of such coin. The explanatory words add nothing to the legal sense and common acceptation of the principal ones. Therefore the former are necessarily included in the latter. It is an instance of tautology and verbosity, inherited from the past, in which the statute abounds." See generally **FORGERY**, vol. 8, p. 495.

1. May's Cr. Law, § 148.

2. 1 Bouv. Inst. (2d ed.) 1900.

Distinguished from Special Trust.—Trusts are of two kinds, simple and special. *Vaux v. Parke*, 7 W. & S. (Pa.) 25. In the former, the trustee is passive and performs no duty, and the trust is there purely technical. In the latter he is active, being an agent to execute the donor's will; and the trust is operative. A simple trust gives to the *cestui que trust* a right to the possession, control, and disposal of the property, and the legal estate becomes executed in him, unless when it is necessary to remain in the trustee to preserve the estate for the *cestui que trust*, or to pass it to others. A special trust, on the other hand, maintains the legal estate in the trustee to enable him to perform the duties devolved on him by the donor, and gives to the *cestui que trust* only a right in equity to enforce a performance of the trust. *Vaux v. Parke*, 7 W. & S. (Pa.) 25. See also *Barnet's Appeal*, 46 Pa. St. 392; *Rife v. Geyer*, 59 Pa. St. 393; 98 Am. Dec. 351; *Dodson v. Ball*, 60 Pa. St. 496; 100 Am. Dec. 586.

Definition.

SINCE—SINKING FUND.

Definition.

SINCE—(See also **SUBSEQUENTLY**).—The proper signification of since is after, and its appropriate sense includes the whole period between an event and the present time.¹

SINE DIE.—Without day; indefinitely; without a day appointed for a further meeting or hearing. The term is applied to the final adjournment of an assembly, for whatever purpose called, or to the final dismissal of a defendant.

SINGLE.—See note 2.

SINGLE BILL OR BOND—(See also **BONDS**, vol. 2, p. 448).—If a bond be without condition, it is called a single bill or bond.³

SINGULAR.—See note 4.

SINKING FUND (*Compare* **FUND**, vol. 8, p. 983) is a fund arising from particular taxes, imposts, or duties, which is appro-

1. Webster's Dict., followed in *In re Rosenfield*, 7 Am. Law Reg. N. S. 621; 1 Nat. Bank. Reg. 575. See also *Jones v. First Nat. Bank*, 79 Me. 195.

"Since" a day named does not ordinarily include that day. *Monroe v. Acworth*, 41 N. H. 201.

2. **Single Man, Single Woman**.—Acts which gave a "single woman" who had a bastard child the right to sue the putative father for its maintenance have been held to include in that expression, not only a widow (*Anthony v. Cardenham*, 2 Bott. 194; *Reg. v. Wymondham*, 2 Q. B. 541; 42 E. C. L. 798), but a married woman living apart from her husband. *Rex v. Pilkington*, 2 E. & B. 546; 75 E. C. L. 546; *Reg. v. Collingwood*, 12 Q. B. 681; 64 E. C. L. 681; *Rex v. Luffe*, 8 East 193. *Compare* *Stacey v. Lintell*, 4 Q. B. Div. 291.

But the term will not include a woman single at the birth of her child but who has since married. *Stacey v. Lintel*, 4 Q. B. Div. 291; *Tozer v. Lake*, 4 C. P. Div. 322.

And it has been held, where the object and context of the statute required it, that the phrase "single man" included a single woman. *Silver v. Ladd*, 7 Wall. (U. S.) 217. And see for a fuller statement of that case *MAN*, vol. 14, p. 86.

Single Tenement.—Where a part of an entire tract of land upon which plaintiff's mill was built, including the pond or water-basin which was a necessary adjunct or appurtenance to the mill, was in a certain county, the remainder being in another, it was held that this was a "single tenement" within the mean-

ing of the *Pennsylvania* statute giving jurisdiction to the court of either county. *Finney v. Somerville*, 80 Pa. St. 59.

Single Sitting.—"It seems to have been once thought, that, in the act of Anne, which gave the loser at play a right to recover by action his losses above 10*l.*, when lost at a single sitting, and gave an informer the right to recover them and treble value besides, if the loser did not take proceedings in time, the expression 'a single sitting' might receive two different meanings according as the plaintiff was a loser or an informer; that is, that a sitting suspended for dinner should be held single and continuous when the loser sued, but be broken into two sittings when the action was brought by the informer, on the ground that in one case the act was remedial and therefore entitled to a beneficial construction, while in the latter it was penal and therefore was to be construed strictly." *Endlich on Statutes*, § 387; *citing* *Bones v. Booth*, 2 W. Bl. 1226.

3. *Shattuck v. People*, 5 Ill. 483.

4. **Singular and Plural**.—The rule of construction that "words importing the singular number only may also be applied to the plural of persons and things" (*Code*, § 798) is only to be applied to the words of a statute or instrument when the plain and evident sense and meaning of the words, derived from the context, render such a construction necessary to effect the intention of the maker of the statute or instrument. *Garrigus v. Parke Co.*, 39 Ind. 66. See also *NUMBER*, vol. 16, p. 1005; *STATUTES*; *WILLS*.

Definition.

SISTER—SITTINGS.

Definition.

priated toward the payment of the interest due on a public loan and for the payment of the principal.¹

SISTER—(See also BROTHER, vol. 2, p. 599; STATUTES OF DESCENT AND DISTRIBUTION).—A woman who has the same father and mother with another, or one of them only. In the first case she is called sister simply; in the second, half-sister.²

SIT—(Compare SITTINGS).—See note 3.

SITE.—See note 4.

SITTING.—See note 5.

SITTINGS.—In practice, the holding of a court, with full form, and before all the judges, as a sitting *in banc*; the holding of a court of *nisi prius* by one or more of the judges of a superior court instead of the ordinary *nisi prius* judge.⁶

1. Union Pac. R. Co. v. Buffalo Co., 9 Neb. 453. See also Bank for Savings v. Mayor, etc., of N. Y., 102 N. Y. 313; Ketchum v. Buffalo, 14 N. Y. 367.

2. Bouv. L. Dict. quoted in Wood v. Mitchell, 61 How. Pr. (N. Y.) 48.

A gift to "sisters" may include half-sisters. Luce v. Harris, 79 Pa. St. 432.

But, if, by holding sisters in a will to include half-sisters, the testator's property would be diverted to strangers, that construction will not be adopted, owing to the familiar rule that where a will is capable of two interpretations that one should be adopted which prefers those of the blood of the testator to strangers. Wood v. Mitcham, 92 N. Y. 379. See also WILLS.

3. Sit in any Case.—See CASE, vol. 3, p. 30.

4. The charter of Jersey City empowers the board of public works to purchase "sites" for certain necessary public buildings. In State v. Mayor, etc., of Jersey City, 36 N. J. L. 168, the court, by Woodhull, J., said: "A site, in the sense of the act, means only so much land as is reasonably required or needed for the location and convenient use of some particular necessary building, . . . not a tract of unlimited extent, designated for the location and use of such buildings as might, in the near or distant future, become necessary, but only so much land as in the judgment of the board was reasonably required for the purposes of that one building." Accordingly, it was held that a purchase of

nine acres of land for a city hall was unauthorized, there being no determination of the board that so large a tract was needed for the city hall.

5. By the constitution of Maryland, it is provided that the party against whom a decision is made, may have the point or question reserved for the consideration of the court *in banc*; but the motion for the reservation of the point, must be entered of record during the "sitting" at which the decision was made. It was held that the word "sitting" as here used, was not synonymous with "term" of the court, but only includes the time between the decision and the adjournment of the court for the day. Costigin v. Bond, 65 Md. 122. Compare SITTINGS.

6. Stephen's Com. 422, 423.

Sittings Equivalent to Term.—An Oregon act provided for the holding of a district court in one place in each judicial district, and for "sittings" in each county for the trial of issues of fact. It was held that the word "sittings" may be regarded as signifying "term." The court by Wait, C. J., said: "The district judges in their 'sittings' in the several counties for the trial of issues of fact, attended as they were by clerks, sheriffs, juries, and all the paraphernalia of courts of record, were holding district courts, and the duration of each of these sittings was a 'term' of court." Gird v. State, 1 Oregon 311. Compare SITTING.

Sittings in Bank or Banc.—The sessions of a court, with the full bench present, for the purpose of determining matters of law argued before them. Black's L. Dict.

SITUATE—(*Compare* SITUS).—To have a *situs*; a place or position.¹

SITUATION.—See note 2.

SITUS.—Site; location; situation. A place where a thing is. Real property has always a fixed *situs*; and so, of course, the actual *situs* of tangible chattels can always be readily determined. But it is obvious that the *situs* of intangible chattels, such as choses in action, must be conventional. At common law, however, rules have been established which assign a *situs* or locality to every subject of personal property for the purposes of administration and probate; and there seems to be no reason why these rules should not be extended to cases arising under the recording acts.³

1. And. L. Dict. Anderson says that in the United States, the term "situated" has been more commonly used than "situate" in such expressions as "all that tract of land situated," etc. The term "situate" is, however, still very common.

"Generally speaking, a house may be said to be situate on all the land within the same inclosure, necessary for its proper enjoyment, and actually so used and occupied." *Orr v. Baker*, 4 Ind. 86.

2. An action was brought by the plaintiff for the death of her husband caused by a fall into an excavation, dug by the defendant, adjoining the highway. It was claimed for the defense that plaintiff's husband was drunk. The trial court instructed that "ordinary care means that degree of care which may reasonably be expected of a person in the situation of plaintiff's husband at the time the accident occurred." It was held that the word "situation," as here used, had reference to the probable surroundings of the plaintiff's husband at the time of the accident, and not to his physical and mental condition, and therefore there was no error in the charge. *Buesching v. St. Louis Gas-Light Co.*, 73 Mo. 219; 39 Am. Rep. 503.

3. See 2 Minor's Inst. (2d ed.) 853; RECORDING ACTS, vol. 20, p. 575.

Situs of Personal Property.—(See also PROBATE, vol. 19, p. 186).—Dr. Minor (2 Minor's Inst. (3d ed.) 853) gives the rules as follows:

1. "Movable and tangible chattels are, of course, of the county or corporation where they are at the date of the writing to be registered.

2. "Shares in joint-stock companies

belong to the county or corporation where the chief office of the company is situated and shares transferred. (See also *Arnold v. Arnold*, 62 Ga. 627.)

3. "Judgments, decrees, recognizances, and other debts of record, are of the county or corporation where the record is kept—that is, where is the seat of the court. (See also *Smith v. Union Bank*, 5 Pet. (U. S.) 525; *Vaughn v. Barret*, 5 Vt. 337; 26 Am. Dec. 306; *Thomas v. Tanner*, 6 T. B. Mon. (Ky.) 58.)

4. "Bonds, mortgages, and specialties generally (and, it would seem, negotiable securities in a negotiable state) are of the county or corporation where they happen to be at the date of the execution of the writing which affects them; and if not then in the State, they are understood to belong where the debtor resides. (*Ex parte Barker*, 2 Leigh (Va.) 719; *Fisher v. Bassett*, 9 Leigh (Va.) 119; 33 Am. Dec. 227.) See also *Smith v. Union Bank*, 5 Pet. (U. S.) 525; *Vaughn v. Barret*, 5 Vt. 337; 26 Am. Dec. 306; *Goodlett v. Anderson*, 7 Lea (Tenn.) 286; *Moore v. Jordan*, 62 Ga. 627; PROBATE, vol. 19, p. 169.

5. "Promissory notes, bills of exchange, and all simple contract demands, are of the county or corporation where the debtor resides. (*Fisher v. Bassett*, 9 Leigh (Va.) 119; 33 Am. Dec. 227.) See also *Stearns v. Wright*, 51 N. H. 600; *Murphy v. Creighton*, 45 Iowa 179; *Sullivan v. Fosdick*, 10 Hun (N. Y.) 173; *Swancy v. Scott*, 9 Humph. (Tenn.) 327; *Wyman v. Halstead*, 109 (U. S.) 654. See also *Smith v. Union Bank*, 5 Pet. (U. S.) 525; *Vaughn v. Barret*, 5 Vt. 337; 26 Am.

SKATING RINK—SLAVES AND SLAVERY.

SKATING RINK.—See LICENSE, vol. 13, p. 535.

SLANDER.—See LIBEL AND SLANDER, vol. 13, p. 292.

SLANDER OF TITLE.—See LIBEL AND SLANDER, vol. 13, p. 366.

SLAUGHTER-HOUSES.—See MUNICIPAL CORPORATIONS, vol. 15, pp. 1174, 1180; NUISANCES, vol. 16, p. 952; POLICE POWER, vol. 18, p. 748.

SLAVES AND SLAVERY.

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| I. Definition, 788. | V. Legitimacy—Inheritance, 794. |
| II. Incapacity to Take or Hold Property, 788. | VI. Effect of Slavery on Property Rights of Free Negroes, 795. |
| III. Marriage, 789. | VII. Abolition, 795. |
| IV. Divorce, 794. | |

I. DEFINITION.—Slavery is properly a state of involuntary servitude for life.¹ A slave is a person who is wholly subject to the will of another; one who has no freedom of action, but whose person and services are wholly under the control of another.²

II. INCAPACITY TO TAKE OR HOLD PROPERTY.—The peculiar relations of slaves to each other and to the white population of the South produced different rules of property from those belonging to any other class of people, and dissimilar to the other disabilities. It was a universal rule that the property of the slave was that of his master, and that he could neither take nor hold property.³

A conveyance in trust to slaves to cultivate and receive the profits, was held void.⁴ Following the same rule, a bequest to a

Dec. 306; PROBATE, vol. 19, p. 168.
"And lastly—

6. "Demands against the commonwealth belong to the county or corporation wherein is situated the seat of government. (Com. v. Hudgin, 2 Leigh (Va.) 248.)"

But in *Vaughan v. Northup*, 15 Pet. (U. S.) 6, it was said: "The debts due from the government of the United States have no locality at the seat of government. The United States, in their sovereign capacity, have no particular domicile, but possess, in contemplation of law, an ubiquity throughout the Union; and the debts due by them are not to be treated like the debts of a private debtor, which constitute local assets in his own domicile." See also *U. S. v. Cox*, 18 How. (U. S.) 105; *U. S. v. Halstead*, 109 U. S. 654. And see *Ex parte Dauthereau*, 2 Brev. (S. Car.) 459; cited in PROBATE, vol. 19, p. 168.

Taxation.—For *situs* of personal property within tax laws, see TAXATION.

1. 1 Minor Inst. (3d ed.) 161.

An institution by which one man is made the property of another. *Douglas v. Ritchie*, 24 Mo. 177.

2. Webster's Dict.

3. *Jenkins v. Brown*, 6 Humph. (Tenn.) 299; *Fable v. Brown*, 2 Hill (S. Car.) 378; *Fletcher v. State*, 6 Humph. (Tenn.) 256; *Bedford v. Williams*, 5 Coldw. (Tenn.) 207; *M'Cullough v. Moore*, 9 Yerg. (Tenn.) 307; *Hall v. U. S.*, 92 U. S. 27.

Contracts Void.—All contracts to which a slave is a party are void; it matters not what efforts have been made for freedom, or what privileges are enjoyed. *Woodland v. Newhall*, 31 Fed. Rep. 434.

So where a slave contracted for the purchase of realty, and made payments thereon, both before and after he was emancipated, he was allowed to file a bill for a rescission after he was emancipated, and to recover back payments made on the ground of incapacity to make an original contract. *Embry v. Morrison*, 4 Baxt. (Tenn.) 186.

4. *Smith v. Betty*, 11 Gratt. (Va.) 752; *Rucker v. Gilbert*, 3 Leigh (Va.)

slave was void,¹ and he could not take in such a case even through the interposition of a trustee.²

III. MARRIAGE.—The practical questions which arise to-day from the defunct institution of slavery, are those growing out of slave marriages, and relating to the rights of the children of such marriages. The customary slave marriage was for most purposes a nullity and was not governed by the rules of law applicable to free marriages; yet where it did not interfere with the doctrines of slavery and the rights of the master, effect was given to it so far as possible.³

8; *Wynn v. Carrell*, 2 Gratt. (Va.) 227.

1. *Hargraves v. Lott*, 67 Ga. 133.

2. *Taylor v. Embry*, 16 B. Mon. (Ky.) 340; *Trotter v. Blocker*, 6 Port. (Ala.) 269; *Lamb v. Girtman*, 26 Ga. 625; *Graves v. Allan*, 13 B. Mon. (Ky.) 190; *Jones v. Lipscomb*, 14 B. Mon. (Ky.) 239; *Turner v. Smith*, 12 La. Ann. 417; *Hinds v. Brazealtee*, 2 How. (Miss.) 837; 32 Am. Dec. 307; *Craig v. Beatty*, 11 S. Car. 375.

Bequests in Contemplation of Emancipation.—But where a testator provided for certain slaves serving his children until such slaves were thirty years old, and then each was to have twenty-five acres of land, neither the conversion of the land into money nor release of such service before the time fixed will defeat the trust. *Clement v. Riley*, 33 S. Car. 66. And in general, trusts for the benefit of slaves in contemplation of emancipation were upheld. *Hoover v. Brem*, 43 Miss. 603; *Estill v. Deckerd*, 4 Baxt. (Tenn.) 497; *Brown v. Brown*, 12 Md. 87; *Cowan v. Stamps*, 46 Miss. 435.

3. 1 Bishop on Mar., Div. & Sep., § 654; *Smith v. State*, 9 Ala. 990; *Haden v. Ivey*, 51 Ala. 381; *Canteloe v. Hood*, 56 Ala. 519; *Howard v. Howard*, 6 Jones (N. Car.) 235; *State v. Taylor*, Phil. (N. Car.) 508; *State v. Adams*, 65 N. Car. 537; *State v. Samuel*, 7 Dev. & B. Eq. (N. Car.) 177; *Com. v. Clements*, 6 Binn. (Pa.) 206; *Timmins v. Lacey*, 30 Tex. 115; *McKnight v. State*, 6 Tex. App. 158; *Johnson v. Johnson*, 45 Mo. 595; *Estill v. Rogers*, 1 Bush (Ky.) 62; *Minor v. Jones*, 2 Redf. (N. Y.) 289; *Wallace v. Godfrey*, 42 Fed. Rep. 812.

Thus, in *Smith v. State*, 9 Ala. 990, it was held that slaves cohabiting as husband and wife might be witnesses for and against each other. But in *Georgia* the rule was otherwise. *Williams v. State*, 33 Ga. Supp. 85. In

Andrews v. Page, 3 Heisk. (Tenn.) 653, it was said by the court that there were "circumstances under which the courts of this State recognized the relation of husband and wife, and the ties of consanguinity, as existing among slaves, as well as among free persons and free persons of color; and we hold that a marriage between slaves, with the consent of their owners, whether contracted in common law form or celebrated under the statute, always was a valid marriage in this State, and that the issue of such marriages were not illegitimates. We do not hold that such marriages were followed by all the legal consequences resulting from the marriage of white persons."

Mr. Bishop well states the effect of a slave marriage. "Since there was recognized among slaves the same distinction between matrimony and fornication as among freemen; since slave marriages were for most purposes invalid when tested by the general law, simply by reason of the incompatibility of the duties of common marriage with those due from the slave to the master; and since by universal sentiment and public opinion, ripening into a law for slaves, their customary marriages were valid as far as in the nature of the case they could be,—they are deemed to have been, not null in the widest sense of the word, but only null as compared with ordinary marriage; and were good in law for any purpose for which they could so be held, not inconsistent with the master's superior claims or the general policy of the law of slavery. This rule would seldom permit any validity to be assigned them in the every day litigation of the courts, hence judges would naturally speak of them as void." 1 Bishop on Mar. & Div., § 659.

Marriage Between Master and Slave.—In *Pearson v. Pearson*, 51 Cal. 124, it was held that a marriage between a

Emancipation alone, whether general or special, apparently had no effect upon the slave marriage. But emancipation accompanied by the consent of the parties to a transmutation of the slave marriage into a legal one, or by continued cohabitation, had the effect of rendering the imperfect slave marriage a valid and legal union.¹ In those States where a formal solemnization is

master and his female slave contracted within a jurisdiction where such marriages were lawful, manumitted the slave. The court said: "There being no law or regulation at the time prevailing in the territory of Utah interdicting marriage between a white and a black person, we think that such an intermarriage legally had there between a master and his female slave, neither party being otherwise incapacitated to contract marriage, operated, by analogy to the rule of a common law already adverted to, the manumission of the slave woman, since such manumission was indispensable to her assumption of her new relation of wife to her former master. She certainly could not be, in contemplation of law, both the slave and wife of a person."

1. *Stikes v. Swanson*, 44 Ala. 633; *McReynolds v. State*, 5 Coldw. (Tenn.) 18; *McDowell v. Sapp*, 39 Ohio St. 558; *Wallace v. Godfrey*, 42 Fed. Rep. 812; *Jones v. Jones*, 36 Md. 447; 11 Am. Rep. 505.

Where slaves had children and lived as man and wife till the fall of 1866, and the State constitution in 1865 provided for the ratification of marriages between negroes, it was held that she was entitled to dower in his lands, although he had in October, 1866, abandoned her, and regularly married another woman by whom he had had a child before marriage, and with whom he lived until his death. *Washington v. Washington*, 69 Ala. 281.

"The slave, in entering into marriage, did a moral act; and although not binding in law, it was no violation of any legal duty. If, after the emancipation, there was no confirmation by cohabitation or otherwise, it is obvious there would be no grounds for holding the marriage as subsisting or binding. But, as in the case of other parties incapacitated, we perceive no good reason for holding that the contract may not be assented to and ratified after the incapacity or disability is removed. And in harmony with these views, the supreme court of *Louisiana*

have expressly decided that a marriage contracted in a state of slavery may be ratified and become binding by mutual assent and cohabitation after the slaves have attained their freedom." *Wagner, J.*, in *Johnson v. Johnson*, 45 Mo. 600; citing *Girod v. Lewis*, 6 Martin (La.) 559. And in *Girod v. Lewis*, 6 Martin (La.) 559, it was held that a slave marriage became binding by the subsequent emancipation of the parties, apparently *ipso facto*, without regard to their continued cohabitation or assent. See also *Pierre v. Fontenette*, 25 La. Ann. 617; *Pearce's Succession*, 30 La. Ann. 1168.

Mr. Bishop says: "The doctrine is, that, since the invalidity of slave marriages, whether deemed more or less or perfectly complete, was in consequence of their antagonism to the rights of the master, while yet the universal and universally known custom which sanctioned them was law up to the point of such antagonism, the same rules of dissent and affirmance which we have considered in their application to the marriages of insane persons—or probably made at one or two places even more liberal in favor of the marriage—governed these slave marriages subsequently to emancipation; namely, with nothing transpiring, they still lack the legal quality of ordinary or non-slave marriage; but without any new formalities, even in States by the general laws of which a formal solemnization is indispensable, the anti-emancipation marriages of the freedmen are perfected by any mutual consent of the parties, whether expressed in words or implied from a continuance of the cohabitation." And again, "The mutual consent which two slaves gave at their marriage was to be husband and wife in the slave-marriage sense. They had no opportunity to say, so they are not supposed to have considered, whether or not they would sustain the marriage relation as it is known among free persons. Therefore, according to our defining, to make the marriage a free marriage, they must after emancipation, either by continu-

necessary to a legal marriage, if from the want of some essential formality the slave union was itself meretricious, continued cohabitation after emancipation cannot render it a legal marriage.¹ In most, if not all, of the late slave holding States there are statutory or constitutional provisions confirming slave marriages after certain formalities, varying in the different States, have been complied with; and without any formality in others.² These

ing their cohabitation or otherwise, consent to it. Lacking this, the slave-marriage does not become a free marriage." 1 Bishop on Mar., Div. & Sep., §§ 661, 663.

North Carolina.—In *North Carolina* it was held contrary to the doctrine of the text that the fact of the husband and wife of a slave-marriage continuing to live together as husband and wife after emancipation, did not render such marriage a legal union. The court, commenting upon the case of *Girod v. Lewis*, 6 Martin (La.) 559, cited *supra*, this note, said: "No authority is cited, and no reason is given for the decision, except the suggestion that the marriage, being dormant during slavery, is endowed with full energy from the moment of freedom. We are forced to the conclusion that the idea of civil rights, being merely dormant during slavery, is rather a fanciful conceit (we say it with respect) than the ground of a sound judgment. It may be that in *Louisiana* the marriage relation is greatly affected by the influence of religion, and the mystery of its supposed dormant rights is attributable to its divine origin. If so, the case has no application; for in our courts marriage is treated as a mere civil institution."

But in *State v. Adams*, 65 N. Car. 537, it was held that it was not fornication for the parties to a slave marriage to continue their cohabitation after their emancipation, thus giving to this extent a recognition of the legality of the union.

Kentucky.—In *Kentucky*, the courts hold that a slave marriage can only be confirmed after emancipation in the manner prescribed by statute, and such confirmation will not relate back as against third parties to the time at which they were manumitted, although the cohabitation has been continuous. Thus, in *Stewart v. Munchandler*, 2 Bush (Ky.) 278, it was held that a colored woman could not plead coverture as a defense to a suit brought upon her note executed after her manumis-

sion but before she and her husband had gone through statutory formalities, although they had been married by a colored preacher as slaves, sixteen years before, and had lived together continuously since as husband and wife. See also *Estill v. Rogers*, 1 Bush (Ky.) 62.

In *Dowd v. Hurley*, 78 Ky. 260, however, it was held that the effect of complying with the statute was to legalize the customary marriage between persons of color, and not to institute a new marriage; and that after such confirmation of the slave marriage, the husband might claim the homestead exemption against creditors whose claims had their origin prior to such confirmation.

1. 1 Bishop on Mar., Div. & Sep., § 666.

2. *Georgia.*—In *Williams v. State*, 67 Ga. 260, it was held that it was not error on the part of the trial judge to charge, upon a trial for bigamy, that, if defendant and the woman alleged to be his wife (negro slaves prior to the emancipation) had lived in a state of concubinage, then the act of 1866 did not marry them; but on the contrary if they so lived on the 9th of March, 1866, then the act did marry them.

Virginia.—Code of 1873, ch. 104, § 13, provides: "Where colored persons before the passage of this act shall have undertaken and agreed to occupy the relation to each other of husband and wife, and shall be cohabiting together, as such, at the time of its passage, whether the rites of marriage shall have been solemnized between them or not, they shall be deemed husband and wife and be entitled to all the rights and privileges and subject to the duties and obligations of that relation in like manner as if they had been duly married by law." *Tritchett v. Smith*, 78 Va. 524. See also *Francis v. Francis*, 31 Grat. (Va.) 283.

And under the *Virginia* act rendering children of colored persons, recognized by the man as his, legitimate, the recognition may have occurred

prior to the passage of the statute. *Tritchett v. Smith*, 78 Va. 524. See also *Scott v. Raub*, 88 Va. 721.

Mississippi.—See *Andrews v. Simmons*, 68 Miss. 732.

Kentucky.—The *Kentucky* statute of February 14, 1886, provides that the husband and wife of the slave marriage "shall appear before the clerk of the county court of their residence, and declare that they have been and desire to continue living together as man and wife," and upon the payment of certain fees the clerk is required to make "a record of such declaration that shall be evidence of the existence of the marriage and the legitimacy of the issue born, and to be born of said parties, provided the issue of customary marriages of negroes shall be held legitimate." *Whitesides v. Allen*, 11 Bush (Ky.) 23. In this case, it was held that the children of such marriage were legitimate, even though the parents did not make the statutory declaration, and the statute was spoken of as "this confused statute." *Dowd v. Hurley*, 78 Ky. 260. See also *Brown v. McGee*, 12 Bush (Ky.) 428.

Where slaves were emancipated and thereafter lived together for a year, and had for twenty-five years prior thereto lived as husband and wife, this was sufficient to render a subsequent attempted marriage by the man with another woman void, and the first wife is entitled to dower in his land. *Ewing v. Bibb*, 7 Bush (Ky.) 655.

Alabama.—The constitutional convention of 1865 (R. C. of 1867, p. 64) adopted an ordinance providing that "All marriages between freedmen and freedwomen, whether in a state of slavery or since their emancipation, heretofore solemnized by anyone acting or officiating as a minister, or anyone claiming to exercise the right to solemnize the rites of matrimony, whether bond or free, are hereby ratified and made valid, provided the parties are now living together as man and wife; and in all cases of freedmen and freedwomen who are now living together recognizing each other as man and wife, be it ordained that the same are hereby declared to be man and wife, and bound by the legal obligations of such relationship." Of this ordinance the court, in *Washington v. Washington*, 69 Ala. 286, said: "By force of the ordinance, all the legal infirmity of their relation was removed

and they became husband and wife. They were not compelled into an involuntary relation, but the voluntary relation they had formed, and which by continuance after emancipation they had affirmed, so far as it was capable of confirmation by their own acts, was legalized." See also *Jackson v. State*, 53 Ala. 472; *McConico v. State*, 49 Ala. 6.

Arkansas.—The provisions of the act of February 6, 1867, providing that negroes and mulattoes then cohabiting as husband and wife, and recognizing that relation, should be deemed lawfully married from the passage of the act, with the rights and obligations appertaining to the marital relation, was valid, and of its own force created that relation between such persons as were within its provisions, without the necessity of a marriage ceremony. Evidence of cohabitation as husband and wife at and after the passage of the act, and the admission of the parties, are competent to establish a marriage under the act. *Scoggins v. State*, 32 Ark. 205.

The *Arkansas* act of 1867, rendering the recognized offspring of negroes, who had lived as man and wife, legitimate, included the children of parents who were then dead as well as the children of those living. *Gregley v. Jackson*, 38 Ark. 487.

Texas.—By section 27, art. 12, of the Constitution of 1869, all persons who were formerly held in bondage and in that condition lived together as husband and wife, and who, when that constitution was adopted, were so living together in this State, became legally married; and the abdication of that constitution by the constitution of 1876 has not annulled such marriages nor exempted those who contracted them from amenability to the laws relating to unlawful marriage. *Steward v. State*, 7 Tex. App. 326. See also *McKnight v. State*, 6 Tex. App. 158; *Hill v. Fairfax*, 38 Tex. 220; *Webb v. State*, 24 Tex. App. 165.

The above section legitimated the children of slaves who, prior to emancipation, lived together as husband and wife, and continued so to do until the death of one of them; and validated the marriages of such persons as were living together as husband and wife at the time of its adoption, and legitimated the children of such persons, whether born before or after that time. *Livingston v. Williams*,

75 Tex. 653; *Hill v. Fairfax*, 38 Tex. 220.

South Carolina.—In *Davenport v. Caldwell*, 10 S. Car. 317, it was held under the enabling acts of that State, where two slaves, persons of color, went through the form of marriage, lived together as husband and wife for a number of years, and died leaving issue before the general emancipation took place, that such persons were to be considered in law as husband and wife, their children legitimate and capable of inheriting from each other under the statute of distribution. The case has been recognized and followed in *State v. Whaley*, 10 S. Car. 500; *Dingle v. Mitchell*, 20 S. Car. 202; *Myers v. Ham*, 20 S. Car. 522; *James v. Mickey*, 26 S. Car. 270; *Clement v. Riley*, 33 S. Car. 66.

North Carolina.—The act of 1866, ch. 40, § 5, provides "that in all cases where a man and woman, both or one of whom were lately slaves, are now emancipated, now cohabit together in the relation of husband and wife, the parties shall be deemed to have been lawfully married as man and wife at the time of the commencement of such cohabitation, although they may not have been married in due form of law;" and further provides for an acknowledgment before the clerk of the county court, etc.

In *State v. Whitford*, 86 N. Car. 637, it was held that such act was not unconstitutional as validating a contract void for want of consent, the act making cohabitation and living together as man and wife after emancipation, and continued up to the time of ratification, evidence of the consent.

In *State v. Adams*, 65 N. Car. 537, it was held that the formality of acknowledgment before the clerk, etc., was not essential to the confirmation of the marriage. To the same effect is *Long v. Barnes*, 87 N. Car. 332.

In *State v. Harris*, 63 N. Car. 1, Reade, J., said: "The substance of marriage, the consent of the parties, existing, it was as clearly within the power of the legislature to dispense with any particular formality, as it was to prescribe such. This neither made nor impaired the contract, but gave effect to the parties' consent, and recognized as a legal relation that which the parties have constituted a natural one. So that by force of original consent of the parties while they were slaves, renewed after they became free,

and by the performance of what was required by the statute, they became to all intents and purposes man and wife."

Where a slave has maintained relations with two women, which separately considered would have brought either case within the terms of the legalizing statute, it was held that the statute did not render either union valid. The court said: "Its purpose and its effect are to legalize and give validity to a single relation formed and maintained among the late slave population and possessing the features and conditions of marriage." *Branch v. Walker*, 102 N. Car. 34.

The *North Carolina* act of 1879, declaring that "the children of colored parents," born before January 1, 1868, of persons living together as husband and wife, are legitimate children of such parents, with all the rights of heirs and next of kin, applies to the children of all colored parents, whether slaves or free, and whether the parents were incapable of entering into the marriage relation by virtue of positive law or their *status* as slaves. *Woodard v. Blue* (N. Car. 1889), 9 S. E. Rep. 492.

This statute has been held not to extend the right of inheriting beyond parents and children, and the estates of such parents and children. *Tucker v. Bellamy*, 98 N. Car. 33; *Jones v. Haggard*, 108 N. Car. 178. See also *Tucker v. Tucker* (N. Car. 1891), 13 S. E. Rep. 5.

Tennessee.—The provision of the code (Mill. & V.), §§ 3303, 3304 (act 1866), which declares to be husband and wife all colored persons living as such while in slavery, and conferring the right of inheritance on children of such persons, does not apply to marriages contracted without the consent of the owner of the contracting parties. *Brown v. Cheatham* (Tenn. 1892), 17 S. W. Rep. 1033. And though one of the parents died during slavery, still the child may inherit. *Wallace v. Godfrey*, 42 Fed. Rep. 812.

District of Columbia.—It is provided by act of Congress of February 6, 1879, "that the issue of any marriage of colored persons contracted and entered into according to any custom prevailing at the time in any of the States shall for all purposes of descent and inheritance" be deemed legitimate. It has been held that a slave marriage with the consent of the master was

statutes are in general applicable only where the cohabitation was continued down to the passage of the act,¹ "and only where the subsequent commerce was intended to be matrimonial."²

IV. DIVORCE.—The parties to the customary slave marriage might divorce themselves at will,³ but, in one State at least, such a divorce was of no effect without the consent of the master.⁴

V. LEGITIMACY—INHERITANCE.—As marriage between slaves was not held by the courts to be an illicit connection, but was regarded as a *quasi* marriage, and effect given to it as far as possible, having due regard to the rights of the master, the children of such marriage were not regarded as bastards, and therefore it would seem that upon emancipation their heritable blood was restored to them, apart from any statute expressly declaring them legitimate.⁵

It has been held that the slave marriage must have existed at the time of emancipation in order that the children might inherit as heirs of the father, and that if the marriage was dissolved during slavery they could not so inherit.⁶

If, from the disability of slavery, the descendant, at the death of the ancestor, was incapable of inheriting the property, subsequent emancipation will not enable him to take it,⁷ nor will an express statute declaring such emancipated slaves legitimate.⁸

As in several of the States a bastard may inherit and transmit inheritance through his mother, the question of legitimacy of a negro child claiming through a maternal ancestor would not in those States come in question.⁹

within the meaning of the act. *Thomas v. Holtzman*, 7 Mackey (D. C.) 62.

1. 1 Bishop on Mar., Div. & Sep., § 668; *Cantelou v. Hood*, 56 Ala. 519; *Livingston v. Williams*, 75 Tex. 653; *State v. Whaley*, 10 S. Car. 500; *Andrews v. Simmons*, 68 Miss. 732; *Jones v. Hoggard*, 108 N. Car. 178.

2. 1 Bishop on Mar., Div. & Sep., § 668; *Livingston v. Williams*, 75 Tex. 653; *Rundle v. Pegram*, 49 Miss. 751; *Clement v. Riley* (S. Car.), 11 S. E. Rep. 699; *Washington v. Washington*, 69 Ala. 281. But see *Williams v. State*, 67 Ga. 260.

3. 1 Bishop on Mar., Div. & Sep., § 667; *Pierre v. Fontenette*, 25 La. Ann. 617; *McDowell v. Sapp*, 39 Ohio St. 558.

4. *Brown v. Cheatham* (Tenn. 1892), 17 S. W. Rep. 1033.

5. *Andrews v. Page*, 3 Heisk. (Tenn.) 653; *Stikes v. Swanson*, 44 Ala. 633. Mr. Bishop argues for the position of the text with great force. 1 Bishop on Mar., Div. & Sep., §§ 670, 678. See also *Hoover v. Brem*, 43

Miss. 603; *Jones v. Jones*, 36 Md. 447; 11 Am. Rep. 505; *Wallace v. Godfrey*, 42 Fed. Rep. 812. But see *Andrews v. Simmons*, 68 Miss. 732; *Cantelou v. Hood*, 56 Ala. 519.

In *Ohio* the issue of a slave marriage (contracted in *Virginia*) have been held legitimate under a statute declaring that the issue of a marriage "null in law" shall be legitimate. *Morris v. Williams*, 39 Ohio St. 554.

6. *Pierre v. Fontenette*, 25 La. Ann. 617; *Harris v. Cooper*, 31 U. C. Q. B. 182. See also *McDowell v. Sapp*, 39 Ohio St. 558. But this is apparently unsupported by reason. 1 Bishop on Mar. & Div., § 676. See also *Brown v. Cheatham* (Tenn. 1892), 17 S. W. Rep. 1033.

7. 1 Bishop on Mar., Div. & Sep., § 675; *Woods v. Pearce*, 68 Ga. 160; *Bennett v. Williams*, 46 Ga. 399.

8. *Powell v. Com.*, 88 Ky. 689.

9. *Jackson v. Collins*, 16 B. Mon. (Ky.) 214; *Neel v. Hibard*, 30 La. Ann. 808; *Garland v. Harrison*, 8 Leigh (Va.) 368; *Johnson v. Johnson*, 45 Mo. 595. See also *BASTARDY*, vol. 2, p. 143.

The statutes confirming the slave marriages provide also that the issue of such marriages shall be deemed legitimate.¹

VI. EFFECT OF SLAVERY ON PROPERTY RIGHTS OF FREE NEGROES.—A free negro could take and hold land.²

VII. ABOLITION.—Involuntary servitude is abolished by constitutional amendment, except such as may be imposed as a punishment for crime.³

SLAY.—The word slay is synonymous with kill.⁴

1. See *supra*, this title, MARRIAGE.

2. Leiper v. Hoffman, 26 Miss. 615.

And where the owners of slaves took them to a State where slavery was not allowed, and emancipated them, they were then capable of holding property in *Mississippi*. Thus, where a testator took his slaves to *Ohio* and freed them, and then moved to *Kentucky*, where he died, and directed by will that his estate in *Mississippi* should be converted into money and invested in land in *Ohio* for the use of the freed slaves, it was held that they could take under the will. *Berry v. Alsop*, 45 Miss. 1, overruling *Mitchell v. Wells*, 37 Miss. 235, and *Heirn v. Bridault*, 37 Miss. 209.

A bequest made by a citizen of *Mississippi* to free negroes residing in a sister State, was sustained under the will probated in *Mississippi*; it might be otherwise as to specific property in *Mississippi*. *Shaw v. Brown*, 35 Miss. 246; *Leiper v. Hoffman*, 26 Miss. 615.

Where, by a will made before 1859, a free man of color devised property to his wife and to his two free sons, it was held, under *Kentucky* Rev. Stat., ch. 30, § 17, that a slave son, who had been emancipated before the death of his father in 1865, was entitled to a share in the estate and should take an interest in the undisposed of personalty equal to that which his brother received. *Miller v. Miller*, 4 Bush (Ky.) 482.

A purchase of property for purposes of worship, by an association of free colored persons, will be sustained, though such a corporation had no legal existence—as the individuals might acquire rights to the property in the corporate name. *African M. E. Church v. New Orleans*, 15 La. Ann. 441.

In *Pennsylvania*, a free colored man could preëempt land belonging to the commonwealth, where he settled with the intention of making his home.

Foremans v. Tamm, 1 Grant Cas. (Pa.) 23. The act of manumission of 1780 was to give to the colored man the same right as whites enjoy.

Under the *South Carolina* act of 1872, rendering the issue of slave marriages legitimate, property descends as in other cases, and the purchase of a slave wife by a free man of color raises the presumption that he accomplished her freedom by taking her out of the State and setting her free; and a wife and child take by descent in preference to sisters. *Dingle v. Mitchell*, 20 S. Car. 202. The act of 1872 is held to be retrospective.

In 1859, under the laws of *Alabama* and of the *United States*, free negroes, whose father and mother were slaves, but who moved to *Ohio*, were not citizens of *Ohio*, and could neither take lands by descent nor acquire a citizenship in *Alabama*. *Donovan v. Pitcher*, 53 Ala. 411; 25 Am. Rep. 634. See also *Tannis v. St. Cyr*, 21 Ala. 449.

3. Amendments to U. S. Const., art. 13; *In re Turner*, 1 Abb. (U.S.) 84. See also *Clark's Case*, 1 Blackf. (Ind.) 122; 12 Am. Dec. 213.

Performance of work upon an assessment for repair of roads is not such involuntary servitude as is contemplated by the amendment. *In re Dassler*, 35 Kan. 678.

A custom prevailing among the uncivilized tribes of Indians in *Alaska*, whereby slaves are bought, sold, and held in servitude, against their will, and subjected to ill treatment at the pleasure of the owner, is contrary to the thirteenth amendment to the constitution of the *United States*, and the "Civil Rights Bill" of 1866. *In re Sah Quah*, 31 Fed. Rep. 327.

4. *State v. Thomas*, 32 La. Ann. 351, in which case it was said: "The word 'slay' adds nothing to the force and effect of the word 'kill,' when used with reference to the taking of human life. It is particularly applicable to the taking of human life in battle; and

SLEEPING CARS; PALACE CARS.—(See also CARRIERS OF PASSENGERS, vol. 2, p. 738; INTERSTATE COMMERCE, vol. 11, p. 539; RAILROADS, vol. 19, p. 775.)

I. Ownership and Control, 796.

II. Duties, Obligations, and Liabilities of Company, 797.

I. OWNERSHIP AND CONTROL.—The sleeping cars and palace cars attached to railroad trains are owned in most instances, though not always, by corporations other than the railroad companies operating the trains; such corporations making a business of the ownership and management of such cars. The growth of the system is comparatively recent; but the relative rights of the sleeping-car company, the railroad company, and the passenger have been pretty well defined by judicial decisions. The railroad company cannot, speaking generally, relieve itself of its obligations and liabilities as a common carrier of passengers who make use of the accommodations afforded by the sleeping and palace cars.¹ A passenger may assume, in the absence of notice to the contrary, that the whole train is under one management.²

when it is not used in this sense, it is synonymous with 'kill.' The man that is slain is killed; and the man that is killed by the hand of his fellow-man is slain. It suffices to charge that the accused 'did feloniously kill and slay' the deceased; and it equally suffices to charge that the accused, with force and arms . . . did willfully and feloniously shoot and kill' the deceased."

1. See *Bevis v. Baltimore, etc., R. Co.*, 26 Mo. App. 19; *Wilson v. Baltimore, etc., R. Co.*, 32 Mo. App. 682; *Hillis v. Chicago, etc., R. Co.*, 72 Iowa 228; 31 Am. & Eng. R. Cas. 108; *Dwinelle v. New York Cent., etc., R. Co.*, 120 N. Y. 117; 44 Am. & Eng. R. Cas. 384; *Thorpe v. New York Cent., etc., R. Co.*, 76 N. Y. 402; 32 Am. Rep. 325; *Kinsley v. Lake Shore, etc., R. Co.*, 125 Mass. 54; 28 Am. Rep. 200.

The question whether railway companies should own their own sleeping cars is discussed in a note to *St. Louis, etc., R. Co. v. Southern Express*, 23 Am. & Eng. R. Cas. 545.

In *Thorpe v. New York Cent., etc., R. Co.*, 76 N. Y. 402; 32 Am. Rep. 325, it appeared that a passenger on the train, finding no vacant seats in the ordinary cars, entered the drawing-room car, which was not owned by the railroad company, and took a seat there; that when called upon for extra fare for the seat he refused to pay, but announced his willingness to go into another car if a seat were provided for him

there; and that then the porter of the drawing-room car, who was in the employ of the owner of that car, attempted forcibly to eject him. It was held that the railroad company was liable for the assault.

In *Pennsylvania R. Co. v. Roy*, 102 U. S. 451; 1 Am. & Eng. R. Cas. 225, the berth in the sleeping car broke down, to the injury of the occupant, and he was allowed to recover against the railroad company to whose train the sleeping car was attached.

In *Dwinelle v. New York Cent., etc., R. Co.*, 120 N. Y. 117; 44 Am. & Eng. R. Cas. 384, a passenger was assaulted by the porter of the sleeping car after, owing to a wash-out, the passenger had been transferred to another train. It was held that the question whether the porter was engaged in the performance of his duty as agent of the railroad company at the time of the infliction of the assault was for the jury under the facts and circumstances.

2. *Cleveland, etc., R. Co. v. Walrath*, 38 Ohio St. 461; 8 Am. & Eng. R. Cas. 371; 43 Am. Rep. 433.

In a *Louisiana* case a passenger sued the palace car company and also the railroad company for an assault committed on him by the porter of the palace car into which, without permission, he had entered to wash his hands. It was held that he could not recover against the palace car company. *Williams v. Pullman Palace Car Co.*, 40 La. Ann.

II. DUTIES, OBLIGATIONS, AND LIABILITIES OF COMPANY.—According to the weight of authority the liability of the sleeping-car company is neither that of a common carrier nor of an innkeeper.¹ There is, however, an obligation to exercise reasonable care and

87; 8 Am. St. Rep. 512, but that he could recover against the railroad company. *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 417; 33 Am. & Eng. R. Cas. 414. Compare *Pad-dock v. Atchison*, etc., R. Co., 37 Fed. Rep. 841.

In *Ulrich v. New York Cent.*, etc., R. Co., 108 N. Y. 80; 34 Am. & Eng. R. Cas. 350; 2 Am. St. Rep. 369, one traveling upon a free pass was injured by a collision due to the negligence of the railroad company. Upon the pass was an indorsement releasing the company from liability in case of accident. It appeared that the passenger had purchased from the drawing-room car conductor a ticket entitling him to a seat in that car. It was held that this did not make him a passenger for hire, nor vary the effect of the indorsement, and that he was not entitled to recover against the railroad company.

1. *Pullman Palace Car Co. v. Smith*, 73 Ill. 360; 24 Am. Rep. 258; *Scaling v. Pullman Palace Car Co.*, 24 Mo. App. 29; *Illinois Cent. R. Co. v. Handy*, 63 Miss. 609; 56 Am. Rep. 846; *Lewis v. New York Sleeping Car Co.*, 143 Mass. 269; 28 Am. & Eng. R. Cas. 148; 58 Am. Rep. 145; *Woodruff Sleeping*, etc., *Coach Co. v. Diehl*, 84 Ind. 474; 9 Am. & Eng. R. Cas. 294; 43 Am. Rep. 102; *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87; 33 Am. & Eng. R. Cas. 407; 8 Am. St. Rep. 512; *Pullman Palace Car Co. v. Gaylord*, 23 Am. L. Reg. N. S. 788; *Tracy v. Pullman Palace Car Co.*, 67 How. Pr. (N. Y.) 154; *Welch v. Pullman Palace Car Co.*, 16 Abb. Pr. N. S. (N. Y.) 352; *Palemeter v. Wagner*, 11 Alb. L. J. 149; *Bevis v. Baltimore*, etc., R. Co., 26 Mo. App. 19; *Pullman Palace Car Co. v. Gardner*, 3 Penny (Pa.) 78; 16 Am. & Eng. R. Cas. 324; *Pullman Palace Car Co. v. Matthews*, 74 Tex. 654; 15 Am. St. Rep. 873; *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120; 34 Am. & Eng. R. Cas. 217; 5 Am. St. Rep. 31; *Lemon v. Pullman Palace Car Co.*, 52 Fed. Rep. 262.

In *Blum v. Southern Pullman Palace Car Co.*, 1 Flip. (U. S.) 500, *Browning, J.*, said: "*First*. The peculiar construction of sleeping cars is

such as to render it almost impossible for the company, even with the most careful watch, to protect the occupants of berths from being plundered by the occupants of adjoining sections. All the berths open upon a common aisle, and are secured only by a curtain, behind which a hand may be slipped from an adjoining or lower berth with scarcely a possibility of detection. *Second*. As a compensation for his extraordinary liability, the innkeeper has a lien upon the goods of his guests for the price of their entertainment. I know of no instance where the proprietor of a sleeping car has ever asserted such lien, and it is presumed that none such exists. The fact that he is paid in advance does not weaken the argument, as innkeepers are also entitled to prepayment. *Third*. The innkeeper is obliged to receive every guest who applies for entertainment. The sleeping car receives only first-class passengers traveling upon that particular road, and it has not yet been decided that it is bound to receive those. *Fourth*. The innkeeper is bound to furnish food as well as lodging, and to receive and care for the goods of his guests, and, unless otherwise provided by statute, his liability is unrestricted in amount. The sleeping car furnishes a bed only, and that, too, usually for a single night. It furnishes no food and receives no luggage, in the ordinary sense of the term. The conveniences of the toilet are simply an incident to the lodging. *Fifth*. The conveniences of a public inn are an imperative necessity to the traveler, who must otherwise depend upon private hospitality for his accommodation, notoriously an uncertain reliance. The traveler by rail, however, is under no obligation to take a sleeping car. The railway offers him an ordinary coach, and cares for his goods and effects in a van especially provided for that purpose. *Sixth*. The innkeeper may exclude from his house everyone but his own servants and guests. The sleeping car is obliged to admit the employes of the train to collect fares and control its movements. *Seventh*. The sleeping car cannot even protect its guests, for the conductor of the train has a right to put them off

vigilance over the persons and property of passengers, especially while they are sleeping.¹

The company is bound to furnish the required accommodations, if it has them;² but not to one who by the rules of the railroad company is not entitled to use these accommodations, as, for example a second-class passenger, or one not holding a through ticket.³ The company is bound, and it is its right, to preserve order and enforce a proper decorum, as well as to keep a reasonable watch over the persons and property of passengers.⁴ So it

for non-payment of fare or violation of its rules and regulations. I hold, therefore, that sleeping-car companies are not subject to the responsibility of innkeepers at common law, and that defendant cannot be held liable upon that ground."

The argument against this position is stated and summed up in an article by Morris Gray in 20 Am. Law Review, p. 159.

In *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239; 40 Am. & Eng. R. Cas. 637; 26 Am. St. Rep. 325, it was held that the liability of a sleeping-car company in the case of articles of wearing apparel lost in the car was similar to the innkeeper's liability. Of this case it is said in *Hutchinson on Carriers* (2d ed.), § 617d, note: "This case is clearly opposed to the great weight of authority, and its force is lessened by the fact that the court treated the question as a new one, which it obviously was not." See also *Thompson on Carriers of Passengers*, p. 531; *Pullman Palace Car Co. v. Gardner*, 3 Penny (Pa.) 78; 16 Am. & Eng. R. Cas. 324.

1. *Carpenter v. New York, etc., R. Co.*, 124 N. Y. 53; 47 Am. & Eng. R. Cas. 421; 21 Am. St. Rep. 644; *Lewis v. New York Sleeping Car Co.*, 143 Mass. 267; 28 Am. & Eng. R. Cas. 148; 58 Am. Rep. 135; *Pullman Palace Car Co. v. Gaylord*, 23 Am. Law Reg. N. S. 788; *Woodruff Sleeping, etc., Coach Co. v. Diehl*, 84 Ind. 474; 9 Am. & Eng. R. Cas. 294; 43 Am. Rep. 102; *Scaling v. Pullman Palace Car Co.*, 24 Mo. App. 29; *Bevis v. Baltimore, etc., R. Co.*, 26 Mo. App. 19; *Hampton v. Pullman Palace Car Co.*, 42 Mo. App. 134; *Pullman Palace Car Co. v. Gardner*, 3 Penny (Pa.) 78; 16 Am. & Eng. R. Cas. 324; *Pullman Palace Car Co. v. Matthews*, 74 Tex. 654; 15 Am. St. Rep. 873; *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120; 34 Am. & Eng. R. Cas. 217; 5 Am. St. Rep. 31; *Barrott v. Pullman Palace Car Co.*, 51 Fed. Rep. 796.

For an indecent assault upon a female passenger by the porter of the sleeping car, the company is liable. *Campbell v. Pullman Palace Car Co.*, 42 Fed. Rep. 484. See also *Heenrich v. Pullman Palace Car Co.*, 10 Sawy. (U. S.) 80; 20 Fed. Rep. 100.

A sleeping-car company is liable in an action on the case for excluding a passenger from a berth which it has assigned him and which he has offered to pay for. *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222; 11 Am. & Eng. R. Cas. 92; 46 Am. Rep. 688.

Loss of Ticket.—A passenger in a sleeping car lost his ticket. The agent declined to issue another ticket but gave him his personal card with the statement thereon: "This gentleman holds seat in 'Nokomis' this P. M. Misland. C. E. Benedict." With this card and his passage ticket the passenger took his seat in the drawing-room car, and when called upon by the conductor for his drawing-room car ticket explained the facts and produced the card of the agent. The conductor refused to recognize the card and compelled him to remove to an ordinary car. In an action for damages the company was held liable. *Buck v. Webb*, 58 Hun (N. Y.) 185.

2. *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222; 11 Am. & Eng. R. Cas. 92; 46 Am. Rep. 688; *Searles v. Mann Boudoir Car Co.*, 45 Fed. Rep. 330.

3. *Lawrence v. Pullman Palace Car Co.*, 144 Mass. 1; 28 Am. & Eng. R. Cas. 151; 59 Am. Rep. 58; *Lemon v. Pullman Palace Car Co.*, 52 Fed. Rep. 262.

One who has paid for a berth from one point to another is entitled to a continuous passage in it, or in one equally as good, and cannot be transferred to another berth or another car at the arbitrary discretion of the company. *Pullman Palace Car Co. v. Taylor*, 65 Ind. 153; 32 Am. Rep. 57.

4. *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222; 11 Am. & Eng. R. Cas. 92;

is bound to awaken and notify passengers in time for them to leave the train.¹ A breach of these duties, or either of them, will confer a right of action.²

46 Am. Rep. 688; *Lewis v. New York Sleeping Car Co.*, 143 Mass. 267; 28 Am. & Eng. R. Cas. 148; 58 Am. Rep. 135; 2 Rorer on Railroads 987; *Pullman Palace Car Co. v. Balles*, 80 Tex. 211; 47 Am. & Eng. R. Cas. 416.

1. *Pullman Palace Car Co. v. Smith*, 79 Tex. 468; 23 Am. St. Rep. 356.

2. *Pullman Palace Car Co. v. Balles*, 80 Tex. 211; 47 Am. & Eng. R. Cas. 416.

In *Blum v. Southern Pullman Palace Car Co.*, 1 Flip. (U. S.) 500, it appeared that the plaintiff, a passenger, put his waistcoat, containing his wallet and money, under his pillow. It was the custom of the company to have the conductor and porter keep awake during the night, but on this night they went to sleep. In the morning the wallet and money were gone. It was held that plaintiff was entitled to recover their value.

In *Pullman Palace Car Co. v. Gardner*, 3 Penny. (Pa.) 78; 16 Am. & Eng. R. Cas. 324, Gardner put his watch and pocketbook under the outside corner of the mattress of his berth, went to sleep, and next morning both money and watch were gone. The watchman, who should have been on duty, had been negligently absent, and Gardner got a judgment. *Woodruff, etc., Sleeping Coach Co. v. Diehl*, 84 Ind. 474; 9 Am. & Eng. R. Cas. 294; 43 Am. Rep. 102, presents almost the same state of facts as the Gardner case, and, as there, a judgment against the company was affirmed.

In an action against a palace car company, it appeared that plaintiff was a passenger in one of defendant's sleeping cars; that he was told he would require to change cars on account of a wreck, that having partially dressed himself, he left his pocketbook containing a sum of money lying upon the bedding of his berth and went to the wash room, whence, having finished dressing, he went out of the car and forward to the wrecked train some 60 or 70 yards distant. Immediately on arriving there he missed his pocketbook and went back to recover it. He found the conductor and porter in the smoking room and informed them of his loss. All the other passengers had left the car before plain-

tiff, and they did not return to it until after he did. He testified that he was not absent from the car more than three or four minutes, and that when he left it no one remained in it except the conductor and porter. It appeared in evidence that a train brakeman had passed through the car but without stopping. The conductor, porter and passengers were searched, but the pocketbook was not found. *Held*, that a verdict for the plaintiff was sufficiently sustained by the evidence, and that it would not be reversed on appeal. *Pullman Palace Car v. Matthews*, 74 Tex. 654; 15 Am. St. Rep. 873. Henry, J., who delivered the opinion of the court, said: "In the case of *Pullman's Palace Car Co. v. Pollock*, 69 Tex. 120; 34 Am. & Eng. R. Cas. 217, the following language of the supreme court of Massachusetts, used in deciding the case of *Lewis v. New York Sleeping Car Co.*, 143 Mass. 267; 28 Am. & Eng. R. Cas. 159; 58 Am. Rep. 135, is quoted with approbation: 'While it [the sleeping car company] is not liable as a common carrier or as an innholder, yet it is its clear duty to use reasonable care to guard the passengers from theft; and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable therefor.' We think this doctrine is as applicable to the case now before us as it was in the cases in which it was asserted. The evidence suggests either that the plaintiff did not lose any money or that the servants of the defendant, or one of them, found and appropriated it. The district court found the issue in favor of the plaintiff, and the judgment is sufficiently sustained by the evidence to make it our duty to affirm it, following the rule always enforced in such cases. The position in which plaintiff left his money was unquestionably an act of negligence on his part; and, if the evidence did not so conclusively exclude the idea of its having been taken by anybody except the servants of defendant, who were in charge of the car, he ought not to have had a recovery, because of his own negligence. The fact, however, that plaintiff's negligence furnished

The company cannot avoid liability for property lost or stolen through its negligence, by posting in the car a notice disclaiming responsibility, if it does not appear that the passenger saw the notice.¹ Negligence on the part of the company, or its servants, is not to be presumed from the mere fact of a loss, but must be shown;² and contributory negligence on the part of the complaining passenger may defeat his recovery.³

the temptation and opportunity to defendant's servants to take the money did not release it from its obligation to protect him against them."

1. *Lewis v. New York Sleeping Car Co.*, 143 Mass. 267; 28 Am. & Eng. R. Cas. 148.

2. *Root v. New York Cent. Sleeping Car Co.*, 28 Mo. App. 199; *Tracy v. Pullman Palace Car Co.*, 67 How. Pr. (N. Y.) 154; *Carpenter v. New York, etc., R. Co.*, 124 N. Y. 53; 47 Am. & Eng. R. Cas. 421; 21 Am. St. Rep. 644; *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120; 34 Am. & Eng. R. Cas. 217; *Hillis v. Chicago, etc., R. Co.*, 72 Iowa 228; 31 Am. & Eng. R. Cas. 108; *Dargan v. Pullman Palace Car Co. (Tex.)*, 26 Am. & Eng. R. Cas. 149; *Stearns v. Pullman Car Co.*, 8 Ont. Rep. 171; 21 Am. & Eng. R. Cas. 443. Compare *Railroad Co. v. Walrath*, 38 Ohio St. 461; 8 Am. & Eng. R. Cas. 371; 43 Am. Rep. 433; *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239; 40 Am. & Eng. R. Cas. 637.

3. *Barrott v. Pullman's Palace Car Co.*, 51 Fed. Rep. 796; *Whitney v. Pullman Palace Car Co.*, 143 Mass. 243; 28 Am. & Eng. R. Cas. 147; *Root v. New York Cent. Sleeping Car Co.*, 28 Mo. App. 199; *Hillis v. Chicago, etc., R. Co.*, 72 Iowa 228; 31 Am. & Eng. R. Cas. 108; *Illinois Cent. R. Co. v. Handy*, 63 Miss. 609; 56 Am. Rep. 846; *Pullman Palace Car Co. v. Matthews*, 74 Tex. 654; 15 Am. St. Rep. 873.

In *Welch v. Pullman Palace Car Co.*, 16 Abb. Pr. N. S. (N. Y.) 352, Welch went to bed in a sleeping car, placing his overcoat in a vacant berth overhead. In the morning it was missing and he sued to recover its value, and got a judgment therefor, which was, however, reversed. In *Pullman Palace Car Co. v. Gaylord*, 23 Am. Law Reg. N. S. 788, Gaylord placed a scarf, having upon it a \$300 diamond pin, in the receptacle intended for articles of clothing and placed at the head of the berth. The pin was stolen, suit was brought, the company de-

murred, and on appeal the demurrer was sustained.

In *Whitney v. Pullman Palace Car Co.*, 143 Mass. 243, the plaintiff, while the train was stopping at a station, left the car for ten minutes, leaving his satchel upon the sill of one of the car windows, which could be reached from the outside through an adjoining open window. It was held that the plaintiff was guilty of negligence which contributed to his loss and that the action could not be maintained.

A passenger on a railway train entered a car, having in the pocket of his overcoat a sum of money, and gave the overcoat to the porter without mentioning the money, and the porter hung the coat in the passenger's berth. It was held that the money was in his own custody and at his risk; and the fact that soon afterwards an accident overturned the car, and on the passenger making his way out told the porter and brakeman of the railway company that the money was in the car, put no liability for the money on the company as gratuitous bailee, or otherwise, and it was not in such case responsible for the loss of the money. *Hillis v. Chicago, etc., R. Co.*, 72 Iowa 228; 31 Am. & Eng. R. Cas. 108.

In an action against a sleeping-car company for the loss of a passenger's property by theft, the evidence tended to show that the property of two passengers in one car was stolen from their berths during the same night; that the porter of the car was found asleep at an early hour of the morning in a position from which no view could be had of that part of the car in which the passengers were asleep; and that the porter was required to be on duty for thirty-six hours continuously, which included two nights. It was held that there was evidence of negligence on the part of the defendant proper to be submitted to the jury. *Lewis v. New York Sleeping Car Co.*, 143 Mass. 267.

In *Root v. New York Cent. Sleeping Car Co.*, 28 Mo. App. 199, it ap-

Definition.

SLIP—SLOUGH.

Definition.

In the case of a loss of property which the passenger in the sleeping car retains in his possession, the liability of either the railroad company or the sleeping car company is limited to the amount of money reasonably necessary for the traveling expenses of the passenger upon the projected journey,¹ and to the amount of baggage usually carried by passengers in their valises.²

SLIP—(See also DOCKS, vol. 5, p. 851; WHARVES).—1. A slip is an opening between two pieces of land or wharves.³

2. That part of a police court in which the prisoner is placed; the dock.⁴

3. In marine insurance in *England* "the 'slip' is in practice the complete and final contract between the parties, fixing the terms of the insurance and the premium; and neither party can, without the assent of the other, deviate from the terms thus agreed on without a breach of faith, for which he would suffer severely in his credit and future business."⁵

SLOUGH.—See note 6.

peared that the plaintiff, a passenger, deposited a purse containing nearly \$500 in his vest-pocket and placed his vest under his pillow, and that in the morning he left it there while in the toilet-room for five minutes. The court discussed the questions of negligence and contributory negligence, and deemed the facts to show "specific negligence on the part of the passenger touching the custody of his own valuables of a gross character," and that there was no case to go to the jury upon the ground of negligence.

In *Illinois Cent. R. Co. v. Handy*, 63 Miss. 609; 56 Am. Rep. 846, the court, in reviewing a charge to the jury, said, that if the passenger "carelessly and negligently left his pocket-book on the car when he reached his destination, and its contents were abstracted by persons other than the servants of the company, there would be no liability on the part of the company."

1. *Barrott v. Pullman's Palace Car Co.*, 51 Fed. Rep. 796; *Illinois Cent. R. Co. v. Handy*, 63 Miss. 609; 56 Am. Rep. 846; *Root v. New York Cent. Sleeping Car Co.*, 28 Mo. App. 199; *Wilson v. Baltimore, etc., R. Co.*, 32 Mo. App. 682; *Blum v. Southern Pullman Palace Car Co.*, 1 Flip. (U. S.) 500; 3 Cent. L. J. 591. See also *Pullman Palace Car Co. v. Gardner*, 3 Penny. (Pa.) 78; 16 Am. & Eng. R. Cas. 324; *Carpenter v. New York, etc., R. Co.*, 124 N. Y. 53; 47 Am. & Eng. R. Cas. 421; 21 Am. St. Rep. 644.

2. *Hampton v. Pullman Palace Car Co.*, 42 Mo. App. 134; *Blum v. Southern Pullman Palace Car Co.*, 1 Flip. (U. S.) 500; 3 Cent. L. J. 591.

3. *Mayor, etc., of N. Y. v. Scott*, 1 Cai. (N. Y.) 543; *Thompson v. New York, 3 Sandf. (N. Y.) 487*; *Mayor, etc., of N. Y. v. Rice*, 4 E. D. Smith (N. Y.) 604.

"The word has undoubtedly been used in two senses, that is, as designating the docks which form the intermediate space, and also as designating the intermediate space formed by the docks, but most generally in the latter sense." *Thompson v. Mayor, etc., of N. Y.*, 11 N. Y. 120.

4. *Brown's L. Dict.*

5. *Ionides v. Pacific F. & M. Ins. Co.*, L. R., 6 Q. B. 674; *aff'd* L. R., 7 Q. B. 517; 1 Moak's Rep. 637. See also *Cory v. Patton*, L. R., 7 Q. B. 308; L. R., 9 Q. B. 577; *Morrison v. Universal M. Ins. Co.*, L. R., 8 Exch. 199.

The slip, though "binding in honor and conscience," is not enforceable at law or in equity, owing to the statute of 30 Vict., ch. 23, §§ 7, 9. See *Ionides v. Pacific F. & M. Ins. Co.*, L. R., 6 Q. B. 674; *aff'd* L. R., 7 Q. B. 517; 1 Moak's Rep. 637; *Cory v. Patton*, L. R., 7 Q. B. 308; L. R., 9 Q. B. 577; *Morrison v. Universal M. Ins. Co.*, L. R., 8 Exch. 199.

6. "Slough" means "a channel diverging from the main channel and returning into it again at a lower point. . . . We know as matter of history, that streams diverging from the main

Definition.

SLUICE DAM—SMUGGLE.

Definition.

SLUICE DAM.—A sluice dam is for the purpose of utilizing the water of a stream by raising a head sufficient to float logs and lumber over obstructions and shoal places down to the dam; and then by letting it out, flood the stream below so as to carry the logs down to their destination. It is constructed with a sluiceway, or opening, for the passage of logs. When logs are not passing, it is closed to collect the water above; and when logs come down and are desired to be passed through, it is opened to let them out, together with sufficient water to carry them down stream.¹

SMART-MONEY.—(See also **EXEMPLARY DAMAGES**, vol. 7, p. 448).—Vindictive, punitive, or exemplary damages.

SMOKE.—(See also **NUISANCE**, vol. 16, p. 946; **STREET RAILWAYS**).—See note 2.

SMUGGLE.—(See **REVENUE LAWS**).—The word "smuggle" is a technical word having a known and accepted meaning. It implies

stream whether running into it again or forming a distinct outlet for the waters of a river into some other body of water, are called sloughs, even though navigable for steamboats." *Black River Imp. Co. v. La Crosse Booming, etc., Co.*, 54 Wis. 673; 41 Am. Rep. 66. See also *Dunlieth, etc., Bridge Co. v. Dubuque*, 55 Iowa 565.

1. *Anderson v. Munch*, 29 Minn. 416.

2. **Constitutionality of Smoke Ordinances.**—In *People v. Lewis*, 86 Mich. 273, 37 Am. & Eng. Corp. Cas. 481, a city ordinance forbidding under penalty the emission of dense smoke from any chimney in the city, but exempting dwelling houses and steamboats from its operation, was held not to be invalid on the ground that it makes an unreasonable discrimination between classes of persons residing within the same municipal territory. But in that case two of the justices dissented; and in *State v. Ramsey Co.* (Minn. 1892), 51 N. W. Rep. 112, the relator was arrested upon the charge of creating a nuisance in violating chapter 375, Special Laws of Minnesota 1889, declaring the emission of dense smoke within the city of St. Paul under certain circumstances a nuisance and prescribing a penalty. Section 3 contained the following provision: "Nothing herein contained shall be construed to apply to manufacturing establishments using the entire product of combustion, and the heat, power, and light produced thereby, within the building, where they are generated or within a radius of three hundred feet therefrom."

The relator asked for his discharge on *habeas corpus* for the reason that the said statute was unconstitutional as partial or class legislation. The court held the act unconstitutional, saying: "No arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar. The statute is leveled against the nuisance occasioned by dense smoke, and it can make no practical difference in what business the owners or occupants of the buildings in which such smoke is produced are engaged, or whether the heat evolved from the combustion of the fuel producing such smoke is applied to the generation of steam or other useful purposes; or, further, whether steam power is used in manufacturing or is applied to other uses, as a grain elevator or hoisting apparatus in a warehouse. We are obliged to hold that the distinction or classification attempted to be made is untenable. Section 3 must be read in connection with section 1, and is evidently intended to be a limitation upon the latter section, and is so connected with it that its provisions must be regarded as inseparable from the general purpose and object of the act so that the whole must stand or fall together. For these reasons we hold the act invalid."

As to when smoke amounts to a nuisance, see **NUISANCES**, vol. 16, p. 946.

Of smoke from elevated railroads as an element of damage to neighboring tenements, see **STREET RAILWAYS**.

Definition.

• **SO—SOCIETIES AND CLUBS.**

Definition.

something illegal and is inconsistent with an innocent intent. The idea conveyed by it is that of a secret introduction of goods with intent to avoid payment of duty.¹

SO.—The terms "hence" and "therefore" are sometimes the equivalent of "so," and the latter word is thus understood whenever what follows is an illustration of or conclusion from what has gone before.²

SOBER.—(Compare **DRUNKARD**, vol. 6, p. 34; **DRUNKENNESS**, vol. 6, p. 35; **HABITUAL DRUNKENNESS**, vol. 9, p. 258; **INTEMPERANCE**, vol. 11, p. 365; **INTOXICATING LIQUORS**, vol. 11, p. 705).—See note 3.

SOCAGE.—See **TENURE**.

SOCAGE, GUARDIAN IN.—See **GUARDIAN AND WARD**, vol. 9, p. 87.

SOCIETIES AND CLUBS.—(See also **BENEFICIAL ASSOCIATIONS**, vol. 2, p. 171; **BY-LAWS**, vol. 2, p. 705; **CORPORATIONS**, vol. 4, p. 184; **DISFRANCHISEMENT**, vol. 5, p. 684; **JOINT STOCK COMPANIES**, vol. 11, p. 1036; **PARTNERSHIP**, vol. 17, p. 824; **RELIGIOUS SOCIETIES**, vol. 20, p. 773; **STOCK EXCHANGE**).

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I. DEFINITION.—A society or club may be defined as a voluntary association of persons, generally unincorporated, united together

1. *U. S. v. Clafin*, 13 Blatchf. (U. S.) 184.

2. *Clem v. State*, 33 Ind. 431. See also *Leonard v. Territory*, 2 Wash. Ter. 381.

"So" when used in connection with something to be done—*e. g.*, "so completed"—imports the doing of the thing in the manner and so as to satisfy the requirements previously prescribed. *G. W. R. Co. v. Halesowen*, 52 L. J. Q. B. 479. See also *Elmer v. Burgin*, 2 N. J. L. 173.

Sometimes Equivalent to Hereinbefore.—The expression "so devised" in a will has been held to mean "hereinbefore devised." *Giles v. Melsom*, L. R., 6 H. L. 24.

"So Far as the Law Allows."—In *Davies v. Davies*, 36 Ch. Div. 359, a covenant to retire from a certain trade or business, "so far as the law allows,"

was held too vague for the court to enforce.

So as Aforesaid.—See **AFORESAID**, vol. 1, p. 320.

3. Sober and Temperate.—In *Brockaway v. Mutual Ben. L. Ins. Co.*, 9 Fed. Rep. 249, it was said: "The words 'sober and temperate' are to be taken in their ordinary sense. The language does not imply total abstinence from intoxicating liquors. The moderate, temperate use of intoxicating liquors is consistent with sobriety. But if a man use spirituous liquors to such an extent as to produce frequent intoxication, he is not sober and temperate within the meaning of this contract of insurance."

In *Hutton v. Waterloo L. Assur. Co.*, 1 F. & F. 735, where it was shown that deceased had had delirium tremens the same year the policy was issued,

by mutual consent for a common purpose, and governed by a constitution and by-laws formulated and agreed to by the members.¹

and the year before, it was held that this was a breach of warranty of sober and temperate habits. See also *LIFE INSURANCE*, vol. 13, p. 636; *INTOXICATING LIQUORS*, vol. 11, p. 706, n.

1. Black's L. Dict.; Sweet's L. Dict. A society is a number of persons united together by mutual consent, in order to deliberate, determine, and act jointly for some common purpose. 2 Bouv. L. Dict.

The term "association" has practically the same signification. "This term is used throughout the *United States* to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise. It also enters into the names bestowed by the legislatures upon many corporations. In this connection it is used without any very uniform discrimination as to its precise meaning; but seems to be, on the whole, preferred for bodies which are not vested with full and perfect corporate rights and powers; also for organizations formed to promote the improvement, welfare, or advantage of the public, as distinguished from the improvement of members, for which 'society' is preferred, or making profits, for which 'company' is the better name." Abb. L. Dict., *Tit. ASSOCIATION*.

A club is a voluntary association of persons for social purposes, and sometimes, also, for purposes of a literary or political nature, or the like. In some clubs the expenses are borne by a contractor, who receives the subscriptions of members, and makes his profit out of the difference; these are called proprietary clubs. Sweet's L. Dict., p. 156. Black's L. Dict., p. 214.

In *Com. v. Pomphret*, 137 Mass. 564; 50 Am. Rep. 340, Field, J., said: "The word 'club' has no very definite meaning. Clubs are formed for all sorts of purposes, and there is no uniformity in their constitutions and rules. It is well known that clubs exist which limit the number of the members, and select them with great care, which own considerable property in common, and in which the furnishing of food and drink to the members for money is but one of the many conveniences which they enjoy."

Distinguished from Other Organizations—Corporations.—It is plain that a club is not a corporation, although it resembles one in some points. A corporation is a fictitious person, and can only be created by the legislature or by a proper court. "It has, in common with a club, perpetual succession, that is, the power of electing new members to fill the places of those who 'go off.' But it is only regarded as a whole, separate from the members composing it. Its rights and obligations are only exercisable by, and enforceable against, the whole body, and by its corporate name, and not at all against the individual members separately, or even jointly. The members of a club do not form a collective whole, and cannot collectively acquire any rights or incur any obligations." Club Cases by Arthur F. Leach, London, 1879. See *White v. Brownell*, 3 Abb. Pr. N. S. (N. Y.) 318; *Leech v. Harris*, 2 Brew. (Pa.) 571.

Partnership.—In *Lindley on Partnership*, p. 1, it is said that a partnership implies "an agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement;" and in 1 Bl. Com. 475, the thing to be shared in a partnership is described as "the profit arising from some predetermined business engaged in for the common benefit." But in the case of a club the thing to be shared is merely the conveniences and social intercourse which it affords.

Societies and clubs whose object is not the sharing of profits, and whose members do not hold themselves out as partners, are neither partnerships nor quasi partnerships. *Lindley on Partnership* (Ewell) 57; *Fleming v. Hector*, 2 M. & W. 172; *In re St. James Club*, 2 DeG. M. & G. 383; *Leech v. Harris*, 2 Brew. (Pa.) 571; *Ash v. Guie*, 97 Pa. St. 493; 39 Am. Rep. 818; *White v. Brownell*, 3 Abb. Pr. N. S. (N. Y.) 318; *McMahon v. Rauhr*, 47 N. Y. 67; *Richmond v. Judy*, 6 Mo. App. 465, where it was said: "Associations and clubs, the objects of which are social or political, and not for purposes of trade or profit, are not partnerships; and pecuniary liability can be fastened on the individual members of such associations only by

II. ORGANIZATION.—The organization of societies and clubs, unlike that of corporations, does not depend upon statutory provisions; but as to manner and effect, is within the discretion of the associators.¹ The constitution, rules, and by-laws form what corresponds to the charter of a corporation, and the assenting thereto, either by signing or otherwise, provided such assent is personal, places the members under obligations in the nature of a contract.²

reason of the acts of such individuals or their agents; and the agency must be made out—none is implied from the mere fact of association."

Again, in *Thomas v. Ellmaker*, 1 Pars. Sel. Cas. (Pa.) 98, it was held that an unincorporated hose company, having accumulated funds by voluntary subscriptions, is not under the common and statute laws of *Pennsylvania* a co-partnership; and a court of equity will not dissolve such an association and decree an apportionment of the funds upon the application of a minority.

"Associations of this description are not usually partnerships. There is no power to compel the payment of dues, and the right of the member ceases when he fails to meet his annual subscriptions. This certainly is not a partnership; and the rights of co-partners, as such, are not fully recognized. The purpose is not business, trade, or profit, but the benefit and protection of its members, as provided for in its constitution and by-laws. In accordance with well established rules, no partnership exists under such circumstances." *Miller, J., in Lafond v. Deems*, 81 N. Y. 507.

But in one case, *Park v. Spaulding*, 10 Hun (N. Y.) 128, the members of a club were treated as partners, and held liable for the debts of the club according to the principles governing partnerships.

In *Lloyd v. Loaring*, 6 Ves. 773, and *Beaumont v. Meredith*, 3 Ves. & B. 180, a lodge of Freemasons and a friendly society, respectively, were called partnerships.

Joint Stock Companies.—"The distinction between a partnership and a joint stock company is, 'that a partnership consists of a few individuals known to each other . . . whilst a company consists of a larger number of individuals, not necessarily acquainted with each other at all; so that it is a matter of indifference whether changes are effected amongst them or

not. . . . It may be said that the law of unincorporated companies is composed of little else than the law of partnerships modified and adapted to the wants of a large and fluctuating body.' It would follow then that as a club is not in any sense a partnership, it is not a company." *Leach's Club Cases*, pp. 8, 9. See *In re St. James' Club*, 2 De G. M. & G. 383; *Leech v. Harris*, 2 Brew. (Pa.) 571; *White v. Brownell*, 3 Abb. Pr. N. S. (N. Y.) 318. Special reference must be had to *JOINT STOCK COMPANIES*, vol. 11, p. 1036, the principles in regard to such companies being analogous to this subject.

Miscellaneous.—An association which had for an object the aiding of its members by means of loans of money, was held not to be strictly a benevolent or charitable association. *People v. Nelson*, 10 Abb. Pr. N. S. (N. Y.) 200.

An association for purposes of mutual benevolence among its members only, is not an association for charitable uses; and if unincorporated its members are regarded as partners in their relations to third persons. *Babb v. Reed*, 5 Rawle (Pa.) 151; 28 Am. Dec. 650.

Again, clubs differ from co-owners, in that they have not the right of co-owners in the transmission of their interest; and from mutual benefit societies, because the nature of the benefits they confer is definite and not regulated by legislature. *Leach's Club Cases*, p. 11.

1. "A club organized for social purposes is 'unknown to the common law,' and in England as yet ignored by statute law. In *New York*, and several other States, social clubs may be incorporated; and when they have become so, they are subject to the laws that govern corporations." *Club Law*, 27 Alb. L. J. 326.

2. A social club is founded on contract, and the obligation of that contract cannot be violated. This contract consists of both the written and unwritten laws of the association. The

III. RIGHTS AND LIABILITIES — 1. Property Rights. — Voluntary unincorporated associations are incapable of holding real property in their own name; but it may be held for their use and benefit by trustees appointed for that purpose.¹

2. To Sue and be Sued. — At common law, no suits by or against voluntary unincorporated societies can be maintained, either in the name of the association, or of its agents or trustees; but such action must be instituted in the name of all its members.²

first are expressed by the constitution and by-laws. *Club Law*, 27 Alb. L. J. 327. See *Fleming v. Hector*, 2 M. & W. 172, per Parke, B.; *Austin v. Searling*, 16 N. Y. 123; 69 Am. Rep. 665.

In the case of an unincorporated association, persons become members of the association by originally subscribing to the articles. *Dennis v. Kennedy*, 19 Barb. (N. Y.) 517.

In *Waite v. Merrill*, 4 Me. 102; 16 Am. Dec. 238, it was held that the covenant by which the members of the societies of Shakers are bound to each other is a valid instrument, obligatory on all who voluntarily enter into it.

1. *Liggett v. Ladd*, 17 Oregon 89; *East Haddam, etc., Church v. East Haddam, etc., Soc.*, 44 Conn. 259. See *BENEFICIAL ASSOCIATIONS*, vol. 2, p. 171; *RELIGIOUS SOCIETIES*, vol. 20, p. 805.

By a recent *New Jersey* statute, societies, clubs, or associations, having for their object "the promotion of artistic taste in general, and of vocal music in particular," are authorized to take, hold, etc., real and personal estate. *Laws 1890*, ch. 262.

It seems, however, that in case of a voluntary unincorporated association, which is not empowered to hold realty, but whose members can be ascertained, a deed to it may be construed as a grant to such members as tenants in common. *Byam v. Bickford*, 140 Mass. 31.

Where realty is purchased by an unincorporated association, and the title is conveyed to trustees for their benefit, and certificates are issued to the members who subscribed money for the purchase, which entitled them to shares in the association, such certificates constitute an equitable lien on the realty for the amount represented by them. *Crawford v. Gross*, 140 Pa. St. 297.

Knights of Labor. — In *Wells v. Monihan*, 59 Hun (N. Y.) 617, it was held that a decree of the general assembly of the Knights of Labor, by which the charter of a local assembly was an-

nulled, did not affect the rights and title of the latter to property it had acquired, and could not be enforced by the court.

Transfer. — Where several local assemblies of the Knights of Labor had purchased a hall for their joint use, the title having been conveyed to trustees, and the assemblies afterwards organized themselves into a corporation for the purpose of administering property, it was held that such a corporation could compel the trustees to transfer the property, and to account for the rents and profits. *Organized Labor Hall v. Gebert* (N. J. 1891), 22 Atl. Rep. 578.

The title to property may be vested in an association before it is incorporated, and in order to vest such title in the corporation, no formal transfer is necessary. *American Silk Works v. Salomon*, 4 Hun (N. Y.) 135.

A court of equity will compel the transfer of funds from former trustees of a voluntary association to trustees newly elected. *Birmingham v. Gallagher*, 112 Mass. 190.

Appropriation of Funds. — A court of equity will enjoin self constituted trustees from applying the profits of a fair to purposes other than those for which it was held. *Morton v. Smith*, 5 Bush (Ky.) 467.

The funds of an association can only be applied to further the general purpose for which they were contributed. The majority cannot dispose of the money of the minority, or of a single member, to any other purpose without his consent. *Abels v. McKeen*, 18 N. J. Eq. 462.

2. *Detroit Schuetzen Bund v. Detroit Agitations Verein*, 44 Mich. 313; *Curd v. Wallace*, 7 Dana (Ky.) 190; 32 Am. Dec. 85; *Niven v. Spickerman*, 12 Johns. (N. Y.) 401; *Mears v. Moulton*, 30 Md. 142; *Pipe v. Bateman*, 1 Iowa 369.

Thus, an unincorporated lodge of masons could not sue in the corporate name to recover property, but only as

But such associations may bring a suit, it seems, through an agent properly appointed for that purpose,¹ and likewise, by reason of community of interest, when the members of a voluntary unincorporated association are very numerous, one or more may sue in behalf of all, but in such case the representative capacity must be distinctly and clearly stated in the declaration.² By statute, however, voluntary unincorporated associations are now authorized, both in *England* and in some of the States of the Union, to sue and be sued in the names of certain officers, in most cases the president or treasurer.³

individuals. *Lloyd v. Loaring*, 6 Ves. 773. See *Smith v. Smith*, 3 Desaus. (S. Car.) 557; *Fells v. Read*, 3 Ves. 70.

In case of a suit against the members of a voluntary association, the name of a person which was signed to the articles of association without authority may be omitted as a defendant. *Boyd v. Merriell*, 52 Ill. 151.

1. *Habicht v. Pemberton*, 4 Sandf. (N. Y.) 657, where it was said by Duer, J.: "To enable a plaintiff to bring a suit in his own right and in behalf of others having a common interest, it is not sufficient to allege that the other parties are so numerous that it would be impracticable to bring them all before the court; but the nature of their common interest must appear to be such as would entitle them, were they all before the court, to maintain the action in their own right, or in their own names . . . It is true, the complaint avers that the plaintiff is specially authorized to bring the suit for and on behalf of the society; but whether he has such authority as can enable him to bring the suit in his own name, is a question of law which can only be determined when the nature and terms of his authority shall be set forth. An action in the name of the general agent of the society may certainly be sustained." See *Phipps v. Jones*, 20 Pa. St. 260; 59 Am. Dec. 708.

So a suit may be brought against the trustees of a Shaker community, when such trustees hold the property of the community, and make its contracts. *Davis v. Bradford*, 58 N. H. 476.

But a note given to a voluntary association, and made payable to the "treasurer," cannot be sued upon by such treasurer. *Ewing v. Medlock*, 5 Port. (Ala.) 82.

2. *Beatty v. Kurtz*, 2 Pet. (U. S.) 566; *Dennis v. Kennedy*, 19 Barb. (N. Y.) 517; *Wood v. Draper*, 4 Abb. Pr.

(N. Y.) 322; *Beekman F. Ins. Co. v. First M. E. Church*, 29 Barb. (N. Y.) 658; *Mears v. Moulton*, 30 Md. 142. See *Birmingham v. Gallagher*, 112 Mass. 190; *Floyd v. Loaring*, 6 Ves. 773.

Thus, in *New York Code Civ. Procedure*, § 448, provides that "where the persons who might be made parties are very numerous . . . one or more may sue for, the benefit of all," and this notwithstanding the fact that another section provides for the maintaining of actions by or against certain unincorporated associations in the name of the president or treasurer." *Bloete v. Simon*, 19 Abb. N. Cas. (N. Y.) 88.

In such a case, where a bill was filed in the name of the agent of such an association, for the benefit of the concern, and it did not appear by the bill that the complainant was a member of the association, the bill was held bad on demurrer. *Marshall v. Loveless*, Cam. & N. (N. Car.) 217.

Actions By and Between a Society and Its Members.—At common law, a member of an unincorporated association cannot sue such association. *Huth v. Humboldt Stamm*, No. 153, 61 Conn. 227.

A member of a voluntary unincorporated association for pleasure purposes, cannot maintain an action in his own name, either in his own behalf or as assignee of other members, upon a contract made with the association by another member. *McMahon v. Rauhr*, 47 N. Y. 67.

A member of a band, one of the by-laws of which is that any member upon leaving the band shall leave all his interest, having left and taken his instrument with him, may be sued in trover to recover the instrument, by the remaining members. *Danbury Cornet Band v. Bean*, 54 N. H. 524.

3. **Actions in Names of Officers.**—The *English Stat.* 10 Geo. IV., ch. 56, § 21,

authorizes suits by or against friendly societies, to be carried on in the name of the treasurer or trustees for the time being of such society, without any other description; and the same provision is contained in 3 and 4 Vict., ch. 110, § 8, in regard to loan societies.

New York Code Civ. Pro., § 1919, provides that an action against an unincorporated association, having seven or more members, may be maintained against the president or treasurer of such association. See *Olery v. Brown*, 51 How. Pr. (N. Y.) 92; *Fritz v. Muck*, 62 How. Pr. (N. Y.) 69. This section suspends an action against the individual members of an association in the first instance. *Flagg v. Smith*, 25 Hun (N. Y.) 623. The case of *Park v. Spaulding*, 10 Hun (N. Y.) 128, seems to be antagonistic to this view, but in distinguishing the two cases *Dykeman, J.*, said that there was some difference between them. "In the latter the body was unorganized and had no constitution, or by-laws, or articles of association; while in the former, by-laws were adopted and a club organized." See also *Ebbighousen v. Worth Club*, 4 Abb. N. Cas. (N. Y.) 300, where the court of common pleas refused to concur with the doctrine laid down in *Park v. Spaulding*, 10 Hun (N. Y.) 128, and held that the action should be brought against the president in the first instance. Compare *Allen v. Clark*, 64 Barb. (N. Y.) 563.

But by § 1923 of the same code the plaintiff may, however, sue all the members in the first instance; and it has been held that the right to sue the officers is granted for the sake of convenience merely, and that it must be proved that all the members of the association are liable either jointly or severally. *McCabe v. Goodfellow* (N. Y. 1892), 30 N. E. Rep. 728; *Hudson v. Spaulding*, 53 Hun (N. Y.) 638.

Where defendant was sued as president, under this statute, and after being notified to produce the constitution and by-laws, failed to do so, it was held sufficient, in order to prove that the association consisted of more than seven members, to produce evidence that, in addition to the original members, tickets had been issued to a large number of others, who contributed to the support of the society. *Heden v. Clarke* (Supreme Ct.), 10 N. Y. Supp. 291. The complaint need not contain the names of the seven or

more members, but it is sufficient if it aver that there is such a number. *Tibbets v. Blood*, 21 Barb. (N. Y.) 650.

As a rule, statutes derogatory to the common law must be strictly complied with, and therefore, where the officers against whom the action may be brought are the president or treasurer, an action against the president, secretary and treasurer is improperly instituted. *Schmidt v. Gunther*, 5 Daly (N. Y.) 452.

A complaint alleged that the plaintiff was president of the National Cross Country Association of America, an association of seven members and upwards; that said association was organized on or about, etc., and that it then and there adopted a constitution, etc., to which it referred, and which was made part of the complaint. After the verification, a list was added, headed, "Officers of the National Cross Country Association of America. President, Otto Ruhl, N. Y. Athletic Club; Vice President, William Halpin, Olympic Athletic Club;" and then followed the constitution and by-laws. The constitution provided that any amateur club or cross country association should be eligible to membership; but it nowhere appeared that such organizations were not meant to be incorporated, nor did the complaint base the qualifications of members on the fact that they were not natural or legal persons. Therefore, an objection of want of legal capacity to sue, because the members were unincorporated associations and not persons, within the meaning of the Code of Civil Procedure, § 1919, was properly taken by answer instead of demurrer. *Ruhl v. Ware*, 56 N. Y. Super. Ct. 473.

In an association, formed in pursuance of a charter granted by a general organization of such associations, the treasurer's right to sue upon a note executed to him according to the provisions of the code, § 1919, is not defeated by an order of the executive board of the general organization, which revokes the charter of the local association. *Wells v. Monihan*, 59 Hun (N. Y.) 617.

Residence of Officer.—Under the statute allowing certain associations to sue and be sued in the name of certain officers, the decision in a transitory action upon a question of change of venue will depend upon the residence of those officers. *Bacon v. Diasmore*, 42 How. Pr. (N. Y.) 358.

3. Liabilities—*a.* IN GENERAL.—As an unincorporated society cannot be treated as a partnership or corporation, it would seem that at common law any liability incurred in its name, through its officers or members, cannot be fixed upon the association itself, as such, but only upon such officers or members.¹

Connecticut.—The statute provides that "any number of persons associated together as a voluntary association, not having corporate powers, but having some distinguishing name, may be sued" by the name by which such association is known. Under this statute a military company, formed by voluntary enlistment, is a voluntary association, and may be sued by the name by which it is known. *Fox v. Naramore*, 36 Conn. 376. But a statute of this kind does not give to a member of such an association the right to sue it. *Huth v. Humboldt Stamm*, No. 153, 61 Conn. 227.

1. "Many of the associations, societies and fraternities, and beneficial associations of the country are unincorporated; and as they cannot be regarded as individuals or co-partnerships, they may appear to have no especial legal status at all, and thus not at all subject to being brought into court." *Hirschl, Fraternities, etc.*, 39.

In a note to *Ebbinghausen v. Worth Club*, 4 Abb. N. Cas. (N. Y.) 300, it is said, "there are two principal classes of cases: . . . one where a question has arisen between the members—an internal controversy; the other where the question has arisen between a creditor on the one hand, and the body, or one or more members, on the other—an external controversy. The courts have always distinguished between the principles applicable to these two classes of controversies, and have, in the absence of a better guide, leaned, in the one class of cases, toward the rules afforded by the law of corporations, and often, in the other class of cases, toward those afforded by the law of partnerships or of agency."

"The true principle is, and upon this view the apparent discordance in the cases may be nearly reconciled, that the law allows associates to imitate the organization and methods of corporations so far as their rights between themselves are involved, and will enforce their articles of agreement, nothing illegal or unconscientious appearing as between the parties to them. But the public and creditors

have a right to invoke the application of the law of partnership to the dealings of any training association, unless such association has the shield of incorporation. Thus, if the controversy is between members of the association and relates to such subjects as mode of acquiring membership, tenure of property, division of the profits, transfer of shares, voting, expulsion, dissolution, or the like, the courts may deal with the association by analogy to the law of corporations so far as the contract between the members contemplates." *Abb. Dig. Corp.*, tit. *Associations*, n.

The *Connecticut Gen. Stat.*, 1875, p. 403, § 9, provides that it is optional with the creditor of an unincorporated voluntary association to proceed against the association as such, or against the individual members; but if he pursue the former plan, he can levy only on the property of the association; if the latter, execution will go against the property of the individuals. *Davison v. Holden*, 55 Conn. 103; 3 Am. St. Rep. 40. See *supra*, this title, *Right to Sue and be Sued; infra*, *Members; Officers*.

Agricultural Society—Liability Upon Reorganization.—In *Livingston Co. Agricultural Soc. v. Hunter*, 110 Ill. 155, it was held that where an agricultural society was reorganized upon a joint stock place, and there was no change in respect to the objects of the society, a separate and independent society was not thereby formed, but the old organization existed under a new name and creditors of the old held the new society the same as the old, whether their claims accrued before or after reorganization.

Liability for Negligence.—Where the seats at an agricultural fair were so negligently constructed that persons occupying them sustained injury by reason of the negligence, the society was held liable. *Dunn v. Brown Co. Agricultural Soc.*, 46 Ohio St. 93. See *Brown v. South Kennebec Agricultural Soc.*, 47 Me. 275; 74 Am. Dec. 484.

But in *Barton v. Pepin Agricultural Soc.* (Wis.), 52 N. W. Rep. 1120, it was held that where a fair association

b. SALE OF LIQUOR.—As to the liability to indictment of the members or officers of a club, where liquor is furnished to the members and money received therefor, there has been a conflict of authority, the weight of authority, however, denying such liability.¹

IV. MEMBERS—1. **Rights.**—Membership in societies and clubs is, as a rule, elective; the right is conferred only on such persons as the existing members see fit to associate with themselves;

was in the habit of allowing private teams to be driven around the track after the races were over, and on one occasion the driver of a team of young horses whipped them into running away, so that they left the track and injured a visitor, the association was not liable, as the injury was proximately caused by the act of the driver and was not a direct or natural consequence of the permission given to owners of teams to drive around the track.

Boat Club.—A boat club was possessed of a landing-stage and a floating barge or a house boat, moored in the Isis at a distance of thirty feet from the bank by means of two iron rings, which were fixed to the barge, and passed loosely and movably round two posts driven into the bed of the river. Between the barge and the bank four other posts were driven into the bed of the river, and a movable frame of boards, laid on the top of these posts, but not fixed to them nor touching the barge or bank, formed the gangway from the barge to the bank. The barge was roofed over and formed a room, which was used by the members of the club, as a means of access to their boats, and for reading and other amusements. No land was occupied with the barge, nor was the club owner of the posts. The posts had been driven into the bed of the river more than twenty years, for the purpose of being used as aforesaid, and had remained and been so used without the leave or license of the corporation of the city, who were owners of the soil of the bed of the river, and no rent had been paid or other acknowledgment made by the club. It was held that the club was not ratable in respect of the barge, which was a mere chattel, nor in respect of the posts, as the club had no exclusive occupation of them. *Grant v. Oxford Local Board*, 9 B. & S. 900.

1. It was held in *State v. McMaster* (S. Car. 1892), 14 S. E. Rep. 290, that under the *South Carolina*

statute a social club required no liquor license.

In *Piedmont Club v. Com.*, 87 Va. 540, the court held likewise under the *Virginia* act of 1889-90.

So in *Barden v. Montana Club* (Mont. 1891), 25 Pac. Rep. 1042, the holding was the same under the *Montana* statute.

In *State v. Neis*, 108 N. Car. 737, the court, following *State v. Lockyear*, 95 N. Car. 633; 59 Am. Rep. 287, sustained an indictment against the steward of a club, the facts being that liquor was given to him by the individual members of the club, who owned the liquor in common, and the steward furnished a drink to a member and received ten cents in return, this being just about the actual value of the liquor furnished, and the money being used with other money obtained in the same way to replenish the stock of liquor. The transaction was deemed by the court to be a sale.

In *State v. Essex Club* (N. J. 1890), 20 Atl. Rep. 769, a transaction somewhat similar was deemed to constitute a violation of a municipal ordinance prohibiting the sale of liquor at retail without a license. And to the same effect were the decisions in *People v. Sinell*, 58 Hun (N. Y.) 607; *People v. Andrews*, 115 N. Y. 427; *State v. Easton Social, etc., Club*, 73 Md. 97.

In *Nogales Club v. State* (Miss. 1891), 10 So. Rep. 574, it appeared that a social club had one room separated from the rest of the club-rooms, such room being fitted up with a side-board from which the steward sold drinks to members and visitors. A sale was made to a minor at the price fixed by the governing committee of the club, which had no license. It was held that an indictment was sustainable under the statute prohibiting unlicensed sales to minors.

So where a social club bought liquor at wholesale, and, while retaining the ownership, served it out by the drink or the bottle to members signing

tickets payable monthly or paying cash, it was held that such a club was within a municipal ordinance prohibiting the retailing of liquors at a club-house without the payment of a license tax. *Kentucky Club v. Louisville* (Ky. 1891), 17 S. W. Rep. 743.

In *Com. v. Baker*, 152 Mass. 337, it was held that if a club through its agent uses a place for the purpose of keeping intoxicating liquors and selling them to its members, the place is a common nuisance, and the agent may be convicted of keeping the same under *Massachusetts* statute of 1887, ch. 206, which provides that all places used by clubs for the purpose of selling, distributing, or dispensing intoxicating liquors to their members or others, shall be deemed a common nuisance. This case is distinguished from *Com. v. Pomphret*, 137 Mass. 564; 50 Am. Rep. 340, in the fact that in the latter case the city where the club was located had voted to license the sale of intoxicating liquors, and the provision of *Massachusetts* Pub. Sts., ch. 100, § 45, prohibiting clubs in no-license towns from selling, etc., intoxicating liquors, did not apply; while in the present case the club was located in a town which had voted not to license the sale of liquor.

In *People v. Bradley*, 58 Hun (N. Y.) 601, the steward of a club who furnished beer in pint bottles to one of the members, punching his ticket as a charge therefor, was held to be properly convicted under *New York* laws of 1857, ch. 628, § 13, which prohibits the sale of liquors in quantities of less than five gallons without a license; and whether credit was given or the liquor paid for at the time, or whether the charge was shown by punching the ticket, was not material.

As a Device for Evading Revenue Laws.—In *State v. Tindall*, 40 Mo. App. 271, it appeared that the defendant had organized a club in which a person became a member by signing certain articles of association and paying an admission fee, thereupon being entitled to obtain liquors at the club-room by purchasing a "requisition ticket" upon which the defendant who supplied the liquor received a profit. The court held that the transaction was a mere device for evading the revenue laws, and constituted a sale notwithstanding the alleged membership of the purchaser to the club.

At the trial of an indictment against

the steward of an incorporated social club for keeping and maintaining a common nuisance, there was evidence that a large quantity of intoxicating liquors in bottles was found at different times in the rooms of the club, together with utensils, fixtures, etc., of an ordinary bar-room; that lockers in the room contained bottles of liquor with the names of members marked on them, the keys to which were found in a drawer; that a number of men were found drinking there, and that when the police tried to enter, the defendant held the door, but afterwards, upon being arrested, said, "I cannot go; I am running this place, and if I go the men will help themselves to the liquor." He then turned down the gas, ordered the men to leave and locked the door. It was held that this evidence was sufficient to warrant a finding that the club was a mere device to cover the illegal sale of intoxicating liquors. *Com. v. Ryan*, 152 Mass. 283.

In *Com. v. Tierney* (Pa. 1892), 24 Atl. Rep. 64, the following facts appeared: The defendant, who had been refused the renewal of a liquor license but continued to sell at the same place, claimed that a club had rented the bar-room from him for ten dollars a month, the rest of the house being occupied by himself and family, and had employed him as steward to dispense liquors to the members and guests. The initiation fee of the club was twenty-five cents and the dues ten cents a week, and it was formed for social purposes and mental improvement although the literary department consisted of the *Police Gazette*, and two other newspapers; the guests and members paid ten cents for a glass of whisky and five cents for beer. The court held that this evidence showed that the club was nothing more than a device to evade the license law, and that an instruction that if the jury should believe the evidence they should find the defendant guilty, was not error.

Upon an indictment for running a club where liquors were furnished to the members, it need not be shown, in order to maintain such indictment, that the sole purpose of the club was a sale and distribution of liquor, but it is sufficient if such was one of the purposes only. *Com. v. Jacobs*, 152 Mass. 276. See generally *INTOXICATING LIQUORS*, vol. 11, p. 567; *SEARCHES AND SEIZURES*, vol. 21, p. 964.

therefore, the courts will not interfere to compel the admission of an applicant, no matter what his claims may be.¹ Having, however, once become a member, he acquires, under the constitution and by-laws, certain rights in which he will be protected by the courts.²

The interest of each member in the property and effects of an association is equal, and no member has an interest therein which can be taken out of the whole for his sole use until the affairs are wound up and the rights of the respective members settled.³

The rights generally pertaining to membership are determined by the constitution and by-laws.⁴

1. *White v. Brownell*, 4 Abb. Pr. N. S. (N. Y.) 162. See *Mayer v. Journeymen Stone Cutters' Assoc.*, 47 N. J. Eq. 519.

Thus where a person was duly elected a member of a democratic county committee, which was a voluntary, unincorporated, political association, the courts would not attempt to enforce his right to sit as a member of such committee. *McKane v. Adams*, 51 Hun (N. Y.) 629. *Aff'd* in *McKane v. Democratic Gen. Committee* (N. Y. 1890), 25 N. E. Rep. 1057.

2. "The courts will interfere for the purpose of protecting property rights of members of unincorporated associations, and, when they do interfere, it may be stated with safety that the rules, which the courts will follow, are essentially the same as those which guide the courts when dealing with formally incorporated bodies of the same kind." Hirschl on the Law of Fraternities and Societies, p. 47. See *Beaumont v. Meredith*, 3 Ves. & B. 180; *Penfield v. Skinner*, 11 Vt. 296.

3. *McMahon v. Rauhr*, 47 N. Y. 67, where Folger, J., said further: "The rights of the associates in the property, and the modes of enforcing them, are not materially different from those of partners in the partnership property."

Lord St. Leonards, in the *St. James's Club Case*, 2 De G. M. & G. 383, said: "Clubs are all formed on this principle: the candidate must be elected; he must then pay an entrance fee, and also an annual sum or subscription. In what, then, are the interests and liabilities of a member? He has an interest in the general assets as long as he remains a member, . . . but he has no transmissible interest; it is a simple right of admission to and en-

joyment of the club, while it continues."

See *infra*, this title, *Dissolution*.

4. *Joining Another Association*.—

Where there are no provisions in the constitution of an association which forbid one of its members to join another of similar character, the fact that officers and members of such association do, as individuals, unite themselves with another, does not deprive them of their offices or forfeit their membership; nor does the fact that the second organization has in its constitution such provisions affect their relations to the first. *Farrell v. Cook*, 58 Hun (N. Y.) 603; *Farrell v. Daltzell* (Supreme Ct.), 5 N. Y. Supp. 739.

So in *Harmstead v. Washington Fire Co.*, 1 Leg. Gaz. Rep. (Pa.) 392, it was held that the privileges of honorary membership were not forfeited by temporary membership in another company, if acquiesced in by the original association, although there was a by-law of such association forbidding it.

Use of Name.—Where dissatisfied members of a voluntary association withdraw therefrom, and incorporate themselves under the name of such association, they cannot deprive the original organization of the use of its name. *Black Rabbit Assoc. v. Munday*, 21 Abb. N. Cas. (N. Y.) 99. In this case Donohue, J., said: "The matter in dispute may be a very small one and may not be important, but the question involved is one of great importance. It is the question whether dissatisfied members of a voluntary institution can, by incorporating themselves, deprive the association with which they are dissatisfied, of rights which they have acquired, and vest themselves—the dissatisfied members—with those rights. On the ground, therefore, that the plaintiff suppressed,

2. Liabilities.—The cases involving questions of the individual liability of members of a society or club for its debts seem to show that such liability is governed generally by the principles of agency, and the fact of such agency may be determined by the rule, or custom of the club, as to the plan upon which its business is conducted. If a cash system be employed, a member can be held individually liable upon debts contracted by officers or other members, only to the extent to which he has assented, expressly or by implication, to the contracts out of which such debts arise;¹ and the mere fact that he has used the things bought is not

in the complaint and affidavits, the fact that the association they sought to restrain was prior in date to their own, and on the ground that the prior association's right cannot be taken away in the manner in which the plaintiff has attempted to do so, the motion for an injunction will be denied."

An action lies on behalf of an unincorporated association, particularly one consisting of more than seven members, and which sues in the name of its president or treasurer, to restrain part of its members from incorporating a society under the same name as the association. *McGlynn v. Post*, 21 Abb. N. Cas. (N. Y.) 97.

Power of Part of Members.—A part of the members of a voluntary organization cannot, without the consent of the others, bind them, before the act claimed to be binding is done, or they, with full knowledge of the facts, ratify and adopt it. *Sizer v. Daniels*, 66 Barb. (N. Y.) 426.

Where property rights are involved, the majority of the members have no right, and will not be permitted by the courts, to impair or affect them, against the will of any of the owners. *Austin v. Searings*, 16 N. Y. 126; 69 Am. Rep. 665.

The majority of an unincorporated lodge or secret society, who withdraw from the grand lodge and surrender their charter, will not be allowed to retain the lodge property, where the minority continue the organization under the same name, their own officers being installed by the grand lodge. *Altmann v. Benz*, 27 N. J. Eq. 331. But see *Chamberlain v. Lincoln*, 129 Mass. 70, where it was held that the rights of different persons claiming to represent a subordinate lodge of the Order of Good Templars of Massachusetts, are to be determined by the constitution of the Grand Lodge, and, although a subordinate lodge has done

acts which render it liable to have its charter declared forfeited, yet, until it is declared so, it is entitled to possession of the lodge property; and a bill in equity cannot be maintained against its members, to recover possession of such property, by persons claiming to be recognized by the Grand Lodge as the subordinate lodge, until they have exhausted the remedies prescribed in the constitution of the Grand Lodge.

Censure—Notice.—Where it is provided by the constitution of a club that the board of governors may censure or expel members for misconduct, but that no such penalty shall be enforced until after "ten days" notice in writing has been given, it has been held that personal notice is necessary; and a notice by mail received only nine days before such action is not sufficient. *People v. Hoboken Turtle Club* (Supreme Ct.), 14 N. Y. Supp. 76.

Non-User.—Honorary Member.—See *Harmstead v. Washington Fire Co.*, 1 Leg. Gaz. Rep. (Pa.) 392, where it was held that the privileges of honorary membership in a fire company, if such membership has not been declared forfeited by the proper authority, or in the proper manner, are not lost by non-user.

1. In *Fleming v. Hector*, 2 M. & W. 172, where a club had got into difficulties, and was dissolved, and a call was made on the members for a certain amount to meet the liabilities, the defendants, among others, refused to pay; whereupon suit was brought for the price of certain articles furnished the club. Lord Abneger, C. B., delivering the opinion of the court, said: "The case must stand upon the ground of principal and agent. It is, therefore, a question as to how far the committee who was to conduct the affairs of the club as agents are authorized to enter into such contracts as that upon which the plaintiffs now seek to bind

the members of the club at large; and depends on the constitution of the club, which is to be found in its own rules; and on looking at these rules it certainly does strike me that it is impossible to interpret them so as to give the committee the power of dealing on credit even for the purposes of the club. . . . The moment you state the case as one of principal and agent, you see that something more was necessary to fix the defendant than the mere fact that the committee did not pay the money the moment they ordered the wine." In the same case Parke, B., added: "These cases resolve themselves into questions of construction as to the meaning of the original rules of the club. It appears to me quite clear the club was formed upon ready-money principles. If the committee chose to enter into contracts on credit when they had not sufficient funds, that is their own affair," and Lord St. Leonards: "The member pays on the spot, and were he also liable to those supplying the articles, he would pay twice over."

Again, in *The St. James's Club Case*, 2 De G. M. & G., 383, which was the case of a proprietary club, Lord St. Leonards said: "It was said that the debts were incurred with the sanction of the general body of the members. It is clear that the other members may not be liable generally, yet all who concur in the expenditure are liable. The committee of management exceeded the power given to them; they had no power, either express or implied, to raise money by debentures. It is said there was a meeting approving of this being done, but it nowhere appears who were present. It was also contended that though not liable to third persons, the members are liable *inter se*. There is the fallacy—they are not liable, except to the extent to which they have agreed to be so." See *Todd v. Emly*, 8 M. & W. 505; *Caldicott v. Griffiths*, 8 Exch. 806; *Wood v. Finch*, 2 F. & F. 447; *Bailey v. Macaulay*, 19 L. J. Q. B. 73.

The decision in *Richmond v. Judy*, 6 Mo. App. 465, seems to have been based upon this principle. In this case the court, per Bakewell, J., said: "Associations and clubs, the objects of which are social and political, and not for purposes of trade or profit, are not partnerships, and pecuniary liability can be fastened upon the individual members of such associations only by

reason of the acts of such individuals or their agents; and the agency must be made out—none is implied from the mere fact of association."

So in *Ash v. Gine*, 97 Pa. St. 493, 39 Am. Rep. 818, it was held that all the members of a masonic lodge were not liable as partners to persons who had advanced money upon certificates of deposit in the name of the lodge and signed by the officers thereof, who had been appointed a committee to erect a building for the lodge and authorized to borrow money for this purpose; but that the members of the committee, and all who participated in the erection of the building by voting for or advising it; or who in any way assented to the undertaking, or subsequently ratified it, were alone liable for the amount of the certificate. See also *Ferris v. Thaw*, 72 Mo. 446, where the same rule was laid down in the case of money borrowed upon a note, and used for lodge purposes. Compare *Lewis v. Tilton*, 64 Iowa 220; 52 Am. Rep. 436; *Reding v. Anderson*, 72 Iowa 498; *Ray v. Powers*, 134 Mass. 22; *Devoss v. Gray*, 22 Ohio St. 159.

Where several individuals, by voluntary subscription, raised money to build an academy, and at a meeting chose A as their agent to employ workmen, procure materials, etc., and he hired the plaintiff to do work on the building, it was held, that all the subscribers were bound, and might be joined in the suit. *Robinson v. Robinson*, 10 Me. 240.

McCabe v. Goodfellow (N. Y. 1892), 30 N. E. 728, arose out of an action for services of an attorney at law employed by the president of a law and order league. The league was formed pursuant to a resolution adopted at a public meeting of citizens. A constitution was at the same time adopted and signed by the members, which stated that the object of the league should be to unite all orderly and law abiding citizens, with a general view to aiding the officers of the town in the discharge of their official duties. The members should consist, first, of the central committee, composed of three members of each church and temperance society, and those appointed by the league itself; second, of all other persons willing to sign the constitution. A president, two vice presidents, and a secretary were provided for, and they were to constitute

the executive committee. Regular committee meetings were to be held once a month for general business, and funds were to be raised by collections and subscriptions to the "guaranty fund," to which the plaintiff was a subscriber. Under these circumstances, it was held that as there was nothing in the organization of the league, its constitution, or objects, which showed an intention to create a partnership amongst the members, or that they should become personally bound for any debts contracted by its officers, beyond what was necessary for the maintenance of its existence, and as no authority was given to any officer, agent or committee to pledge without limit the personal credit of the members, the action could not be maintained; and the fact that the members knew of the plaintiffs' employment and ratified and approved it, did not render them liable since it appears that they expected that his compensation would be paid out of the fund voluntarily contributed for the purpose, and did not intend that there should be any debts contracted in excess of those funds. The decision below, reported in 15 N. Y. S. 377, was reversed.

The decision in *Park v. Spaulding*, 10 Hun (N. Y.) 128, as to the liability of members for the debts of the club, does not seem to be based upon any principle of agency, but is broadly stated to the effect that "where a body of gentlemen join themselves together for social intercourse and pleasure, and assume a name under which they commence to incur liabilities, by opening an account, they become jointly liable for any indebtedness thus incurred; and if either of them wishes to avoid his personal responsibility by withdrawal from the body, it is his duty to notify the creditors of such withdrawal; otherwise if a creditor continues to furnish, in good faith, articles such as have been previously purchased for the use of the club, his responsibility will continue upon the same principle that holds retiring partners to liability for an indebtedness subsequently contracted with former creditors."

Where it was shown that a tradesman had examined a list of the members of a club, and, on account of their general reputation, concluded that there was no reason to suppose that his bill would not be paid, it was held that he relied on the general respect-

ability of the members, and could not attempt to fix the liability on any one member. *Overton v. Hewett*, 3 Times L. R. 446.

To the general rule that the members of an association are liable for goods furnished on the order of an agent of the association, if furnished with their concurrence and approbation, see *Ridgeley v. Dobson*, 3 W. & S. (Pa.) 118; *Downing v. Mann*, 3 E. D. Smith (N. Y.) 36; *Steele v. Gourley*, 3 Times L. R. 118; *Jones v. Hope*, 3 Times L. Rep. 247; *Newell v. Borden*, 128 Mass. 31, where oral evidence that the defendants at one of the meetings of the association passed a vote authorizing the act of the defendant, who ordered certain work and material of the plaintiff, was held competent to show that the other defendants were jointly liable with him.

But where it was sought to hold the defendant, a member of an unincorporated association, liable for a premium offered at an exhibition by a committee of the association, and it did not appear that he was present at the meeting appointing the committee, and there was no evidence of the authority of the committee to incur the debt, judgment was given for the defendant. *Vogler v. Ray*, 131 Mass. 439.

Where the acting president of a society for educational purposes employed a teacher, the members of the society were held personally liable for his salary. *Heath v. Goslin*, 80 Mo. 310; 50 Am. Rep. 505.

A and B and twenty-four other persons were members of the committee of management of a club. The club being in debt, a resolution was passed at a general meeting of the club, at which B was not present, on the 1st of June, 1852, to the effect that a loan of £4,000 was necessary to free the society from outstanding liabilities, and that the committee be empowered to raise that sum on the guaranty of the society. At a meeting of the committee on the 15th of June, at which B was present, this resolution was discussed; and at a second general meeting of the society, held on the same day, the resolution for the loan was confirmed. At a meeting of the committee on the 3d of August, the terms of a loan from the Commercial Bank were arranged, and the money was placed to the credit of the club on the 5th, their account being at the same time transferred from another bank to the Commercial Bank.

sufficient to fix his liability.¹ But where the officers of a club are allowed by its rules to buy on credit, the members can be held responsible for such purchases.²

On the 12th of August the signatures of B and of other members, who were authorized to sign checks on behalf of the club, were transmitted to the Commercial Bank, and various checks were afterwards drawn by B and other members of the committee, upon the Commercial Bank, for the current expenses of the club. An action was brought by the Commercial Bank against A to recover the balance due to them from the club, and judgment having been recovered therein against A for a large sum which he had paid, it was held that, there being evidence of his previous assent to and subsequent ratification of the act of the committee in obtaining the loan, B was liable to contribution, and that the proceedings at the meetings at which he was not present were admissible in evidence against him in an action brought by A to enforce such contribution. *Mountcashell v. Barber*, 14 C. B. 53; 78 E. C. L. 51; 2 C. L. R. 60.

Where a person, by express permission, allowed his name to be used as a member of a committee of arrangements for an association ball, and subscribed for some of the preliminary expenses, but did nothing more and was not present at the ball, he could not be liable for the costs of a supper provided at the ball without his knowledge or consent. *Downing v. Mann*, 3 E. D. Smith (N. Y.) 36.

A rented a room to a theatrical club at a certain amount per month. After the contract was made B became a member of the association and as such used the room but was not liable for the rent on the contract made before he became a member. *Barry v. Nickolls*, 2 Humph. (Tenn.) 324.

Where one member of an association had employed the plaintiffs to do work for the benefit of all, and had had an accounting with the other members, assuming and receiving credit for payments due the plaintiffs, it was held that he was liable therefor without the other members being joined in the action. *Secor v. Law*, 4 Abb. App. Ct. Dec. (N. Y.) 188.

The defendant purchased a steamboat and had her repaired, with the expectation of selling her to an association which he and the plaintiff who

made the repairs expected to join; it was held that, unless the credit was given to the association by agreement, the defendant was liable. *Wells v. Turner*, 16 Md. 133.

In *Tenney v. New England, etc. Union*, 37 Vt. 64, it was held that a member of an association does not relieve himself from liability by ceasing to participate in its management. And in an action against the association, if a person was a member thereof at the time negotiations between the plaintiffs and such association began, they may treat him as a member until notified of his withdrawal, unless it is shown that they were ignorant of his being a member when credit was given. See *Park v. Spaulding*, 10 Hun (N. Y.) 128. And in the same case it was held that neither the death nor the withdrawal of a member of an association affects the liability of those continuing to be members, for debts contracted in the name of the association, when it was not designed that such should be the effect, the organization being intended to be perpetual. Compare *Tyrrell v. Washburn*, 6 Allen (Mass.) 466.

Burden of Proof.—The burden of proving that authority has been conferred upon the officer making the contract is upon the party who asserts its validity. *New Ebenezer Assoc. v. Gress Lumber Co.* (Ga. 1892), 14 S. E. Rep. 892.

New York Statute.—The *New York* statute provides that, in the case of incorporated clubs, the creditors must look to the trustees or other officers for the payment of all debts contracted while they are trustees, provided such debts are payable one year from the time they were contracted; and that a suit shall be brought within one year after the debts are due. *Hall v. Siegel*, 7 Lans. (N. Y.) 206. See *Sieger v. Culyer*, 67 N. Y. 601.

1. *Fleming v. Hector*, 2 M. & W. 172.

2. *Cockerell v. Ancompte*, 40 Eng. L. & Eq. 284. See *Delanury v. Strickland*, 2 Stark. 416, where the members of a club were held liable for plate purchased with their concurrence.

An action was brought against a suspended member by a lodge of Odd

3. Expulsion.—The causes for expelling members from societies and clubs are to be looked for in the rules and by-laws.¹ The power to carry these rules into effect is vested usually in a committee, or in the general body of the club, when it may be exercised in a meeting by the vote of a prescribed proportion of the members, and it is only under certain circumstances that the courts will interfere to annul the action of such committee or meeting.²

Fellows for arrears due by him. Upon his admission to the lodge he had signed the constitution and by-laws, thereby agreeing to support the same and to pay all legal demands against him so long as he should continue a member of the lodge. It was held that, the demands being not unreasonable, and the distinction between suspension and expulsion having been frequently recognized in the by-laws of the society, the party suspended did not cease to be a member, and continued liable to pay the contributions which the by-laws required. *Palmetto Lodge v. Hubbell*, 2 Strobb. (S. Car.) 457; 49 Am. Dec. 604.

1. For what has been held reasonable or unreasonable causes for expulsion, see *DISFRANCHISEMENT*, vol. 5, p. 687.

"There is no reason why the principles laid down [in regard to formally incorporated bodies] should not apply to those unincorporated; we have seen in a former section that these also are favorably regarded by the courts, and all property rights of members jealously protected. A recent English case (*Wood v. Wood*, L. R., 9 Exch. 190) tends to prove that the courts are fully as considerate in dealing with the unincorporated as with the others." *Hirschl, Fraternities and Societies*, § 12.

In *Rigby v. Connol*, 28 W. R. 650, the principle is laid down that the courts will not interfere in the matter of expulsion if there are no property rights involved. It is to be presumed, however, that such case would very rarely arise. In delivering the opinion, *Jessel, M. R.*, said: "No courts of justice can interfere so long as there is no property, the rights to which are taken away from the person complaining. Now if that is the foundation of the jurisdiction, the plaintiff, if he succeeds at all, must succeed on the ground that some rights of property to which he was entitled have been taken away from him. That this is the foundation of the interference of courts as

regards clubs, I think, is quite clear, for, if you look at the Lord Chancellor's judgment in *Re St. James's Club*, 2 De G. M. & G. 387, you will see that he puts it thus—that the member had an interest in the assets of the club. Similarly, in the case of *Hopkinson v. Marquis of Exeter*, 16 W. R. 266, L. R., 5 Eq. 66, Lord Romilly starts with the right to the enjoyment of the club property, and the subsequent cases have gone on the same ground." *Compare Sale v. First Regular Baptist Church*, 62 Iowa 26; 49 Am. Rep. 136.

2. Power to Expel.—It would seem from *Dawkins v. Antrobus*, 17 Ch. Div. 615, that in England a club, if unincorporated, or any unincorporated voluntary association, was without inherent power to expel a member in the absence of a provision in its constitution or by-laws; but this is not the American doctrine. *Leech v. Harris*, 2 Brewst. (Pa.) 571; *White v. Brownell*, 2 Daly (N. Y.) 329; *Loubat v. Le Roy*, 15 Abb. N. Cas. (N. Y.) 1; 40 Hun (N. Y.) 546.

As to the English rule, see *Innes v. Wylie*, 1 C. & K. 257; 47 E. C. L. 255, where it was held that any society may make any rules by which the admission and expulsion of its members are to be regulated, and the members must conform to those rules; but where there is not any property in which all the members of the society have a joint interest, and where there is no rule as to expulsion, the majority may, by resolution, remove any member; but, before that is done, notice must be given to him to answer the charge made against him, and an opportunity given to him for making his defense.

"In all cases, whether the power of expulsion is rated in committee or general meeting, it is a very wide and arbitrary power, and in its terms there is no restriction of any kind on the exercise of it, however capricious or tyrannical. But it is an ancient and

It may be said generally that the courts will not assume jurisdiction of matters of expulsion until all recourse to the tribunals of the club itself has been exhausted;¹ but after this has

well established rule of English law, that no person shall be dispossessed of a place of profit or honor, or be deprived of rights which he has acquired by contract or otherwise, without a fair trial, and without the exercise of a *bona fide* and sound discretion on the part of those who claim the power so to dispossess or deprive him." Leach's Club Cases, p. 16.

"In an unincorporated voluntary association, the privilege of membership is not given by statute, or derived through prescription, as in a corporation; but is created and conferred by the organization itself. It is not a franchise—a franchise being a particular privilege vested in individuals, which is conferred by a grant from a sovereign or government—while on the contrary the privilege of membership in a voluntary association is derived exclusively from the body that bestows it, and may be conferred or withheld at pleasure. The law cannot compel such an organization to admit an individual to membership, as may be done in the case of a corporation, nor can it interfere to restore a member who has been deprived of the privilege, for not complying with the conditions upon which the enjoyment of it was made to depend. A member of a body of this description has, as such, undoubtedly, rights which the law will protect, but they do not rest upon the same ground, and are by no means co-extensive with the franchise enjoyed by a member of a corporation. They depend upon the nature of the organization, upon the object for which it was formed and upon the rules, regulations, constitution or by-laws which are explanatory of its purpose, and which the body has adopted for its government." Daly, J., in *White v. Brownell*, 4 Abb. Pr. N. S. (N. Y.) 192.

By-Laws.—The members of a voluntary unincorporated society are bound by their by-laws, whether reasonable or unreasonable. *Elsas v. Alford*, 1 City Ct. Rep. 123. Where there is a provision in the rules of a social club that a general meeting may alter rules affecting the general interests of the club, a new rule providing for the expulsion of a member for conduct injurious to the character and interests

of the club, is binding upon a member expelled under it, although there was no provision for expulsion when he became a member; for he is presumed to have consented to such rule. *Dawkins v. Antrobus*, 41 L. T. N. S. 490. Compare *Poultney v. Bachman*, 31 Hun (N. Y.) 49. *White v. Brownell*, 3 Abb. Pr. N. S. (N. Y.) 318.

Where a by-law of a club gives the directors the power of expulsion, "for acts or conduct which they may deem disorderly or injurious to the interests, or hostile to the objects, of the club," it is not essential to the validity of a conviction upon such charge, that there be a finding by the tribunal trying the offense, *in totidem verbis*; but it is sufficient if a resolution be passed, that the member was guilty of a violation of the by-law, based upon the fact that, without provocation, he charged a fellow member in the clubhouse of acting like a blackguard. *Com. v. Union League*, 135 Pa. St. 301.

See **By-Laws**, vol. 2, p. 708.

Where it was provided in the constitution of a voluntary medical society that if the annual dues were not paid by a certain time, "the defaulter shall forfeit his membership . . . and of this he shall be duly notified;" and that notice of such requirement should be severed every year, and that on reading the roll of members, any such defaulter should be immediately stricken from the roll, it was held that the nonpayment of dues at the specified time was not *ipso facto* a forfeiture of membership. *Medical, etc. Society, etc. v. Weatherly*, 75 Ala. 248.

1. To the effect that an expelled member must seek redress within the association before the courts are open to him are, *Loubat v. Le Roy*, 15 Abb. N. Cas. (N. Y.) 1; 40 Hun (N. Y.) 546; *White v. Brownell*, 2 Daly (N. Y.) 329; *Lafond v. Deems*, 81 N. Y. 508; *Poultney v. Bachman*, 31 Hun (N. Y.) 49; *Harrington v. Workmen's Ben. Assoc.*, 70 Ga. 340; *Bauer's Appeal* (Pa. 1878), 18 Alb. L. J. 218; *Lewis v. Wilson*, 50 Hun (N. Y.) 166.

In *Lafond v. Deems*, 81 N. Y. 508, Miller, J., said: "As the members who are claimed by the plaintiffs to have been chargeable with a violation of the rules of the association, were

been done, legal interposition may be sought where it appears that the expulsion was effected without giving to the member expelled, notice, and a fair opportunity to defend himself,¹ or where

not called upon to answer so as to correct the evils complained of, and as the power to remedy the same was ample and complete, the plaintiffs are not in a position to seek the interposition of a court of equity. Courts, as a general rule, should not interfere with the contentions and quarrels of voluntary associations, so long as the government is fairly and honestly administered; and those who have grievances should be required in the first instance to resort to the remedies for redress provided by their rules and regulations." See also *Olery v. Brown*, 51 How. Pr. (N. Y.) 92; *Lucas v. Case*, 9 Bush (Ky.) 297.

But in *Mulroy v. Supreme Lodge*, 28 Mo. App. 463, it was held that this rule only applies where the association is acting strictly within the scope of its powers.

1. Notice and Hearing.—The question of notice underwent discussion in the case of *Loubat v. Le Roy*, 15 Abb. N. Cas. (N. Y.) 1; 40 Hun (N. Y.) 546. In the opinion at the special term the court said that this was the first case in *New York State* in which a court of equity had been called upon to determine the principles or methods of governing, or to be employed by a purely social club in conducting investigations as to the conduct of a member leading to his expulsion. The court said that the jurisdiction was indisputable, membership in the club in question being a valuable social privilege, and an unjust expulsion a stigma on character to be redressed in a court of equity. The case of *Wachtel v. Widows' etc., Soc.*, 84 N. Y. 28; 38 Am. Rep. 478, was cited as analogous, though that was not the case of a club; and the language of the opinion in that case—"It is well settled that an association whose members become entitled to privileges or rights to property therein cannot exercise its proper powers of expulsion without notice to the person charged, or without giving him an opportunity to be heard"—was approved and deemed applicable. The court adverted to the fact that the English court of chancery had been called upon to deal with these questions, and quoted the following language of Lord Romilly in *Gardner v. Freemantle*, 19

W. R. 256: "I point out that these clubs are formed entirely for social purposes, and there must be some paramount authority to keep up their objects. In some cases the court will interfere with the exercise of that paramount authority, but only where there is moral culpability, or if the decisions arrived at are from fraud, personal hostility, or bias; but in cases of this description all that this court requires to know is that the persons who are summoned really exercised that judgment honestly. The court will not decide whether they did rightly or wrongly." The facts of the *New York* case were, the governing committee of the club referred to a sub-committee the duty of investigating the facts relied on as ground for expulsion, and reporting the same to the governing committee. The plaintiff, whose conduct was under discussion, was notified to appear before the sub-committee and make his statement. This he did. Statements of other persons were made in his absence, and on these statements, as well as on that of the plaintiff, the sub-committee based its report, which was adopted by the governing committee, without further notice or hearing. In the special term the proceeding was deemed sufficiently regular, but the general term held otherwise, taking the ground that the duty of the sub-committee was one of mere investigation, and of the collection of statements of facts; that this committee had no power, either under the resolution appointing it, or under the constitution and by-laws of the club, to act upon the evidence obtained; that the governing committee was the sole body to hear and determine the case, and that when it received the report of the sub-committee the case was first placed in the condition in which effective action could be taken upon the facts; and that as the plaintiff had no opportunity to appear before the governing committee, or to be heard concerning the action to be taken by it, his rights were infringed.

The leading English case is that of *Dawkins v. Antrobus*, 17 Ch. Div. 615. The court there said: "We have no right to sit as a court of appeal upon the decision of the members of the

it was effected in a manner contrary to the rules and regulations of the society,¹ or where the expulsion was not *bona fide*, but the result of fraud or malice.² The burden of proof is presumably

club duly assembled; all we have to consider is, whether the notice was or was not given according to the proper rules, whether the meeting was properly convened, and whether the meeting, if properly convened, had come to the conclusion that this gentleman ought to be expelled." It was further said: "The court has no right to consider whether what was done was right or not, or, even as a substantive question, whether what was decided was reasonable or not. The only question is, whether it was done *bona fide*."

To the point that courts will not review the merits of the expulsion of a member of a voluntary association if its rules have been complied with and new notice and an opportunity for a hearing have been given are, *Com. v. Pike Ben. Soc.*, 8 W. & S. (Pa.) 250; *Olery v. Brown*, 51 How. Pr. (N. Y.) 92; *Lafond v. Deems*, 81 N. Y. 507; *Hutchinson v. Lawrence*, 67 How. Pr. (N. Y.) 38; *Lambert v. Addison*, 46 L. T. 20.

Where a member of a society used menacing language towards another member of the society, and for this a majority of a general meeting of the society voted that he should no longer be considered a member of the society, but did not give him any notice of the intention to take his conduct into consideration, or any opportunity of making his defense, it was held that this expulsion was invalid, and that he was still a member of the society. *Innes v. Wylie*, 1 C. & K. 257; 47 E. C. L. 255.

Again, in *Fisher v. Keane*, 14 L. T. 335, it was said by Jessell, M. R.: "In my opinion, a committee . . . is bound to act . . . according to the ordinary principles of justice, and is not to convict a man of a grave offense which shall warrant his expulsion from the club without fair, adequate and sufficient notice, and an opportunity of meeting the accusations brought against him. It ought not, as I understand it, according to the ordinary rules by which justice should be administered by committees of clubs, or by any other body of persons, who decide upon the conduct of others, to blast a man's reputation forever, perhaps to ruin his prospects for life, without giving him an opportunity of

either defending or palliating his conduct." See *People v. St. Franciscus Ben. Soc.*, 24 How. Pr. (N. Y.) 216; *Labouchere v. Earl of Wharcliffe*, 13 Ch. Div. 346; *New York Protective Assoc. v. McGrath*, 23 N. Y. St. Rep. 209; *Gebhard v. New York Club*, 21 Abb. N. Cas. (N. Y.) 250.

In *Fritz v. Muck*, 62 How. Pr. (N. Y.) 69, it was held, that even where it was not provided by the rules of the society for notice to be given, the plaintiff, who had been expelled without notice, should be reinstated, as such rule was unreasonable and unjust. Compare *People v. Fire Department*, 31 Mich. 458.

1. Thus in *White v. Brownell*, 4 Abb. Pr. (N. Y.) 162, it was held in a suit for an injunction to restrain the officers of a voluntary unincorporated association from carrying into effect a resolution or vote by which the plaintiff was suspended from membership, that the only question is, whether the plaintiff was suspended according to the constitution and by-laws of the association, and that he has no cause of complaint unless they were violated in the proceeding against him. "Those who become members of such associations are bound by their rules, not being in conflict with the law of the land; and the courts can interfere no further than to hold the association to a fair and honest administration of those rules." See also *Foster v. Harrison*, 72 Law Times 183; 15 Abb. N. Cas. (N. Y.) 46 (n); *Dawkins v. Antrobus*, 44 L. T. N. S. 557; *aff'd* 41 L. T. N. S. 490; *Labouchere v. Earl of Wharcliffe*, 13 Ch. Div. 346.

Quorum.—If a two thirds vote of the committee is required by the constitution of a club to expel a member, and it is provided that a majority of the committee shall constitute a quorum, a two thirds vote of a quorum of the committee as it existed at the time of the vote is sufficient, although there are vacancies in the committee. *Loubat v. LeRoy*, 15 Abb. N. Cas. (N. Y.) 1.

2. *Hopkinson v. Marquis of Exeter*, L. R., 5 Eq. 63, where Lord Romilly, M. R., said: "It is clear that every member has contracted to abide by that rule which gives the absolute discretion to two thirds of the members

on the party complaining, to show the existence of facts to justify the interference of the court, and the ordinary rules of evidence apply.¹

present to expel any member. Such discretion must not be capricious or arbitrary discretion; but if the decision has been arrived at *bona fide*, without any caprice or improper motive, then it is a judicial opinion from which there is no appeal. None but the members of the club can know the little details which are essential to the social well being of such a society of gentlemen, and it must be a very strong case that would induce this court to interfere." And in the later case of *Gardner v. Freemantle*, 19 W. R. 256, the same principle was laid down, somewhat amplified.

To this point generally are *White v. Brownell*, 4 Abb. Pr. N. S. (N. Y.) 162, *aff'g* 3 Abb. Pr. N. S. (N. Y.) 318; *Loubat v. LeRoy*, 15 Abb. N. Cas. (N. Y.) 1.

The case of *Dawkins v. Antrobus*, 44 L. T. N. S. 557, *aff'g* 41 L. T. N. S. 490, reviewed all the grounds upon which the interference of the courts might be based; and it was held that the action of the plaintiff, who had had an opportunity of explanation, the rules having been duly observed, and the action of the club having been exercised *bona fide* and without malice, could not be maintained; and likewise, that even if the decision of the club had been erroneous, but given *bona fide*, and in accordance with the rules, the court would not have interfered. Compare *Com. v. Union League*, 135 Pa. St. 301; *People v. St. George's Soc.*, 28 Mich. 261.

The case of *Lyttleton v. Blackburn*, 33 L. T. N. S. 642, is of little weight on this point. The vice-chancellor refused to review the decision of a club committee, although it had been given under circumstances calculated to lead to the conclusion that the committee had been influenced by a wish to check inquiry into the position and management of the club; and while the vice chancellor did say that the powers of the committee must not be exercised capriciously, but *bona fide*, still he accepted its decision in the suit as conclusive evidence of their *bona fides*, which was quite sufficient to render it impossible that the decisions of a committee or club could ever be reversed, whatever limitations to their power might exist in theory.

In *Gebhard v. New York Club*, 21 Abb. N. Cas. (N. Y.) 248, it was held that where the constitution of a club regulates the trial of offenses against the club, the court will not enjoin the club from proceeding in such trial against the accused member before any violation of his right to a fair trial is shown.

The conclusions drawn by Mr. Leach from the English decisions, in regard to the interference of courts in matters of expulsion from social clubs are summarized as follows: "Clubs are essentially social institutions, and other objects are merely secondary and adventitious. Gentlemanly conduct and good feeling between the members are necessary for the maintenance and prosperity of the club as a social institution; there must be some paramount authority to take note of any ungentlemanly behavior or breach of the good feeling of the club, and that authority is usually vested in a committee; it is their duty, as well as their own and the club's interest, to inquire into any alleged offense against club morals, and, if need be, to take the initiative in instituting such inquiry. But the penalties on the convicted offender are so serious that it behooves them to act in a manner befitting what they are—a judicial or quasi-judicial body—and in consequence, they should in such matters act strictly in accordance with the rules of the club, and the ordinary principles of justice; and they should pay particular attention to the constitution of the court, by seeing that due notices are sent to all the persons who ought to be summoned, whether as committeemen, witness, or accused; and that no one who has any bias or personal interest in the matter in question should sit as a member of the tribunal on the inquiry; the accused person should be given full opportunity of defending himself; and finally the decision should be arrived at in a *bona fide* manner, on the circumstances in evidence, without malice and without caprice. If any of these considerations can be shown to have been disregarded, then a judicial tribunal will interfere, and the decision of the quasi-judicial tribunal will be set aside." Leach's Club Cases, p. 47.

1. Evidence.—In *Gardner v. Freeman*—

If the expelled member maintains his claim, a remedy may be afforded by an injunction restraining the officers from interference with his privileges.¹

V. OFFICERS.—The appointment, powers, and duties of the officers of unincorporated societies and clubs are regulated largely by constitutions and by-laws.² On the unauthorized contracts of

tle, 19 W. R. 256, the testimony of five of the committee, which consisted of eighteen, was introduced to show that they had acted *bona fide*, and were not influenced by the other party to the controversy, who always retired from the meeting after the case of the plaintiff was dismissed.

In *Lyttleton v. Blackburn*, 33 L. T. N. S. 642, the court could not take the plaintiff's assertion that he believed, or suspected the committee to have acted maliciously in expelling him, because the committee called upon swore that they had not acted capriciously, unjustly, or corruptly, and stated their reasons. But this decision has been criticised. *Leach's Club Cases*, 28, and practically overruled in *Fisher v. Keane*, 11 Ch. Div. 353, where it was held that an expulsion on purely *ex parte* evidence will be set aside.

If the rules of a club are contained in a book kept by the master of the club, and accessible to the members, every member of the club must be taken to be acquainted with them. *Raggett v. Musgrave*, 2 C. & P. 556; 12 E. C. L. 260.

Burden of Proof.—The good standing of a member having been shown, by the certificate or otherwise, the burden of proving a loss of good standing is on the society, where it relies on such loss to justify an expulsion. *Supreme Lodge Knights of Honor v. Johnson*, 78 Ind. 110.

1. See *Foster v. Harrison*, 72 Law Times 183; 15 Abb. N. Cas. (N. Y.) 46 n, and cases cited under notes *supra*. *Fritz v. Muck*, 62 How. Pr. (N. Y.) 69.

2. See OFFICERS OF PRIVATE CORPORATIONS, vol. 17, p. 39.

Powers.—A voluntary association cannot be converted into a corporation by the executive board, unless the power to do so is conferred upon such committee by the constitution and by-laws, or by the express resolution of the association; and if it is desired to ratify the action of the committee which has exceeded its authority in such case, the meeting must be called by competent authority, the members

generally must be notified of the meeting and its purpose, and there must be a majority of the members present. *Rudolph v. Southern Ben. League* (Supreme Ct.), 7 N. Y. Supp. 135.

One of a committee of five of an unincorporated religious society assumed authority to make a contract on behalf of the committee, and his act was afterwards ratified by a majority of the members. It was held that the result was the same as if authority had been originally conferred. But ratification will not be sufficient unless those ratifying have a full knowledge of all material facts, or unless it is made under circumstances by reason of which there may be a fair presumption of such knowledge. *New Ebenezer Assoc. v. Gress Lumber Co.* (Ga. 1892). 14 S. E. Rep. 892.

Judicial Powers.—"Most of these associations, societies and fraternities have within their organization provision for adjudication upon questions arising between the member and the society, and many go even so far as to establish tribunals for the adjusting of private controversies between member and member."—Hirschl's *Law of Fraternities and Societies*, p. 38.

The force of adjudications by society tribunals depends largely upon circumstances, and the nature of the right involved. If it be a personal right—for example, the expulsion of a member—their decisions will generally be binding. See *infra*, this title, *Expulsion*. But in the case of property rights, it was held in *Austin v. Searing*, 16 N. Y. 112, 69 Am. Rep. 665, that a voluntary association—for example, the Odd Fellows—cannot confer judicial powers on its officers or committees. The creation of judicial tribunals is one of the functions of the sovereign power, and an adjudication of such officers, as such, on rights of property, is not good as a judgment, nor, it seems, as an award. See *Nicks v. Monihan* (N. Y. 1891), 29 N. E. Rep. 139. *Lamphere v. Grand Lodge* (Mich. 1882), 11 N. W. Rep. 268; *Mauson v. Grand Lodge* (Minn. 1883), 16 N.

officers the members are not liable, though the officers themselves, who attempt thus without authority to bind themselves or the society, may make themselves liable personally.¹

W. Rep. 395; *Davies v. Mayo*, 82 Va. 97.

In *Rudolph v. Southern Ben. League* (Supreme Ct.), 7 N. Y. Supp. 135, it was held that if a decision of a committee of a voluntary association, in pursuance of which property was transferred and pecuniary interests were affected, operates unjustly as to any of the members, the court would restrain its enforcement.

Treasurer.—The treasurer of a voluntary association for charitable purposes will be held to account for the money in his hands, and must pay it over to those entitled to receive it according to the interests of the association. *Penfield v. Skinner*, 11 Vt. 296.

Where an association was formed for the purpose of paying to its members, out of a common fund, certain sums upon certain contingencies, with the condition that should the contingency fail, the fund should be restored to the members according to their subscriptions, it was held that upon the non-occurrence of the contingency, an action by a member, for money had and received, to recover the amount of his subscriptions, would lie against the treasurer, who had possession of the funds. *Koehler v. Brown*, 2 Daly (N. Y.) 78.

The laws of an unincorporated association provided that the funds should be placed in the hands of the treasurer, and that none should be drawn out, except by an order of the council, signed by a certain officer and two trustees; but no manner of transferring the funds to a successor was provided for. It was held that an action to recover the funds would not lie against the treasurer on account of his refusal to pay the money, in pursuance of a resolution by the council, where no order had been drawn and signed, as provided. *Smith v. Pinney*, 86 Mich. 484.

The New Orleans Board of Underwriters, a body composed of private individuals without being incorporated, received through their treasurer on deposit money to which the plaintiff was entitled. It was held that a suit to recover the money could be maintained against the treasurer in his individual capacity. *Bennett v. Wheeler*, 12 La. Ann. 763.

Removal of Officers.—Where the laws which govern a voluntary unincorporated association provide a remedy within the association for any offense committed by its officers, neither opposition on its part of the officers to the authority under which they act, nor irregularity in the performance of their duties, will authorize a part of the members to withdraw from a regular meeting, for the purpose of expelling its regularly elected officers, and of constituting themselves their successors. *McCallion v. Hibernia Sav., etc., Soc.*, 70 Cal. 163. See generally *AMOTON*, vol. 1, p. 557.

Under the constitution and by-laws of the Grand Lodge of Knights of Pythias in *Pennsylvania*, an officer of a grand or a subordinate lodge cannot be suspended by the grand chancellor without a trial and judgment by the lodge. *Lowry v. Stotzer*, 7 Phila. (Pa.) 397.

1. In *re St. James's Club*, 2 DeG. M. & G. 383; 13 Eng. L. & Eq. 589; *Todd v. Emly*, 8 M. & W. 505. See also *Fleming v. Rector*, 2 M. & W. 272.

But trustees of an association are not individually liable for its debts unless they have in some way rendered themselves so. *Wolf v. Schleiffer*, 2 Brew. (Pa.) 563; or unless liability is fixed upon them by statute as in *New York*, where it is provided by laws of 1865, ch. 368, that trustees of associations formed for social and recreative purposes are responsible for debts incurred during their term of office. *Hall v. Siegel*, 7 Lans. (N. Y.) 206.

Under this statute, the trustees of a club are liable for work done under a contract, where they have ratified an excess of expenditure above the amount allowed by the governing board, and have made payments on account of the debt and asked for time in which to pay the residue; and in such case it is not necessary for the creditor to exhaust his remedy against the club before proceeding against the trustees, nor does an action to enforce a mechanic's lien against the club affect the claim against the trustees for the same work. *Robinson v. Fay* (Supreme Ct.), 19 N. Y. Supp. 120.

And so it seems that if it can be shown that individual credit was given to the officer or committee contracting

V. DISSOLUTION—1. Mode; Grounds.—The mode of dissolution is frequently provided for by constitutions and by-laws. In the absence of a provision therein, a resolution passed at a general meeting of the society may direct a dissolution;¹ or a court of equity may be appealed to if the condition of things is such as to make this an appropriate remedy.

In addition to any grounds which may be set out in the constitution or by-laws, for which a society may be dissolved by a resolution of the members, a court of equity will decree a dissolution at the suit of one or more members, where violent dissen-

a debt, he will be primarily liable; and it is a question for the jury, whether credit was given to such officer or to the association. *Ebbinghausen v. Worth Club*, 4 Abb. N. Cas. (N. Y.) 400. See *Fredendall v. Taylor*, 23 Wis. 538; 99 Am. Dec. 203.

Again, in *Todd v. Emly*, 8 M. & W. 505, it was held that in order to charge the whole committee, it must be proved that the member or members of it who gave the order did so with the knowledge, and by the express or implied authority, of the other members; and the question whether the credit was extended to the individual member or to the whole committee is for the jury. *Delaunay v. Strickland*, 2 Stark. 416.

In *Wisconsin* it has been held in *Fredendall v. Taylor*, 23 Wis. 538, 99 Am. Dec. 203, that a committee appointed by an unincorporated association was primarily liable upon a contract made by them for work, although authorized to make such contract. This case arose out of a contract for the construction of a wellor tank in certain fair grounds, to be used by the Firemen's Association in their exercises. In delivering the opinion, the court, by Paine, J., said: "It is true they [the committee] did not act personally in contracting with the plaintiff, the committee having delegated its authority to a sub-committee, composed of S and L [two of the defendants]. But the latter, in making the contract, were acting as agents of the committee, so that the liability of the whole committee is the same as though all had acted in making the contract. It was not claimed that the contract was not within the scope of the committee's authority or of that delegated to the sub-committee. On the contrary, it is conceded that the well was necessary to the tournament and it was for that purpose. It is conceded that the association was not

incorporated at this time and had no legal existence, so that it could contract or be sued as such. And when such is the case, a committee which assumes to contract for services for such an irresponsible, intangible association must become personally liable, else there is no liability whatever." Compare *McCartee v. Chambers*, 6 Wend. (N. Y.) 649; 22 Am. Dec. 556.

Building Committees.—A number of persons formed an association for the purpose of building a meeting house, and three were appointed a committee to superintend the erection. In an action against the committee to recover for services rendered by plaintiff, who was also a member of the association, it was held that as the defendants did not make any express promise, or pledge their individual credit, and as there were no funds put at their disposal by the association; and as they acted under the direction and control of the members; and further, as plaintiff and defendants were all members of the association, and equally interested in the project, the latter were not liable. *Cheeny v. Clark*, 3 Vt. 431; 23 Am. Dec. 219. Compare *Abbott v. Cobb*, 17 Vt. 593.

1. "A club can only be dissolved by a resolution passed by a general meeting, or (perhaps) by a chancery action." *Leach's Club Cases* 55.

In *Industrial Trust Co. v. Greene* (R. I. 1892), 23 Atl. Rep. 914, it was held that a dissolution was not effected by a vote in favor thereof, passed at a special meeting which had been called by a deposed president, who was no longer recognized as president by the society.

In the *St. James's Club Case*, 2 DeG. M. & G. 383, it was held that an organization of this character did not come within the provisions of the English Winding Up Act.

sions and lasting differences have arisen between them;¹ or where the funds have been improperly dealt with; or there has been bad faith or mismanagement in the control of affairs²; and likewise the exclusion of a member from the privileges of membership has been held sufficient ground for dissolution,³ but this view seems contrary to principle and authority.⁴ Non-user may effect a dissolution.⁵

3. *Effect*.—Upon the dissolution of a society or club, its members are each entitled to their proportionate shares of its property and effects, and the officers or members, as the case may be, are liable for the outstanding debts.⁶

1. *Lafond v. Deems*, 52 How. Pr. (N. Y.) 41; 81 N. Y. 507. See *Fischer v. Raab*, 57 How. Pr. (N. Y.) 87, where Daly, J., said: "In case of violent dissensions and irreconcilable differences between the members of a voluntary association, judgment will be rendered at the suit of one or more members against all the others dissolving the society. But no action will be entertained for such a purpose upon mere proof of differences of opinion, bad temper, or the ordinary disputes common to such societies; nor upon proof of injuries or injustice sustained by one member, through the action or vote of the society, if he have another remedy."

In *Thomas v. Ellmaker*, 1 Pars. Sel. Cas. (Pa.) 98, it was held that an unincorporated hose company was not a partnership; and that a court of equity would not dissolve such an association and apportion the fund among those charged by the by-laws with its distribution, "as long as there are those who are ready to execute the public trust with which the fund has been clothed."

2. *Gorman v. Russell*, 14 Cal. 531.

In *Pearce v. Piper*, 17 Ves. 15, it was said that any friendly society formed on erroneous principles would be dissolved by the courts, and payments which exhaust the funds would be restrained.

3. *Gorman v. Russell*, 14 Cal. 531; *aff'd* in 18 Cal. 688.

4. *Burke v. Roper*, 79 Ala. 138; see *Lafond v. Deems*, 81 N. Y. 507; *Thomas v. Ellmaker*, 1 Pars. Sel. Cas. (Pa.) 98; *Fischer v. Raab*, 57 How. Pr. (N. Y.) 87.

And so in a recent case of a mutual benefit society, where the president was removed, in violation of its by-laws, no written charges having been preferred against him; but where he himself had put the motion for his

removal, had retired upon an affirmative vote, and had taken part in subsequent meetings without asserting his right to preside—it was held that the removal of the president was not ground for dissolution, as he was presumed to have acquiesced in the proceeding for the sake of harmony. *Industrial Trust Co. v. Greene* (R. I. 1892), 23 Atl. Rep. 914.

5. Thus, in *Strickland v. Prichard*, 37 Vt. 324, it was held that where an unincorporated masonic lodge sold its furniture, and ceased to have meetings for twenty-three years, it had become dissolved by *non-user*.

So where a voluntary association voted to transfer its funds to another organization, and ceased to hold meetings for five years, it was held that the association was dissolved and that the proceedings of subsequent meetings were of no effect. *Penfield v. Skinner*, 11 Vt. 296. Compare *Burke v. Roper*, 79 Ala. 138.

6. Lord St. Leonards in *In re St. James's Club*, 2 DeG. M. & G. 383. *Hibernia Fire Engine Co. v. Com.*, 93 Pa. St. 264.

In *Hewett v. Hatch*, 57 Vt. 16, it was held that the trustees, upon dissolution of a voluntary association, could not maintain *replevin* against one of its members to recover the common property.

Where the charter of a subordinate organization provided that in case of dissolution such funds as it possessed should be turned over to the general council, but instead of such transfer they had, upon dissolution, been divided amongst the members of the subordinate lodge, it was held that such members could be compelled to repay the funds to the general council, by a suit brought against them personally. *State Council v. Sharp*, 38 N. J. Eq. 24.

SODOMY.—(See also BESTIALITY, vol. 2, p. 185; BUGGERY, vol. 2, p. 600.)

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I. DEFINITION.—Sodomy is a carnal knowledge committed against the order of nature by man with man, or in the same unnatural manner with woman, or by man or woman in any manner with a beast.¹

II. NATURE AND PUNISHMENT—1. *Nature*.—In early times in *England*, this offense was regarded as highly penal.² Gradually, however, it came to be looked upon as less criminal, until, by

1. See 1 Russ. on Crimes (6th Am. ed.) 698; 1 Bish. on Criml. Law (7th ed.), § 503; 4 Bl. Com. 215. See also BUGGERY, vol. 2, p. 600.

The offense is named sodomy from the supposed prevalence of the sin in Sodom. *Ausman v. Veal*, 10 Ind. 355; 71 Am. Dec. 331; 4 Bacon's Abr. (5th ed.) 569. It includes bestiality. See BESTIALITY, vol. 2, p. 185.

In *Ausman v. Veal*, 10 Ind. 355; 71 Am. Dec. 331, the court by Perkins, J., defined bestiality to be a "connection between a human being and a brute of the opposite sex;" and sodomy to be a "connection between two human beings of the same sex—the male;" and held that both may be embraced in the term "crime against nature."

That this distinction is not generally made will be sufficiently seen by a glance at the authorities above cited.

At a trial where the information charged the defendant with an assault with intent to commit the "infamous crime against nature," the court instructed the jury that the "crime against nature" was synonymous with sodomy, and this was correct. *People v. Williams*, 59 Cal. 397.

In *State v. Williams*, 34 La. Ann. 87, it was contended by the defendant that § 788, *Louisiana Rev. Stat.*, providing for the punishment of the "abominable and detestable crime against na-

ture, committed with mankind or beast," does not define the crime, nor describe any crime known to the common law; but it was held that this contention was untenable.

Buggery is a detestable and abominable sin, amongst Christians not to be named, committed by carnal knowledge, against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast. 1 Burns' Justice (23d ed.) 392.

Sodomy is a carnal copulation, by human beings, with each other against nature, or with a beast. 2 Bish. Cr. Law (7th ed.), § 1191.

Sodomy consists in sexual connection with any brute animal, or in sexual connection, *per anum*, by a man with any man or woman. 1 Wharton Cr. Law (8th ed.), § 579. See, also, Stephen's Digest of Cr. Law, art. 168.

By the *Ohio* act of April 12, 1889, "whoever shall have carnal copulation in any opening of the body, except in sexual parts, with another human being, or with a beast, shall be deemed guilty of sodomy."

2. Lord Coke says: "It appears by the ancient authorities of law that this was felony; but they vary in punishment, for Brit., ch. 9, saith that sorcerers, sodomers, and hereticks shall be burnt; F. N. S. 269a agrees with it

statute, it was again declared to be felony.¹ This statute, subsequently repealed,² was revived and confirmed in the reign of Elizabeth.³ So, that, by the common law of the States of the Union, sodomy is an offense;⁴ but whether a crime or a misdemeanor is uncertain.⁵

2. **Punishment.**⁶—According to some of the ancient authorities, the sodomite was punished in *England* by being burned to death;⁷ but one high authority said he should be buried alive.⁸ This

But Flet., bib. 1, ch. 35, *Pecorantes, et sodomitæ terra, vivi cui sodiantur*. But in the ancient book called the Mirror of Justice, vouched in Pow. Com. in Fogoffe's case, the crime is more high, for there it is called *crimen læse Majestatis*, a sin horrible, committed against the King of Heaven." 12 Coke's Rep. 36. See also 1 Russ. on Crimes (6th Am. ed.) 698.

1. 25 Hen. VIII, ch. 6.

2. Stat. 1 Mary.

3. Stat. 5 Eliz., ch. 7. See 12 Coke's Rep. 36.

The present English statute is the 24 and 25 Vict., ch. 100, § 61.

4. See 1 Bish. on Cr. Law (7th ed.), § 503.

5. 2 Bish. on Cr. Law (7th ed.), § 1196.

In *Coburn v. Harwood*, Minor (Ala.) 93; 12 Am. Dec. 37 it was said that sodomy was indictable neither by the statutes of the State nor by the common law.

In *Iowa* sodomy is declared not to be a crime. *Estes v. Carter*, 10 Iowa 400.

In *Texas*, the law has lately undergone a change. *Fennell v. State*, 32 Tex. 378, was an indictment as if at common law for sodomy. The court by Lindsay, J., said: "The third article of the general provisions of the criminal code (Pas. Dig., art. 1605) declares that, 'in order that the system of penal law in force in this State may be complete within itself, and that no system of foreign laws written or unwritten, may be appealed to, it is declared that no person shall be punished for any act or omission as a penal offense unless the same is expressly defined and the penalty affixed by the written law of this State.' Art. 2033 of the same code says: 'If any person shall commit, with mankind or beast, the abominable and detestable crime against nature, he shall be deemed guilty of sodomy, and on conviction thereof he shall be punished

by confinement in the penitentiary for not less than five nor more than fifteen years.' Now, we conceive that this latter article is no definition of the common-law crime of sodomy. It is not defined by our statute what the 'abominable and detestable crime against nature' is. To ascertain what it is we have to appeal to the unwritten or common law. To do so we shall be compelled to act in contravention of the expressed object of the criminal code. The crime against nature is wholly undefined by the criminal code, and, therefore, according to its express injunction, is not punishable."

This case was followed by *Frazier v. State*, 39 Tex. 390.

But in *Ex parte Bergen*, 14 Tex. App. 52, the court by Willson, J., said: "It is no longer required that the offense should be expressly defined." "We are of the opinion that 'sodomy,' which is the 'abominable and detestable crime against nature,' known to the common law, is, by article 342 of the Penal Code, made an offense, with a penalty affixed thereto in compliance with article 3 of the Penal Code."

And *Cross v. State*, 17 Tex. App. 476, citing *Ex parte Bergen*, 14 Tex. App. 52, holds that sodomy is now an offense which can be punished under the law of *Texas*.

6. Says Bacon: "If any crime deserves to be punished in a more exemplary manner, this does. Other crimes are prejudicial to society; but this strikes at the being thereof." 4 Bacons. Abr. (5th ed.) 569.

7. See 12 Coke Rep. 36; 4 Bl. Com. 216.

8. It is said that in the reign of Richard I it was the practice to hang a man and drown a woman found guilty of the offense. 1 Russ. on Crimes (6th Am. ed.) 698, n. a.; *Coburn v. Harwood*, Minor (Ala.) 93; 12 Am. Dec. 37.

The ancient Goths punished the crime either by burning the guilty one

severity was subsequently relaxed, and, for a considerable time the death penalty was not inflicted,¹ the offense being subject, in times of popery, only to ecclesiastical censure.² But in the first half of the sixteenth century, the offense was, by statute,³ again made capital.

In the different States of the Union the punishment varies. While in some it is not indictable,⁴ in others it is declared a felony.⁵

III. WHAT CONSTITUTES THE OFFENSE—1. By Whom May be Committed—*a. IN GENERAL.*—Sodomy may be committed between two male persons;⁶ or between a man and a woman;⁷ or between a man or woman and a beast.⁸

b. PRINCIPALS AND ACCESSORIES.—All persons present, aiding

to death or by burying him alive. 4 Bl. Com. 216.

1. 1 Russ. on Crimes (6th Am. ed.) 698; Coburn v. Harwood, Minor (Ala.) 93; 12 Am. Dec. 37.

2. 4 Bl. Com. 216.

3. 25 Hen. VIII, ch. 6.

This statute, having been repealed by the 1 Mary, was revived and confirmed by 5 Eliz., ch. 6, and thereafter remained in force till repealed by the 9 Geo. IV, ch. 31, which nevertheless provided for the infliction of the death penalty. See 1 East P. C. 480; 4 Bl. Com. 216; 1 Burns' Justice (23d ed.) 392; 1 Russ. on Crimes (6th Am. ed.) 698.

By the 24 and 25 Vict., ch. 100, § 61, every one who is convicted of the felony is liable to penal servitude for life, as a maximum, and to penal servitude for ten years, as a minimum, punishment. See Stephen's Dig. of Crim. Law, (4th ed.), art. 168.

4. As in *Iowa*. See *Estes v. Carter*, 10 Iowa 400.

5. In *Pennsylvania* by act March 31, 1860, which provided for a maximum punishment of a fine of one thousand dollars and separate or solitary confinement at labor for ten years. See *Brightly's Purdon* (10th ed.) 324. See also *BUGGERY*, vol. 2, p. 600, note.

By the criminal code of *Illinois*, ch. 38, § 336, it is declared an infamous crime.

6. Stephen's Dig. of Cr. Law (4th ed.), art. 168; 1 Wharton's Cr. Law, (8th ed.), § 579; 2 Bish. Cr. Law (7th ed.), § 1193.

7. 1 Wharton's Cr. Law (8th ed.), § 579; 1 Russ. on Crimes (6th Am. ed.) 698; 4 Bacon's Abr. (5th ed.), 570; Stephen's Dig. of Cr. Law (4th ed.), art. 168.

A man was found guilty of having committed buggery upon a girl eleven years of age, and had received sentence of death; but the judge, before whom he was tried, reprieved him, in order to obtain the opinion of the judges whether this was a case within the statute. It is said that no opinion was given, because the judges were not unanimous. But Fortescue, who reports the case, affirms that a great majority of them were of opinion that this is buggery by the law of *England*. He adds that the Earl of Macclesfield, then chancellor, to whom he wrote upon the occasion, was clearly of the opinion that this case is not only within the reason, but also within the words of the statute, and that he was surprised there should have been any difference of opinion among the judges. The reporter does, moreover, cite several authorities to show that under the word mankind, all females as well as males of the human species are comprehended. 4 Bacon's Abr. (5th ed.) 570.

8. 1 Burns' Justice (23d ed.) 392; Stephen's Dig. of Cr. Law (4th ed.) art. 168.

Is a fowl a "beast," within the statute? In *Rex v. Mulreaty*, a manuscript case decided in 1812, by Bayley, J., cited in 1 Russ. on Crimes (6th Am. ed.) 698, it was held that "an unnatural connection with an animal of the fowl kind is not sodomy, a fowl not coming under the term 'beast;' and it was agreed clearly not to be sodomy when the fowl was so small that its private parts would not admit those of a man, and were torn away in the attempt."

But in *Reg. v. Brown*, 24 Q. B. Div. 357, it was held that a domestic fowl is an animal within 24 & 25 Vict., ch. 100.

and abetting the commission of the crime, are principals.¹ And where, by statute, the offense is made felony generally, there may be accessories both before and after.²

c. CONSENT.—Consent or non-consent is not material.³

2. **How Committed.**—There must be connection in those parts where sodomy is usually committed.⁴

3. **Carnal Knowledge.**—The carnal knowledge requisite is the same as is required in case of rape.⁵ There must be penetration;⁶ but to no particular depth;⁷ and it is not necessary that there should be emission.⁸

1. 1 Hale's P. C. 670; 4 Bacon's Abr. (5th ed.) 570; 1 Burns' Justice (23d ed.) 392; 1 Russ. on Crimes (6th Am. ed.) 699.

2. 1 Hale's P. C. 670; 1 Burns' Justice (23d ed.) 392; 1 Russ. on Crimes (6th Am. ed.) 699.

3. If the crime be committed between two persons both of whom are of the age of discretion, then both are alike guilty. 1 Hale's P. C. 670. See also *Rex v. Jellyman*, 8 Car. & P. 604.

But if one only be of years of discretion, that one only is guilty. 1 Hale's P. C. 170.

And it matters not whether that one be the pathic or the agent. *Reg. v. Allen*, 1 Den. C. C. 364; 2 Car. & K. 869; 3 Cox. C. C. 270.

In this case the facts proved were that the prisoner induced a boy, twelve years of age, to have carnal knowledge of his person, the prisoner being the pathic in the crime. The prisoner was convicted. The trial judge doubted whether, since the boy was incapable of crime, being under fourteen, the prisoner could be convicted, but it was held that the conviction was right. See also 4 Bacon's Abr. (5th ed.) 570.

4. Russ. on Crimes (6th Am. ed.) 698.

Where a prisoner forced open a boy's mouth with his fingers and put his private parts in the boy's mouth, and emitted, it was held not sodomy. *Rex v. Jacobs*, R. & R. C. C. 331.

5. 1 Russ. on Crimes (6th Am. ed.) 698; Stephen's Dig. of Cr. Law (4th ed.), art. 168, note.

6. Hale's P. C. 669; 1 Wharton's Cr. Law (8th ed.), § 579.

7. *Cross v. State*, 17 Tex. App. 476.

"It is laid down by Coke, Ch. J., that the least degree of penetration maketh a carnal knowledge." 4 Bacon's Abr. (5th ed.) 569.

8. In the early stage of the law it was held that emission of seed, as well as penetration, was essential in sod-

omy. Lord Coke declared this doctrine, citing "the case of Stafford, who was attainted in the King's Bench, and executed." 12 Coke's Rep. 37.

Later we find the judges divided, some holding that both penetration and emission were necessary, others that penetration was sufficient. "Infection," the latter said, "cannot be proved in case of a child, or of bestiality, and penetration may be evidence of emission, and Stafford's case" "takes no notice of emission." Duffin's case, 1 East's P. C. 437.

Bacon says: "It must be allowed, that penetration may be without emission; and it is easy to conceive that it would in some cases be difficult to prove emission where it has in fact been. It seems, then, a little strange to make the proof of emission necessary to the proof of sodomy. It is, indeed, said, in one of the books cited by Mr. Sergeant Hawkins, that emission is an evidence of buggery; but it is not said, that the proof of emission is necessary upon an indictment for buggery." 4 Bacon's Abr. (5th ed.) 569.

Coming down to 1828, we find it enacted by statute, 9 Geo. IV, ch. 31, § 18, that "whereas, upon trials for the crimes of buggery and rape," etc., "offenders frequently escape by reason of the difficulty of the proof which has been required of the completion of those several crimes" "it shall not be necessary in any of those cases to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only."

Since this enactment it has been held that the crime is complete if the jury is satisfied that penetration took place. *Rex v. Reeksepear*, 1 M. C. C. 342.

See also *Rex v. Cojins*, 6 Car. & P. 351; 25 E. C. L. 434.

IV. INDICTMENT.—The ordinary common-law form of indictment, approved by writers and precedents, for this offense, is good.¹

It has been held, recently, that the words, "had a venereal affair," are not essential in an indictment charging the crime against nature; and that these words may be supplied by an allegation of carnal knowledge.² It has been ruled that the *carnaliter cognovit* is unnecessary.³

In this case, the prisoner, being interrupted by a witness calling to him, withdrew himself from the animal, he being then in a state of erection. Parke, J., said: "In the former state of the law, the prisoner would have been entitled to an acquittal; but as the law is now, if there was penetration, the capital offense is completed, although there has been no emission."

See also 2 Bish. Cr. Law (7th ed.), § 1194. The present *English* statute is the 24 & 25 Vict., ch. 100, § 63.

In the *United States* it has been held that emission need not be proved. *Com. v. Thomas*, 1 Va. Cas. 307. See 2 Bish. Cr. Law, (7th ed.), § 1131.

1. *State v. Chaudonette* (Mont. 1890), 25 Pac. Rep. 438.

It was necessary that the indictment should charge, *contra naturæ ordinem rem habuit veneream, et carnaliter cognovit*. But Foster, J., thought it necessary to charge also, *peccatumque illud sodomiticum auglicè dictum buggery, adtunc et ibidem nequiter felonice, diabolice, ac contra naturam, commisit et perpetravit*, since the statute used the term "buggery." 1 Burns' Justice (23d ed.) 392; 1 Russell on Crimes (6th Am. ed.) 699; 1 East's P. C. 480, citing Foster 424, as referring to Co. Ent. 351b, as a precedent settled by great advice.

In *Reg. v. Rowed*, 3 Q. B. 180, the indictment charged that the defendants "in a certain open and public place, called Kensington Gardens," "unlawfully and wickedly did meet together for the purpose and with the intent of committing and perpetrating with each other, openly, lewdly, and indecently, in the said public place, divers nasty, wicked, filthy, lewd, beastly, unnatural, and sodomitical practices; and then and there unlawfully, wickedly, openly, lewdly, and indecently did commit and perpetrate with each other" "divers such practices as aforesaid," etc. This indictment was

held bad, as not specifying any offense with the requisite certainty.

2. Or even by an equivalent allegation. *Lambertson v. People*, 5 Park. Cr. Rep. (N. Y.) 200.

3. On the ground that the crime of sodomy is too well known to be misunderstood, and too disgusting to be defined, further than by merely naming it. *Davis v. State*, 3 Har. & J. (Md.) 154.

Indictments Held Sufficient.—In *Cross v. State*, 17 Tex. App. 476, the indictment alleged that the defendant "did then and there unlawfully and willfully commit with a mare, the same being a beast, the abominable and detestable crime against nature by then and there having carnal connection with said beast, and did then and there commit the crime of sodomy with said beast." Held sufficiently to charge the offense.

In *Reg. v. Allen*, 1 C. & K. 495, where the indictment described the animal as a certain animal called a bitch, it was held that, though the females of foxes and of some other animals, as well as of dogs, are called bitches, yet this was sufficiently certain.

In *People v. Williams*, 59 Cal. 397, it was charged that the defendant "did willfully and unlawfully and feloniously make an assault upon Harry George with intent to commit in and upon the person of the said Harry George, the infamous crime against nature, contrary to the form, force, and effect of the statute," etc., and this was held good.

Included Offense.—An indictment for sodomy will support a conviction for the offense of attempting to commit sodomy. *State v. Frank*, 103 Mo. 120.

Lapse of Time.—In *Reg. v. Robins*, 1 Cox C. C. 114, the prisoner was indicted for bestiality alleged to have been committed nearly two years before.

Alderson, B., said: "I ought not to allow this case to go further. It is monstrous to put a man on his trial

V. EVIDENCE—1. In General.—The nature of the evidence required as to the commission of this offense is the same as in rape.¹ As in rape, the evidence should be unequivocal and should leave no doubt of the guilt of the accused.² Penetration must be proved;³ but it is not necessary to prove emission.⁴

2. Testimony of Accomplice.—The evidence of the prosecuting witness, if an accomplice in the act, is not alone sufficient to convict, but must be corroborated.⁵

after such a lapse of time. How can he account for his conduct so far back? If you accuse a man of a crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about at the time; but if the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on his trial."

1. 1 East's P. C. 480; 1 Russ. on Crimes (6th Am. ed.) 699.

2. 1 Burns' Justice (23d ed.) 393; 4 Bl. Com. 215; 1 Russ. on Crimes (6th Am. ed.) 699.

Lord Hale, speaking of rape, says: "It must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent." 1 Hale's P. C. 635.

This is equally true of sodomy, and therefore even greater caution should be used upon the trial of an indictment for this offense, which is even more heinous.

3. And in *Collins v. State*, 73 Ga. 76, it was held that circumstantial evidence of penetration will authorize a conviction, the testimony of one who actually saw the act not being necessary.

4. See *supra*, this title, *Carnal Knowledge*.

Certain of the States of the Union have statutes providing that it shall not be necessary to prove emission of seed in order to convict of sodomy. See *Illinois* Crim. Code, ch. 38, § 48; Act of March 31, 1860—*Pennsylvania*—Brightly's Purdon (19th ed.) 342.

But it is said that in *Michigan*, the statute of 1841, providing that the offense will be complete on proof of penetration only, not having been reenacted it may be necessary to prove also emission. Tiffany's Cr. Law (4th ed.), 916, note 2.

5. Wharton's Cr. Law (8th ed.) § 580.

Where a man committed the offense against nature with his wife, it was held that if it appeared that the wife consented, the prisoner must be acquitted, the evidence of the wife not being corroborated. Patteson, J., said: "Although consent or non-consent it is not material to the offense, yet, as the wife, if she consented would be an accomplice, she would require confirmation; and so it would be with a party consenting to an offense of this kind whether man or woman." *Rex v. Jellyman*, 8 Car. & P. 604.

See also *Medis v. State*, 27 Tex. App. 194. In this case it was laid down that in sodomy, as in rape, if the evidence tends to show the consent of the prosecuting witness to the criminal act there must be corroborative evidence to warrant conviction. It was held that the trial court erred in failing to instruct the jury that if they found that the alleged injured party was consenting then they must find that his evidence was corroborated.

One Acting Under Coercion.—In *People v. Miller*, 66 Cal. 468, the defendant was convicted of the infamous crime against nature. It was contended that the complaining witness, a boy thirteen years old, was an accomplice whose testimony required corroboration, and that, as he was not corroborated, the conviction was erroneous. But the uncontradicted testimony of the boy showed that he acted under the threats and coercion of the defendant and it was held that he was therefore not an accomplice.

Evidence Sufficient to Corroborate.—

Com. v. Snow, 111 Mass. 411, was the case of an indictment for sodomy committed with one S, who testified that defendant committed the crime in the latter's rooms, at a certain time; that while in the act, S heard a rapping at the outer door; that defendant went

VI. LIBEL AND SLANDER.—The question of the effect of a charge of sodomy under the law of libel and slander has been before the courts. The charge has been held actionable, *per se*, even where sodomy is not indictable.¹ But this doctrine does not seem to be supported by the weight of authority.²

to the door and let some one in; that defendant and M came up stairs, and M went farther up, while defendant returned to his rooms. M testified that she came at the time mentioned to the outer door and found it locked, contrary to custom; that, after she had tried the door, defendant came down stairs and let her in, telling her that he locked the door because he was "having a nap;" that defendant returned to his room and she went up to her rooms. B, a physician, testified that he had prescribed for S for having taken poison, and that, after his return from visiting S, defendant came to him and asked if S would die, and if he had said why he had taken the poison. *Held*, sufficient corroboration to warrant a verdict against defendant, even if S were to be regarded as *particeps criminis*.

In *Territory v. Mahaffey*, 3 Mont. 112; 2 Cr. Law. Mag. 278, M was indicted for sodomy with A, who testified that M had committed the offense with him on a certain date and also at other times before that date. The officer who arrested M testified that M, when arrested, said it would be one of the most interesting cases ever tried, for A was a boy prostitute. A brother testified that M came to his house and requested that A go to the place where the offense was alleged to have been committed to receive some money that M owed him; that A went and did not return till next day. The clerk of a hotel testified that M and A went to bed in a room in the hotel. *Held*, that A was an accomplice, and that his testimony was corroborated by evidence which tended to connect M with the offense.

Evidence Held Competent.—On an indictment for sodomy, evidence was admitted to the effect that defendant attempted, after the commission of the alleged offense, to commit a like offense with the witness, and said to him that he had "done it with other boys." The judge charged that if, either from the language itself, or from proved facts taken with the language the jury should think that defendant intended to include the

prosecuting witness, the declaration was in the nature of a confession and was competent, otherwise, not, and this was held correct. *Com. v. Snow*, 111 Mass. 411.

Evidence Not Admissible.—Since, on the trial of an indictment, evidence may not be admitted to show that the accused has a general disposition to commit the same kind of offense as that charged, therefore an admission by the prisoner, in a prosecution for an infamous crime, that he had committed a similar offense at another time and with another person, and that his natural inclination was toward such practices, ought not to be received in evidence. *Rex v. Cole*, 1 Russ. on Crimes (6th Am. ed.) 700.

In *State v. Gruso*, 28 La. Ann. 952, it was held that the fact that the party injured made complaint immediately or soon after the time of the injury might be proven; but that particulars or circumstances narrated were hearsay and not admissible except to corroborate the testimony of the party when impeached.

1. In *Estes v. Carter*, 10 Iowa 400, it was held that, sodomy being no crime under the laws of Iowa, words charging a person with sodomy were not actionable without showing special damage. But in *Cleveland v. Detweiler*, 18 Iowa 299, the contrary was held, the court by Dillon, J., saying that the charge involved "unchastity of the highest, grossest, and most flagrant character," and that "an ordinary accusation of unchastity is mild and gentle as compared with the one for which this action is brought."

So in *Haynes v. Ritchey*, 30 Iowa 76; 6 Am. Rep. 642, and the court by Miller, J., said: "We have no hesitation in holding that to charge a woman with bestiality is to impute to her a debasement and depravity of thought and sentiment not involved in any other possible accusation, and is an imputation of unchastity of the gravest and grossest character and actionable *per se*."

2. In *Reg. v. Hickman*, 1 M. C. C. 34, it was held that a letter threatening

VII. SODOMY GROUND FOR DIVORCE.—Sodomy or an unsuccessful attempt to commit sodomy, was by the common law a ground of separation between husband and wife.¹ Under the present *English* statute,² the commission of the offense by the husband affords a cause for a divorce *a vinculo*. In at least one State,³ "the commission of the crime against nature, either with mankind or beast, either before or after marriage," is a cause of divorce.

VIII. ATTEMPTS.—An attempt to commit sodomy was indictable at common law.⁴ By statute in *England*⁵ and in some of the States,⁶ the attempt is declared to be a misdemeanor.

to charge the prosecutor with having made overtures to commit sodomy does not threaten to charge a crime which can be regarded as infamous under 4 Geo. IV, ch. 54, § 3.

Coburn v. Harwood, Minor (Ala.) 93; 12 Am. Dec. 37, held that sodomy not being indictable at common law or by a statute of the State, words charging a commission of the offense are not actionable *per se*. So, also, in *Davis v. Brown*, 27 Ohio St. 326; *Melvin v. Weiant*, 36 Ala. 184, followed the case of *Davis v. Brown*, 27 Ohio St. 326, and the court by Boynton, J., said: "Some members of the court, in view of the heinous character of the charge, and of its direct and certain tendency to degrade and exclude from decent society the person against whom the said charge is made, would have inclined to regard the injury as one which the law, now existing, is adequate to redress, while the remaining members are of the opinion that *Davis v. Brown*, 27 Ohio St. 326, was correctly decided."

By the act of Apr. 12, 1889, sodomy has since, however, been made a crime in *Ohio*.

Other Cases.—In *Woolcott v. Goodrich*, 5 Cow. (N. Y.) 714, the slanderous words alleged were: "He has been with a sow." It was held that the action would lie. See *Goodrich v. Woolcott*, 3 Cow. (N. Y.) 231.

In *Ausman v. Veal*, 10 Ind. 355; 71 Am. Dec. 331, the plaintiff alleged that the defendant had used words charging Mary Ausman with having had sexual connection with a dog, and that she had "had pups." Held, that the action would lie.

See also *Woolnoth v. Meadows*, 5 East 463; *Coleman v. Godwin*, 2 B. & C. 285, n.

1. *Mogg v. Mogg*, 2 Add. Ecc. 292; 2 Eng. Ecc. R. 311.

See also *Bromley v. Bromley*, 2 Add. Ecc. 152, n.; 2 Eng. Ecc. R. 260, n.

2. 20 & 21 Vict., ch. 85, § 27, cited in 2 Wait's Actions and Defenses 566.

3. *Alabama*.—See Rev. Code of *Alabama*, 1867, § 2351, 4 a; 2 Wait's Actions and Defenses 566; 1 Bish. Mar. & Div. (5th ed.), § 191 a, n.

4. See *Reg. v. Rowed*, 3 Q. B. 180; *Rex v. Hickman*, 1 M. C. C. 34; Anonymous, 1 B. & Ad. 382; *Reg. v. Middle-ditch*, 1 Den. C. C. 92; *Reg. v. Lock*, 12 Cox, C. C. 244; 1 Wharton's Cr. Law (8th ed.), § 580; 2 Bish. Cr. Law (7th ed.), § 1195. See also ASSAULT, vol. 1, p. 778; ATTEMPT, vol. 1, p. 936.

5. 24 & 25 Vict., ch. 100, § 62.

6. In *Pennsylvania*, by act March 31, 1860, an attempt or solicitation to commit sodomy is declared to be a misdemeanor. *Brightly's Purdon* (10th ed.) 324.

In *State v. Frank*, 103 Mo. 120, it was declared that an attempt to commit the offense of sodomy is a crime in itself and punishable as such under *Missouri Rev. Stat.*, 1879.

In *Michigan*, by act of May 17, 1889, it is provided that "every person above the age of sixteen years who shall entice, allure, or persuade any male person under the age of fourteen years into any room, office, or to any other secret place, to take, or for the purpose of taking any immoral, immodest or indecent liberties, or who shall take or attempt to take such liberties with such person at any place shall be deemed guilty of a felony."

Definition.

SOIL—SOLELY.

Definition.

SOIL—(*Compare* LAND, vol. 12, p. 655; REAL PROPERTY, vol. 19, p. 1028).—See note 1.

SOJOURNMENT—(See also RESIDE—RESIDENCE).—Sojournment is derived from the French substantive *sejour*, or the French verb *sejourner*, which means a temporary residence or dwelling for a short time. The literal meaning of the word is a dwelling in a place for a day only; and by an extended and somewhat figurative mode of expression it is used to signify a dwelling in a place for a short time, without ascertaining the precise length of time.²

SOLAR.—See TIME.

SOLD—(*Compare* SALES; SELL, and references under those titles).—See note 3.

SOLDIER.—See FIELD, vol. 7, p. 958; MILITARY LAW, vol. 15, p. 390; NUNCUPATIVE WILLS, vol. 16, p. 1011; PENSIONS, vol. 18, p. 283; WAR.

SOLD NOTE.—See BROKERS, vol. 2, p. 591; STOCK EXCHANGE.

SOLE.—Alone; single; separate; individual. Thus, an unmarried woman is called a *feme sole*.⁴

SOLELY.—See note 5.

1. "Soil" frequently means the surface of the land only, and does not include minerals. *Putty v. Solby*, 26 Beav. 606; *Wakefield v. Buccleugh*, L. R., 4 Eq. 613; *reversed* L. R., 4 H. L. 377, but upon another ground. But in the absence of a context the term would mean to the center of the earth. See cases *supra*. See, however, *Micklewait v. Winter*, 6 Exch. 644.

2. *Baptiste v. De Volunburn*, 5 Har. & J. (Md.) 88.

Sojourning.—"The term 'sojourning' means something more than 'traveling,' and applies to a temporary as contradistinguished from a permanent residence." *Henry v. Ball*, 1 Wheat. (U. S.) 5.

Sojourner.—The *Pennsylvania* act of 1881, in relation to physicians, requires a physician to register in any county in which he "sojourns" for the purpose of practicing medicine. In *Edge v. Com.* (Pa. 1887), 9 Atl. Rep. 471, it was held that a physician, who resided and practiced medicine in one county and had an office and practiced in another, was a "sojourner" in the latter county, within the statute.

3. In general "sold" imports an absolute and complete transfer of the ownership from vendor to vendee. *Tyler v. Barrows*, 6 Robt. (N. Y.) 104.

But, if it can be gathered that the intention of the parties was only to make an executory contract of sale, effect will be given to such intention. See SALES; *Anderson v. Read*, 106 (N. Y.) 333; *Blackwood v. Cutting Packing Co.*, 76 Cal. 212; 9 Am. St. Rep. 199; *Bradish v. Yocum*, 130 Ill. 386.

The words "I have sold" in a conveyance, import a valuable consideration. *Reaves v. Oreknob Copper Co.*, 74 N. Car. 593.

Sold or Conveyed.—See CONVEY, vol. 4, p. 131; in insurance policies, see FIRE INSURANCE, vol. 7, p. 1028.

Actually Sold.—See ACTUAL, vol. 1, p. 186.

4. The word "sole" in a will has not a fixed technical meaning, throwing on the person who contests the meaning the necessity of showing, by implication, that it is not used in the particular instrument in its strict technical sense. *Massey v. Rowen*, L. R., 4 H. L. 288.

Sole Corporation.—See CORPORATIONS, vol. 4, p. 187.

5. **Solely**.—A vehicle sometimes used for the purpose of advertising—being painted and placarded as an advertisement, or used for carrying about a band in order to make public announce-

SOLEMN FORM—SOLICITATION OF CHASTITY.

SOLEMN FORM.—See PROBATE, vol. 19, p. 180.

SOLEMNIZE—(See also MARRIAGE, vol. 14, p. 614).—To solemnize a marriage means nothing more than to be present at a marriage contract, in order that it may have due publication before a third person or persons, for the sake of notoriety and the certainty of its being made.¹

SOLEMNLY.—See note 2.

SOLEMN OATH.—See INDICTMENT, vol. 10, p. 546.

SOLICIT ; SOLICITATION—(See also SOLICITATION OF CHASTITY).—To “solicit” is defined to be to importune, to entreat, to implore, to ask, to attempt, to try to obtain.² A solicitation to commit a crime is a distinct offense.⁴

SOLICITATION OF CHASTITY—(See also SEDUCTION).—Vol. 21, p. 682.

I. DEFINITION.—Solicitation of chastity is the asking or urging a woman to surrender her chastity.⁵ In *England*, by the common law, this was not an indictable offense, but punishable in the spiritual courts.⁶ In the State of Connecticut, where adultery is a felony, it would seem that solicitation to commit adultery may be indictable as an attempt;⁷ but it has been held otherwise in Pennsylvania, where the solicitation constitutes a

ment—is not used “solely” in the course of trade so as to give exemption from toll, within an exception to an *English* statute levying tolls upon vehicles. *Speak v. Powell*, L. R., 9 Exch. 25.

1. *Pearson v. Howey*, 11 N. J. L. 19.

A marriage is solemnized when, in the presence of a judicial officer, priest, or minister, the parties declare that they take each other as husband and wife; and the officer or minister who witnesses this ceremony is said to “solemnize” the marriage. *Sharon v. Sharon*, 75 Cal. 1.

In *Bowman v. Bowman*, 24 Ill. App. 170, it was contended that a common-law marriage was not such a marriage as the legislature had authorized the courts to dissolve by divorce, such a marriage not being one “contracted and solemnized” within the meaning of the statute on divorce. It was held that “the word ‘solemnized,’ as used in our statute, is not to be construed as meaning only a ceremonial solemnization, whether religious or official, but that for the purpose of divorce a marriage may be self-solemnized by the parties to it, and a contract between them which constitutes them man and wife is a marriage ‘contracted

and solemnized’ within the meaning of our statute authorizing divorce.”

2. **Solemnly.**—Where a thing—*e. g.*, an oath—has to be done “solemnly,” that “does not merely mean religiously, but means with all due solemnities.” *Attorney-Gen’l v. Bradlaugh*, L. R., 14 Q. B. Div. 667.

3. *Reg. v. Most*, 44 L. T. N. S. 823. In that case there was a conviction under a statute making it criminal to “solicit, encourage, or persuade,” etc., any person to murder any other person. The solicitation was by newspaper publication.

4. See CRIMINAL LAW, vol. 4, p. 641.

5. *Blacks’ L. Dict.*

The inviting another to commit fornication or adultery. *Bouv. L. Dict.* (15th ed.) 647.

6. *Reg. v. Pierson*, Salk. 382.

See also *Lockey v. Dangerfield*, 2 Stra. 1100; *Riguid v. Gallisard*, 7 Mod. 78; 2 Raym. 809.

7. *State v. Avery*, 7 Conn. 270. In this case the defendant had written a letter inviting a married woman to make an assignation to meet the defendant for the purpose of committing adultery. The court by Peters, J., said: “The offense is of the most serious kind, no less than that for his own wicked gratification he solicited and

Definition.

SOME—SOON.

Definition.

SOME.—A part or portion. See note 1.

SOMNAMBULISM.—Sleep-walking. It is said that the legal consequences of somnambulism should be the same as those of insanity.²

SON.—(See also *CHILD*, vol. 3, p. 229; *ISSUE*, vol. 11, p. 868; *WILLS*).—An immediate male descendant. The terms "son," "children," etc., are ordinarily words of purchase.³

SON ASSAULT DEMESNE, PLEA OF.—(See also *TRESPASS*).—His own assault. A plea which occurs in the actions of trespass and trespass on the case, by which the defendant alleges that it was the plaintiff's own original assault that occasioned the trespass for which he has brought the action, and that what the defendant did was merely in his own defense.

SOON.—In a short time. See note 4.

Solvency of Bank.—A bank is solvent, within the meaning of the constitution and statutes of *Missouri*, when it possesses sufficient assets to pay, within a reasonable time, all its liabilities through its own agencies. *Dodge v. Mastin*, 17 Fed. Rep. 660.

Instruction almost identical with this was held not to be erroneous in *Iowa*. *State v. Cadwell*, 79 Iowa 432.

It will be observed that this definition falls between the two given in the text, viz., that solvency is the sufficiency of one's entire property and assets to pay all his debts, and that solvency is one's ability to pay his debts in the ordinary course of business. But in both cases it was said that ordinarily "solvency," when applied to a bank, had the latter meaning.

1. "Some" has been held equivalent to "any." *McClellan v. McClellan*, 65 Me. 506; *Cooper v. Hubbuck*, 12 C. B. N. S. 456; 104 E. C. L. 456.

2. *Bouv. L. Dict.*; see also *HOMICIDE*, vol. 9, p. 596; *INSANITY*, vol. 11, p. 105.

Whether this condition is anything more than a co-operation of the voluntary muscles with the thoughts which occupy the mind during sleep, is not settled by physiologists. Not only is locomotion enjoyed, as the etymology of the term signifies, but the voluntary muscles are capable of executing motions of the most delicate kind. There is a form of this affection called *ecstasis*, or "cataleptic somnambulism," from its being conjoined with a kind of catalepsy, in which the walking and other active employments are replaced by what appears to be a deep, quiet sleep, the

patient conversing with fluency and spirit, and exercising the mental faculties with activity and acuteness. Somnambulism may incapacitate a person from the performance of his duties, and so impair the validity of his contracts. By rendering him troublesome, mischievous and dangerous, it furnishes good grounds for annulling contracts of service, whether it existed previously and was concealed, or had made its appearance later. Whether it should be considered a sufficient defense of breach of promise of marriage, is a question which hardly admits of an answer. Hoffbauer suggests as a reason for not regarding the criminal actions of the somnambulist with indulgence, that they have originated, if not in premeditation, at least in the deep and deliberate attention which the mind has given to the subject when awake. Fodere, by a similar logic, holds that the acts of a somnambulist are more independent than others; being the free and unconstrained expression of waking thoughts and designs, and therefore not excusable. He seems to have forgotten, observes Dr. Ray (*Med. Jur. Ins.*) that by no human laws are men responsible for their secret thoughts, but only for their words and acts. *Rap. & Law. L. Dict.*, citing *Whart. L. Dict.*

3. *CHILD*, vol. 3, p. 232; *SHELLEY'S CASE (RULE IN)*.

Sons and Daughters.—The words "sons and daughters," in a will, may include grandchildren. *Archer v. Smith*, 2 Desaus. (S. Car.) 123, n. See also *CHILD*, vol. 3, p. 232.

4. In *Sanford v. Shepard*, 14 Kan.

Definition.**SOUND.****Definition.**

SOUND—(See also HORSES, vol. 9, p. 761; WARRANTY).—"Sound, when used with reference to wood or vegetables, or other inanimate substances, means free of decay or rottenness. When it is used in reference to animals, and applied to the mind, it means that neither from nature nor disease, nor other causes, is the mind incapable of performing its ordinary functions. When applied to the organs of seeing, hearing, smelling, etc., it means that the organ has not, either from nature, disease, or other cause, any defect which makes it incapable or unfit to perform the services ordinarily required of it."¹

232, the trial court had instructed, "if there is no time specified for the performance of an act, or if it is specified that it is to be performed soon, the law implies that it is to be performed within a reasonable time." It was held that there was certainly no error in this instruction sufficient to reverse the judgment.

As Soon as Possible—(See also AS, vol. 1, p. 777; LOGS AND LUMBER, vol. 13, p. 1025; SALES).—"To do a thing 'as soon as possible' means to do it within a reasonable time, with an undertaking to do it in the shortest practicable time." Hydraulic Engineering Co. v. McHaffie, L. R., 4 Q. B. Div. 673; 29 Moak's Rep. 105; Robinson v. Brooks, 40 Fed. Rep. 525.

In Attwood v. Emery, 1 C. B. N. S. 110; 87 E. C. L. 108, a manufacturer agreed to deliver goods "as soon as possible." This agreement was construed to mean "as soon as the vendors could" with reference to their ability to furnish the articles ordered consistently with the execution of prior orders in hand. Attwood v. Emery, 1 C. B. N. S. 110; 87 E. C. L. 108, in Hydraulic Engineering Co. v. McHaffie, L. R., 4 Q. B. Div. 670; 29 Moak's Rep. 105.

In Pope v. Filley, 3 McCrary (U. S.) 190, reversed, but upon another ground, 115 U. S. 213, the vendors agreed to ship the vendee 500 tons of iron "as soon as possible." The court by McCrary, J., said: "The meaning of that clause of the contract is that these parties were to use all reasonable diligence to ship as soon as possible. The time in such a case is of course important, and it was especially important, in this case, because the parties saw fit in their contract to say that the iron should be shipped as soon as possible; but if it was shipped by the first conveyance that could be had, and due diligence was used, then that part of the contract has been complied with."

And again: "This clause did not make it obligatory upon the plaintiff to do everything which was possible as a physical act, if such act lay beyond what shippers of iron might reasonably be expected to do. So far as the obligation of this clause of the contract is concerned, it is sufficient for the jury to find that the plaintiff diligently made every reasonable effort in the usual course of commerce to effect the prompt shipment of the iron."

For constructions of the phrase in fire insurance policies, see FIRE INSURANCE, vol. 7, p. 1049.

As Soon as Conveniently May be.—See CONVENIENTLY, vol. 4, p. 103.

As Soon as They Conveniently Can.—

A railroad charter authorized a company to construct a road with one or more tracks, and to make and erect warehouses and all works and appendages, etc., "as soon as they conveniently can." It was held that the expression "as soon as they conveniently can" did not compel the company to exercise its whole authority in the very beginning, and when the demands of business were few. Philadelphia, etc., R. Co. v. Williams, 54 Pa. St. 107.

1. Pearson, J., in Bell v. Jeffreys, 13 Ired. (N. Car.) 357.

"I think the word 'sound' means what it expresses—namely, that the animal is sound and free from disease at the time he is warranted to be sound." Kiddell v. Burnard, 9 M. & W. 670.

The term "sound" applies to condition only, not to quality or kind, and is opposed to defective, decaying or injured. An article may be of an inferior kind and still be sound. Hawkins v. Pemberton, 35 How. Pr. (N. Y.) 376; 6 Robt. (N. Y.) 43. See also Dickinson v. Follett, 1 M. & R. 299; Budd v. Fairmauer, 8 Bing. 48.

Sound Order.—See INTENT, vol. 11, p. 370.

Sound and disposing mind and mem-

SOUND IN DAMAGES—SPAN OF HORSES.

SOUND IN DAMAGES.—An action is said to “sound in damages” when it is brought, not for specific recovery of lands, goods, or sums of money (as is the case in real and mixed actions, or the personal actions of debt and definue), but for damages only, as in covenant, trespass, etc.¹

SOUNDS—(VOCAL).—See note 2.

SOVEREIGN.—See INTERNATIONAL LAW, vol. II, p. 439; STATES; UNITED STATES.

SPAN.—The word “span” does not, even in architecture, always mean a part of a structure. It is perhaps oftener used to denote the distance or space between two columns.³

SPAN OF HORSES.—See note 4.

ory; sound mind, etc., are expressions frequently used to describe the testamentary capacity of a testator. See INSANITY, vol. II, p. 151; TESTAMENTARY CAPACITY.

“Sound Health,” in an application for insurance, was held to mean a state of health free from any disease or ailment that affects the general soundness and healthfulness of the system seriously, not a mere temporary indisposition which does not tend to weaken or undermine the constitution of the assured. *Brown v. Metropolitan L. Ins. Co.*, 65 Mich. 306. See generally LIFE INSURANCE, vol. 13, p. 632.

1. Steph. Pl. (2d. Am. ed) 133.

An action sounding in damages, within the meaning of the *Illinois* statute relating to appeals and writs of error from or to the appellate court, is one where the damages cannot be determined in dollars and cents by witnesses, but certain facts are proven, and from those facts the jury determine the amount of damages, as in slander, and the like. The words, “sounding in damages,” were intended to include all cases, whether the action is *ex contractu* or *ex delicto*, when the damages are not susceptible of direct proof. *Bradshaw v. Standard Oil Co.*, 114 Ill. 172.

2. A claim of a patent was as follows: “The method of and apparatus for transmitting vocal or other sounds telegraphically.” It was held that articulate speech was certainly included within the description “vocal or other sounds.” *Dolbear v. American Bell Telephone Co.*, 126 U. S. 1.

3. *Hannibal, etc., R. Co. v. Missouri River Packet Co.*, 125 U. S. 260. That was a suit against a railroad company to recover damages for injuries to

plaintiff's steamboats by defendant's bridge across the Missouri river. The Act of Congress authorizing the building of the said bridge provided that the spans should not be less than 160 feet in length in the clear on each side of the central or pivot pier of the draw. The line of the bridge as built ran diagonally across the current of the river, while each several pier was parallel with the current. Measured along the superstructure, the distance from pier to pier was 160 feet, but measured at right angles with the current of the river, the distance was but 153 feet. It was contended for plaintiff in error that the word “span” as used in the statute, meant the structures or parts of the bridge which spanned the river on each side of the pivot pier. It was held in conformity with the definition given above that “span” as used in the statute, meant the open space between the piers measured at right angles with the current; the space left open for navigation purposes, and not the superstructure.

4. **Span of Horses.**—A colt four months old is not exempt from execution as forming with its dam a “span of horses.” *Ames v. Martin*, 6 Wis. 361; 70 Am. Dec. 468. The court, by Cole, J., said: “We should have but little difficulty in saying that the word ‘horse,’ in the statute, was intended to include a young colt, were it not used in connection with the word ‘span’ This word seems to qualify and limit the meaning of the word ‘horse;’ for the ordinary and familiar signification of the language, ‘a span of horses,’ is two animals which may be connected together, or united for the purpose of a team.”

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I. IN GENERAL.—1. *United States as Successor of Spain.*—By the treaty of cession with Spain the United States succeeded to all the rights and duties of the king of Spain in the ceded territory;¹ and, as Spain had power to make grants founded on any

1. *Mayor, etc., of New Orleans v. U. S.*, 10 Pet. (U. S.) 732.

consideration and subject to any restrictions, a grant binding on her is binding on the United States as her successor.¹

2. Land Passing as Public Property.—But where colonists were to receive their titles and grants from the Spanish Government it follows necessarily that the entire title, legal and equitable, must have remained in the Government and have been so understood by the parties; and if the land designated for the establishment remained national property, and was not severed from the national domain, it passed to the United States as public property by the treaty of cession.²

3. Mode of Making Concessions or Grants.—Applications for a concession in Louisiana as well as in California usually addressed a petition to the governor for the land; and it seldom or never appears that any survey was had before the concession was issued; but surveys frequently followed the concession or grant; and where the proceeding is regular it affords strong evidence to support the title of the claimant.³

4. Construction of Acts of Congress.—The incidental construction which the Federal Courts have placed upon the various acts of Congress is given in the notes.⁴

1. In *U. S. v. Clarke*, 16 Pet. (U. S.) 231, the court by Catron, J., said: "All the grants of lands made by the lawful authorities of the king of Spain before the 24th day of January, 1818, were by the treaty ratified and confirmed to the owners of the lands. Such is the construction given to the 8th article by this court in *U. S. v. Arredondo Case*, 6 Pet. (U. S.) 706, and in *U. S. v. Percheman Case*, 7 Pet. (U. S.) 51; that is, imperfect titles were equally binding on this government after the cession as they had been on the Spanish government before."

As to the distinction between a complete Spanish grant and a mere contract, see *U. S. v. Mayor, etc., of Philadelphia*, 11 How. (U. S.) 652. Concerning the invalidity of the *Maison Royal Grant*, see *U. S. v. Coxe*, 17 How. (U. S.) 43, following *U. S. v. Turner*, 11 How. (U. S.) 666; *U. S. v. King*, 7 How. (U. S.) 833, which is also reported in 3 How. (U. S.) 773.

Concerning Indian titles see *Chouteau v. Malony*, 16 How. (U. S.) 237, *et seq.*; *U. S. v. Fernandez*, 10 Pet. (U. S.) 304; *Mitchel v. U. S.*, 15 Pet. (U. S.) 80, *et seq.*

2. *U. S. v. Turner*, 11 How. (U. S.) 666. But see to the effect that a grant for a quay did not pass to the United States, but belonged to the city of New Orleans, Mayor, etc., of New Orleans *v. U. S.*, 10 Pet. (U. S.) 712, *affirming*, as to dedication of property to public

use, the principles upon which were decided the cases of *Cincinnati v. White*, 6 Pet. (U. S.) 431, and *Barclay v. Howell*, 6 Pet. (U. S.) 498.

3. *Trenier v. Stewart*, 101 U. S. 803. Regular concessions or grants were usually made in one of three ways: *First*: Grants by specific boundaries, where, of course, the donee is entitled to the entire tract within the described monuments. *Second*: Concessions or grants by quantity, as of one or more leagues of land within a larger tract described by what are called out-boundaries, where the donee is entitled to the quantity specified and no more, to be located by the public authority usually in a manner to include the improvements of the occupant, and with due respect to any descriptive recitals in the instrument. *Third*: Grants or concessions of a place or rancho by some particular name, either with or without specific boundaries, where the donee is entitled to the tract known by the name specified, according to the boundaries, if boundaries are given, and if not, then according to the known extent and limits of the tract or rancho as shown by the proofs, including evidence of possession and the settlement and cultivation of the occupant. *Trenier v. Stewart*, 101 U. S. 803. See also *Higuera v. U. S.*, 5 Wall. (U. S.) 834.

4. In the proviso in the act of 1836, confirming Spanish and French claims,

II. CONSTRUCTION — 1. In General; Description; Validity.—

Spanish grants are construed strictly against the grantee.¹

The laws and ordinances of the Government of Spain in relation to grants of land by the Spanish Government, must be of universal application in the construction of grants.² To sustain a claim under a Spanish grant there must have been possession under a complete grant or concession from the Government, or an order of survey duly executed, or other mode of investiture of original title in the claimants, by separation from the mass of the public domain, either by actual survey or definition of fixed, natural or ascertainable boundaries, or initial points, courses, and distances, by competent authority, prior to the cession of such lands to the United States.³

the words "under any law of the United States" mean subject to any law thereof. *Mills v. Stoddard*, 8 How. (U. S.) 345.

The act of June 6, 1874, applies only to cases where the party is entitled to a patent. *Snyder v. Sickles*, 98 U. S. 203.

The twenty-fifth section of the judicial act and the treaty with France extend the jurisdiction of the Supreme Court to rights protected by the constitution, by treaty, or by laws of the United States. *Mayor, etc., of New Orleans v. DeArmas*, 9 Pet. (U. S.), 236. See also *Chouteau v. Eckhart*, 2 How. (U. S.) 372; *Pollard v. Kibbe*, 14 Pet. (U. S.) 254; *Mayor, etc., of Mobile v. Eslava*, 16 Pet. (U. S.) 234.

Claims to Spanish grants that may be prosecuted against the United States under the act of 1860, must have three distinguishing elements. First: The claimant, or those under whom he holds, must have been out of possession for twenty years or more. Second: The land must be claimed by a complete grant or concession or order of survey duly executed, or other mode of investiture of the title in the original claimant by separation from the mass of the public domains, either by actual survey or defined natural boundaries or initial points, and courses and distances, by the competent authority, prior to the cession of the United States. Third: Where such title was created and perfected during the period of the actual possession of the prior government under which the claim is asserted. *Scull v. U. S.*, 98 U. S. 410.

Where courts are called upon to decide according to the rules governing a court of equity, they are bound to

give due weight to lapse of time. Thus, where a party under no disability, slept on his rights, for nearly fifty years, without making a single step and made no excuse for his long delay, relief was refused. *U. S. v. Moore*, 12 How. (U. S.) 223. Where a claimant's grant has been determined as having no force, the District Court has no power to act on evidence of naked possession unaccompanied by written evidence conferring, or professing to confer, a title of some description. Such is not a sufficient equity to entitle them to a decree. *U. S. v. Power*, 11 How. (U. S.) 580; *U. S. v. Rillieux*, 14 How. (U. S.) 189.

The Spanish laws which formerly prevailed in Louisiana, and upon which titles to land in that State depend, must be judicially noticed. In *U. S. v. Turner*, 11 How. (U. S.) 668, the court, by Taney, C. J., said: "They are questions of law and not questions of fact, and are always so regarded and treated in the courts of Louisiana."

Where countries have been acquired by the United States, its courts take judicial notice of the laws which prevailed there up to the time of such acquisition. Such laws are not considered foreign, but those of an antecedent government. *U. S. v. Perot*, 98 U. S. 430.

1. *Josephs v. U. S.*, 1 Ct. of Cl. 197.

2. *Buyck v. U. S.*, 15 Pet. (U. S.) 223; *U. S. v. Hanson*, 16 Pet. (U. S.) 198.

3. *U. S. v. Clamorgan*, 101 U. S. 831. Where grants were made by Spain, binding on that government, they are equally binding on the United States. As the successor of Spain, all the grants of lands, made by the lawful

Where there has been no possession, and no survey or other segregation of the land from the public domain, a Spanish grant cannot be valid, it being incomplete according to Spanish usages and regulations until a survey is made by the proper official authority;¹ and where the land claimed by a Spanish concession cannot be located by survey, the petition for confirmation will be dismissed;² or where the points indicated in a survey cannot be found, then the description is too indefinite for a survey to be made, and a claimant can take nothing under the concession.³

Uncertainty of location and vagueness of description is fatal to a Spanish grant.⁴ Where the extent of a grant is not given, being without boundaries or location, so that it cannot be located,

authorities of the king of Spain, before the 24th of January, 1818, were, by the treaty with Spain, ratified and confirmed to the owners of the lands. *U. S. v. Clark*, 16 Pet. (U. S.) 232; *citing* and *approving* the doctrine in *U. S. v. Arredondo*, 6 Pet. (U. S.) 706, and in the *U. S. v. Percheman*, 7 Pet. (U. S.) 51.

1. *U. S. v. Boisdore*, 11 How. (U. S.) 63. A concession merely, without antecedent survey and location, creates no right of property. *Maguire v. Tyler*, 8 Wall. (U. S.) 650. "Concession," according to the Spanish law, is neither a grant nor a survey, but only a warrant or order authorizing the deputy surveyor to make a survey, and to report the survey when made to the intendant, in order to found a grant upon it.

2. *De Villemont v. U. S.*, 13 How. (U. S.) 267.

3. *Buyck v. U. S.*, 15 Pet. (U. S.) 224; *U. S. v. Delespine*, 15 Pet. (U. S.) 333; *U. S. v. Miranda*, 16 Pet. (U. S.) 160; *citing* and *approving* *U. S. v. Forbe*, 15 Pet. (U. S.) 182; *Buyck v. U. S.*, 15 Pet. (U. S.) 215. Also, *O'Harra v. U. S.*, 15 Pet. (U. S.) 275, and *U. S. v. Delespine*, 15 Pet. (U. S.) 319.

4. So, where the beginning point of a Spanish grant is uncertain, and the second point has a range of six or seven miles, no valid survey can be made. *U. S. v. Boisdore*, 11 How. (U. S.) 96. And where a party has taken possession, but had no survey executed during the time Spain exercised jurisdiction, this being his own neglect, it lies on him to establish the boundaries of his grant, and to identify his land with such certainty, as to show what particular tract was severed from the public

domain; and if he fails to do it, then he has no remedy in a court of justice. *Lafayette v. Blanc*, 3 La. Ann. 60, *affirmed* in *U. S. v. Boisdore*, 11 How. (U. S.) 96.

But in the *U. S. v. Percheman*, 7 Pet. (U. S.) 54, the petitioner asked "two thousand acres of land in the place called Ockliwaha, situated on the margin of St. John's River." Governor Estrada says: "I do grant him the two thousand acres of land which he solicits, in absolute property, in the indicated place." The survey of this land was not executed until the 20th of August, 1819, after the treaty of cession. The title was confirmed by the court. So in the case of *U. S. v. Clarke*, 8 Pet. (U. S.) 446, the grant was sustained where the petitioner solicited a grant of the quantity of land which the Governor of Florida had thought proper to assign to the water-mills, equivalent to five miles square; which land he solicits "on the western part of St. John's river, above Black creek, at a place entirely vacant, known by the name of White Spring." In the grant it is declared "A title shall be issued comprehending the place and under the boundaries set forth in the petition." And in the case of *U. S. v. Levi*, 8 Pet. (U. S.) 479, the grant was "for twenty-five thousand acres of land, south of the place known by the name of Spring Garden, in this form: twelve thousand acres of them, adjoining the lake or pond called Second, and known by the name of Valdes, and the remaining thirteen thousand acres on the pond farther above the preceding, known by the name of Long Pond, the whole west of the River St. John." The survey was executed on the 2d of August,

it is void;¹ as also where the boundaries are too indefinite.² A concession indefinite in itself will not be recognized without a survey. The Supreme Court of the United States, in various cases, has either directly or indirectly decided that an actual survey of an open floating concession is a necessary ingredient to its validity, and that it must also be an authorized survey to pass any title.³

A survey under the Spanish Government meant the actual survey of the land, ascertaining the contents by running lines and angles.⁴ Where precise locality is not given to a concession, a survey is necessary to sever the land from the public domain, and where none is made the grant is void.⁵ The land granted must be taken as near as may be to the place described in the petition, and if it cannot be found there the grantee has no claim to an equivalent; and if it shall be found to interfere with previous grants to third persons, the concession will be lessened in quantity according to the extent of the rights of third persons.⁶

1819, and the court confirmed the title. Several other grants reviewed in the same case, where the description is similar, were also confirmed, as being sufficiently certain. Land described as "South and north of the lands at Musquite" is too indefinite, and a claimant can take nothing under such a concession. *Buyck v. U. S.*, 15 Pet. (U. S.) 224; *U. S. v. Delespine*, 15 Pet. (U. S.) 333.

1. *U. S. v. D'Auteriène*, 15 How. (U. S.) 28.

2. *Denise v. Ruggles*, 16 How. (U. S.) 244; *U. S. v. King*, 3 How. (U. S.) 787; *U. S. v. Miranda*, 16 Pet. (U. S.) 160. But where there is some obscurity in the language of the grant, which may be cleared by reference to an official Spanish survey referred to in the grant, and which was before the Government at the time the grant was made, the obscurity is cured. *U. S. v. McMasters*, 4 Wall. (U. S.) 681.

3. *Wherry v. U. S.*, 10 Pet. (U. S.) 338; *Smith v. U. S.*, 10 Pet. (U. S.) 327; *O'Hara v. U. S.*, 15 Pet. (U. S.) 279; *U. S. v. Hanson*, 16 Pet. (U. S.) 198; *U. S. v. Clarke*, 16 Pet. (U. S.) 228; *U. S. v. King*, 3 How. (U. S.) 784; *U. S. v. Lawton*, 5 How. (U. S.) 26.

In most grants, even those of a descriptive character which designated the place where the lands were to be located, a survey was required to be made and returned before a party could obtain a formal and perfect title. *Winter v. U. S.*, Hempst. (U. S.) 384.

Non-interference with the rights of

others was a condition which attached to all grants, and was generally expressed; but if not expressed, always implied. This, of itself, demanded an actual survey on the ground as the only certain mode of observing that condition. *Winter v. U. S.*, Hempst. (U. S.) 384.

4. *U. S. v. Hanson*, 16 Pet. (U. S.) 198; 6 Jac. Law Dict. 157.

"The survey," says the court by Story, J., in *Ellicott v. Pearl*, 10 Pet. (U. S.) 441, "made by a surveyor being under oath, is evidence as to all things which are properly within the line of his duty. But his duty is confined to describing and marking on the plat the lines, corners, trees, and other objects on the ground; and to subjoin such remarks as may explain them."

This case shows the nature of a survey and what must be understood by it. See also *U. S. v. Hanson*, 16 Pet. (U. S.) 200.

5. *De Villemont v. U. S.*, Hempst. (U. S.) 389; *Villalobos v. U. S.*, 10 How. (U. S.) 541.

6. *U. S. v. Arredondo*, 13 Pet. (U. S.) 135.

An equivalent for such diminution cannot be surveyed elsewhere. *U. S. v. Arredondo*, 13 Pet. (U. S.) 135.

In such cases, where the concession does not provide for an equivalent, or for another location, none can be made. *U. S. v. Arredondo*, 13 Pet. (U. S.) 135.

Courts of justice can only adjudge what has been granted; and declare that the lands granted by the lawful

2. **Survey.**—Where the survey does not conform to the concession, the grant will not be confirmed.¹ Where a survey is not wholly within the grant, the title will be confirmed to such part of the survey as is within the grant.² The titles of towns to common fields under Spanish concessions, which were vague and uncertain in their boundaries and locations, do not vest in the towns under the act of 1812, until properly surveyed, as required by the act.³

Where the survey contains more than the concession, according to the exterior boundaries as described in the plat, the grant will not be confirmed.⁴ The validity of the order of survey depends upon the power of the officer making it.⁵ A survey could be executed by the surveyor-general, or by any deputy appointed by him, or by the surveyor of the district, or the commandant of a post, or by a private person authorized by the governor-general or intendant.⁶

authorities of Spain are separated from the public domain; but where the land is expressly granted at one place, they have no power by a decree to grant an equivalent at another place, and thereby sanction an abandonment of the grant made by the Spanish authorities. The courts of the United States have no authority to direct the title of the United States in the public lands, and vest it in claimants, however just a claim may be to an equivalent for land, the previous grant of which has failed. *U. S. v. Forbes*, 15 Pet. (U. S.) 184, *citing U. S. v. Arredondo*, 13 Pet. (U. S.) 88. See also *U. S. v. Clarke*, 8 Pet. (U. S.) 436; *U. S. v. Huertas*, 9 Pet. (U. S.) 171.

But where two places are designated in the petition where the lands are to lie, and an equivalent was decreed in case of a deficiency, the residue may be surveyed elsewhere. *U. S. v. Clarke*, 16 Pet. (U. S.) 233.

Such is the construction given to the 8th article of the Florida treaty in the case of *U. S. v. Arredondo*, 6 Pet. (U. S.) 706, and in *U. S. v. Percheman*, 7 Pet. (U. S.) 51.

In *U. S. v. Clarke*, 16 Pet. (U. S.) 233, the grant was for lands particularly mentioned, or for any other lands that were vacant.

1. *U. S. v. Levi*, 8 Pet. (U. S.) 481; *U. S. v. Hernandez*, 8 Pet. (U. S.) 486; from which *U. S. v. Sibbald*, 10 Pet. (U. S.) 323, and *Seton v. U. S.*, 10 Pet. (U. S.) 309, are distinguished.

2. *U. S. v. Huertas*, 8 Pet. (U. S.) 489; see also *U. S. v. Huertas*, 8 Pet. (U. S.) 476.

3. *Carondelet v. St. Louis*, 1 Black (U. S.) 179; *citing West v. Cochrane*, 17 How. (U. S.) 416; *Bissell v. Penrose*, 8 How. (U. S.) 317; and where such survey of such commons was made and recognized, accepted and acted upon by a town, it became binding and cannot be disputed by it. *Carondelet v. St. Louis*, 1 Black (U. S.) 179; *Bissell v. Penrose*, 8 How. (U. S.) 317; where the cases of *Mackay v. Dillon*, 4 How. (U. S.) 421; *Les Bois v. Bramell*, 4 How. (U. S.) 449, and *Jourdan v. Barrett*, 4 How. (U. S.) 169, are examined and explained.

4. *U. S. v. Richard*, 8 Pet. (U. S.) 472.

5. *Chouteau v. U. S.*, 9 Pet. (U. S.) 139.

For power to set aside a survey, see *Maguire v. Tyler*, 1 Black (U. S.) 195; or change location, see *Villalobos v. U. S.*, 10 How. (U. S.) 541; or correct a mistake, *Chaires v. U. S.*, 3 How. (U. S.) 611.

6. *U. S. v. Hanson*, 16 Pet. (U. S.) 198.

In *Smith v. U. S.*, 10 Pet. (U. S.) 334, it is said that "Spain never permitted individuals to locate their grants by mere private survey. The grants were no authority to the public surveyor, or his deputy, to make the survey as a public trust, to protect the royal domain from being cut up at the pleasure of the grantees. A grant might be directed to a private person, or a separate official order given to make the survey; but without either, it could not be a legal execution of the power."

III. CONDITIONS—1. Inhabitation and Cultivation.—The Government of the United States regards the condition of inhabitation and cultivation, annexed to imperfect titles from the Spanish Government, as material and essential, and as having this character by the laws and usages of that Government.¹

2. Survey.—A Spanish grant requiring for its validity a timely survey and occupation within a reasonable time is void if neither of these conditions be performed,² but when the condition is once performed the grant becomes absolute.³

3. Express Conditions.—A Spanish concession of land upon express condition of inhabitation and improvement is no valid foundation for a grant unless there has been a compliance with such conditions.⁴

4. Time Allowed for Performing Conditions.—By the eighth article of the treaty of cession of Spain to the United States, the same time is allowed to the owners of land granted under the authority of Spain to fulfill the conditions of their grants after the date of the treaty as was limited in the grants.⁵

See also *Glenn v. U. S.*, 13 How. (U. S.) 250.

For additional cases turning upon the survey, especially in *California, Florida and Louisiana*. See *SURVEYS*,

1. *McMicken v. U. S.*, 97 U. S. 214; *Fremont v. U. S.*, 17 How. (U. S.) 556.

2. *U. S. v. Boisdore*, 11 How. (U. S.) 97. But unless a condition to a grant is distinctly intimated it will not be inferred. A condition cannot be implied in an absolute grant. *U. S. v. Rodman*, 15 Pet. (U. S.) 130.

3. *U. S. v. Clarke*, 9 Pet. (U. S.) 169.

4. *McMicken v. U. S.*, 97 U. S. 218.

5. So a concession by a Spanish governor which is not followed by the proceedings which his order required, nor a severance of the land from the royal domain, is invalid and void. *Le Compte v. U. S.*, 11 How. (U. S.) 127; *U. S. v. King*, 3 How. (U. S.) 787. And where the claimant of a grant made in 1797 never had possession, and had made no improvements, and had not perfected his grant fifty years after, the presumption is the grant was forfeited. *U. S. v. Moore*, 12 How. (U. S.) 209. See also *U. S. v. Burgerin*, 13 Pet. (U. S.) 85; *U. S. v. Drummond*, 13 Pet. (U. S.) 84; *U. S. v. Kingsley*, 12 Pet. (U. S.) 476; *U. S. v. Mills*, 12 Pet. (U. S.) 215; *Buyck v. U. S.*, 15 Pet. (U. S.) 215. So a grant upon condition of taking possession within six months is defeated by a breach of that condition. *O'Hara v. U. S.*, 15 Pet. (U. S.) 279. A trifling occupation is insufficient and will not avail the grantee. Thus where

one obtains a grant on the representation that he would "establish his whole family and employ all his negroes" in carrying on the establishment, and it appeared that five years afterward he had but a single slave there, it will not be considered a sufficient occupancy to complete his title. *U. S. v. Boisdore*, 11 How. (U. S.) 95. And where one had obtained a grant on condition that he would introduce a colony and establish a great industry, but had taken no steps to fulfill this condition, it was held that his title could not be confirmed. *Glenn v. U. S.*, 13 How. (U. S.) 260. But a condition in a grant of land "to settle two hundred families thereon," etc., is a condition subsequent, and equity will excuse a strict legal performance where a change of sovereignty and circumstances impede its performance. *U. S. v. Arredondo*, 6 Pet. (U. S.) 691. Or where the performance of the condition subsequent is made impossible by the act of the grantor. *U. S. v. Arredondo*, 6 Pet. (U. S.) 691.

5. In the case of *U. S. v. Arredondo*, 6 Pet. (U. S.) 691, it is said that as to individual rights, the treaty is to be considered as dated at its ratification. The provision of the treaty as to the performance of the conditions in grants, is not confined to owners of land by occupancy or residence; but extends to persons who have a legal seisin and possession of land, in virtue of a grant; and that, in the situation of the province, and the claimants to land at the time

5. *Treaty as Affecting Conditions in Grants.*—As between the governments, parties to a treaty, the treaty relates back to its date, but as to the performance of conditions in a grant to a private individual, it affects only from the time of its final ratification.¹

IV. CONFIRMATION; JURISDICTION TO CONFIRM.—The United States Supreme Court has no jurisdiction over land titles unless they are protected by some act of Congress, or by some treaty applicable thereto.² Where a title is complete in form, according to the usages and laws of Spain, and recognized and sanctioned by

of the cession, it was enough that they should show a performance of the condition *cy pres*. *U. S. v. Gibbald*, 10 Pet. (U. S.) 313. See also *U. S. v. Clarke*, 8 Pet. (U. S.) 436.

1. *U. S. v. Arredondo*, 6 Pet. (U. S.) 691.

2. *Mayor, etc., of New Orleans v. De Armas*, 9 Pet. (U. S.) 226. But where the construction of an act of Congress is involved to sustain the title, the court has jurisdiction under the twenty-fifth section of the Judiciary Act, where the title is not to be determined by Spanish law alone. *Chouteau v. Eckhart*, 2 How. (U. S.) 372, where *New Orleans v. Armas*, 9 Pet. (U. S.) 226, is cited and distinguished. The same question arose in the cases of *Pollard v. Kibbie*, 14 Pet. (U. S.) 354, and *Mayor, etc., of Mobile v. Eslava*, 16 Pet. (U. S.) 234, and the court in these cases held that they had the power to look behind the act of Congress into a Spanish concession for the purpose of construing the act, and comparing it with that under which the defendant claimed. Under the acts of Congress of May 26, 1824 (4 Stat. at Large, 52), and June 17, 1844 (5 Stat. at Large, 676), the courts of the United States have no power to decide upon complete or perfect titles to land. *U. S. v. Mayor, etc., of Philadelphia*, 11 How. (U. S.) 648; *following U. S. v. Reynes*, 9 How. (U. S.) 127; *U. S. v. King*, 3 How. (U. S.) 773; 7 How. (U. S.) 833; *U. S. v. McCullagh*, 13 How. (U. S.) 216.

A perfect Spanish grant is not a subject of jurisdiction in the federal courts under the above acts. They only provide for cases where the title set up is imperfect but equitable. *U. S. v. Roselins*, 15 How. (U. S.) 36.

The acts were not designated to invest the holders of imperfect titles with new or additional rights, but merely to provide a remedy by which legal,

just and *bona fide* claims might be established. *U. S. v. Reynes*, 9 How. (U. S.) 154; *Foster v. Neilson*, 2 Pet. (U. S.) 253; *Garcia v. Lee*, 12 Pet. (U. S.) 511; and see *U. S. v. Percheman*, 7 Pet. (U. S.) 89; *Les Bois v. Bramell*, 4 How. (U. S.) 463.

A decision of a State court giving lands covered by riparian rights to certain claimants under a grant in 1807 by an Intendant-General under the Spanish government, which was excepted from the operation of the act of Congress passed on the 26th of March, 1804, which annulled all Spanish grants made after the first of October, 1800, and which was recognized as a valid grant by the act of 3d of March, 1819, was only a construction of a perfected Spanish title, and cannot be reviewed by the United States Supreme Court, under the 25th section of the Judiciary act, it being a perfect title. *Mackay v. Dillon*, 4 How. (U. S.) 421; *Chouteau v. Eckhart*, 2 How. (U. S.) 344; *Les Bois v. Bramell*, 4 How. (U. S.) 461; *Kennedy v. Hunt*, 7 How. (U. S.) 592; *U. S. v. Castant*, 12 How. (U. S.) 442.

Conflict in Titles.—In the case of *Doe v. Eslava*, 9 How. (U. S.) 421, the court held that where there were two conflicting claims to land, one founded upon a French grant in 1757, with possession continuing down to 1787, and another founded upon a Spanish grant in 1788, with possession continuing down to 1819, both claims being confirmed by congress, that in an ejectment suit, where the titles were in conflict, and the State court instructed the jury that the confirmations balanced each other, and that they must look to other evidence in order to settle the rights of the parties, and the judgment of the court being, ultimately, in favor of the party who claimed under the Spanish grant, that it would not, under the circumstances of the case, be distributed.

Congress as a perfect title, courts of justice are concluded by it and have no authority to set it aside.¹ Where Congress provides a board of commissioners to examine grants, and declares that their decision shall be final, a State court has no jurisdiction to divest a claimant of a title obtained from that body,² and its judgments and orders are regarded as nullities.³ In the case of an imperfect Spanish title to land, a confirmation by Congress is

As between claimants under the former government setting up independent, imperfect claims to the same parcel of land, the courts of justice have no jurisdiction to determine the controversy; in such cases it belongs to the political power to decide to whom the perfect title shall issue. *Maguire v. Tyler*, 8 Wall. (U. S.) 650.

1. Such is the well established doctrine in the cases of *Chouteau v. Eckhart*, 2 How. (U. S.) 344; *Mackay v. Dillon*, 4 How. (U. S.) 421; and especially that of *Les Bois v. Bramell*, 4 How. (U. S.) 461. See also *Kennedy v. Hunt*, 7 How. (U. S.) 586; *U. S. v. Castant*, 12 How. (U. S.) 442.

Jurisdiction of Federal Courts to Confirm.—Under the act of Congress of 1824, for relief to claimants of French or Spanish grants, concessions, warrants, or orders of survey, unless the petition is presented in conformity with that act, the federal courts have no jurisdiction. *U. S. v. D'Auterieve*, 15 How. (U. S.) 30, where an act of Congress extends the jurisdiction of a federal court to all claims "by virtue of any French or Spanish grant, concession, warrant, or order of survey" legally made by the proper authorities, the court thus empowered has authority to confirm such claims, and should do so. And this power extends to grants of any character not reserved by the provisions of the empowering act. *Delassus v. U. S.*, 9 Pet. (U. S.) 134.

The act of May, 26, 1824 (4 Stat. 52), was not intended to give jurisdiction to the district court to determine controversies between intermediate claimants, or ascertain the validity of conveyances. Such questions are to be determined in other tribunals of the country. *Putnam v. U. S.*, *Hempst.* (U. S.) 333.

The real inquiry in these cases is, whether the government is the owner, and if that is decided against herself, she has no further concern in the controversy. *Bullitt v. U. S.*, *Hempst.* (U. S.) 333.

In the case of *Callender v. U. S.*,

Hempst. (U. S.) 334, the district court of Arkansas refused to entertain a petition for the confirmation of a grant, under the act of 1824 (4 Stat. 52), for want of jurisdiction where the greater part of the land granted was situated in another State.

2. *Hickey v. Stewart*, 3 How. (U. S.) 762.

Where full jurisdiction is given to the commissioners, their judgment is final. See *U. S. v. Nourse*, 9 Pet. (U. S.) 9.

In the case of *U. S. v. Arredondo*, 6 Pet. (U. S.) 730, it is laid down as a universal principle that where power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, that the acts so done are valid and binding as to the subject matter. The only question that can arise between an individual, claiming a right under the act done, and the public, or any person denying their validity, are power in the officer and fraud in the party. *Voorhess v. Bank of U. S.*, 10 Pet. (U. S.) 478.

All other questions are settled by the decision made, or the act done by the tribunal or officer, unless an appeal or other revision of the proceeding is prescribed by law. *U. S. v. Arredondo*, 6 Pet. (U. S.) 729, and cases there cited.

3. Thus where Congress provided a board of commissioners to examine certain grants and declared that their decision should be final, the court of chancery of the State of Mississippi had no authority to establish one of these grants. *Hickey v. Stewart*, 3 How. (U. S.) 750.

According to the decision of *Henderson v. Poindexter*, 12 Wheat. (U. S.) 543, the exercise of jurisdiction by a court in such a case, where no power had been conferred by Congress upon it, is a mere usurpation of judicial power, and the whole proceeding of the court is void. See *Elliott v. Peirsol*, 1 Pet. (U. S.) 340; *Wilcox v. Jackson*, 13 Pet. (U. S.) 511, and other cases there referred to.

inoperative, unless the title or survey under it will enable the court to ascertain the specific boundaries of the land;¹ and if, before a survey in such a case, an entry is made and a patent taken out for the land, which conflicts with a subsequent survey of the confirmed concession, the patentee has the better title.² The act of March 3, 1807, § 4, was the first that gave a board of commissioners power to adjudicate claims against the United States, and conclude the government as to the question of right in the claimant.³

The act of May 26, 1824, § 5, declared that all claims within its purview should be brought by petition before the district court within two years from the passing of the act; and when so brought before the court if the claimant, by his own neglect or delay, fail to prosecute the cause to final decision within three years, he should be forever barred, both at law and in equity; and that no action at common law or proceeding in equity should thereafter be sustained in any court whatever in relation to said claim.

By the act of 1828, § 6, the provisions of the act of 1824 were extended to the superior court of Florida with some modifications.

The act of May 26, 1830, providing for the final settlement of land claims in Florida, must be construed to contain the same limitation of time within which claim were to be presented as that by the act of May 23, 1828. In 1828 the time for filing petitions before the courts was reduced from two years to one. Courts of Florida, therefore, had no right to receive a petition for the confirmation of an incomplete concession after May 26, 1831. *U. S. v. Marvin*, 3 How. (U. S.) 624, where the case of *U. S. v. Delespine*, 15 Pet. (U. S.) 329, is commented on.

1. *Ledoux v. Black*, 18 How. (U. S.) 473.

2. *Ledoux v. Black*, 18 How. (U. S.) 473.

Where there is specific tract of land confirmed according to ascertained boundaries, the confirmer takes a title on which he may sue in ejectment. *Bissell v. Penrose*, 8 How. (U. S.) 317.

But where the claim has no certain limits, and the judgment of confirmation carries along with it the condition that the land shall be surveyed, and severed from the public domain and the lands of others, then it is not open to controversy and the title attaches to the land. *West v. Cochran*, 17 How.

(U. S.) 403; *Stanford v. Taylor*, 18 How. (U. S.) 412.

3. The judgment of the Board on all claims for less than a league square were to a large degree judicial, but as their powers and duties depended on the acts of 1805 and 1806, and more especially on that of 1807, by which they were bound to transmit to the secretary of the treasury, and to the surveyor-general of the district where the land lay, transcripts of their final decisions, made in favor of each claimant and by which they were required to deliver to them a certificate stating the circumstances of the case, and that the claimant was entitled to a patent for the tract therein designated. *West v. Cochran*, 17 How. (U. S.) 414.

In all cases where tracts of land were granted by the board, which had not been previously surveyed, the 7th section of the act of 1807 declared that they should be surveyed under the directions of the surveyor-general. When a certificate and plat should be filed in the proper office, a patent certificate was to issue, which should entitle the claimant to a patent from the United States. *West v. Cochran*, 17 How. (U. S.) 414.

But this act of Congress did not, *proprio vigore*, vest the legal title in claimants. When the decision of the commissioners was in the claimant's favor, a patent was necessary to convey the title. The report was made conclusive evidence of the equitable right and nothing more. And when the final report was against the validity of the claim, the opinion was to be reported upon its merits, and Congress reserved to itself the ultimate determination. *Burgess v. Gray*, 16 How. (U. S.) 63.

Under the acts of Congress of 1805 and 1807, in relation to the confirmation of land titles in Louisiana, the confirmation does not inure to the holder of the elder title if he neglects to pre-

Where the petition to confirm a grant is filed out of time, the court has no jurisdiction to examine into the merits of the claim.¹

V. GRANTS IN CALIFORNIA—1. Origin of Titles.—California belonged to Spain by the rights of discovery and conquest. The government of that country established regulations for transfers of the public domain to individuals. When the sovereignty of Spain was displaced by the revolutionary action of Mexico, the new government established regulations upon the same subject. These two sovereignties are the spring heads of all the land titles in California, existing at the time of the cession of that country to the United States by the Treaty of Guadaloupe Hidalgo.²

2. Spanish Grants—Presumption as to.—A grant made by a Spanish governor is *prima facie* evidence of the power of the governor to make the same, and throws the burden of proof on the party denying it.³

3. Mexican Grants—*a.* THE LAW AUTHORIZING.—The Mexican Congress, after the country had thrown off the government of Spain, passed the law of 1824, providing for the grant and colonization of the public lands.⁴ The Supreme Executive Govern-

ment sent his claim to the commissioners. Thus where the French owner conveyed twice, and the possession went with the junior conveyance, and the holder thereof presented his claim, and had the title confirmed by the commissioners, and the holder of the senior conveyance neglected to do so, the latter could derive no benefit from the confirmation, and his title is void and barred. *Strother v. Lucas*, 6 Pet. (U. S.) 771.

1. Under the act of Congress of 1844, reviving section 5 of the act of 1824, a petition to confirm a French or Spanish grant, filed more than two years after the former act, was barred. *U. S. v. Porche*, 12 How. (U. S.) 432. And even if the objection to the time of filing the petition is waived, it would not give jurisdiction to the court when the act of Congress had not conferred it. *U. S. v. Porche*, 12 How. (U. S.) 432.

2. *U. S. v. Moreno*, 1 Wall. (U. S.) 400.

3. *U. S. v. Peralta*, 19 How. (U. S.) 343.

In this case the court, by Grier, J., said: "The appellants on whom the burden of proof is cast, to show want of authority, have produced no evidence, either documentary or historical, that the Spanish officers who usually acted as governors of the distant provinces of California were restricted in their powers, and could not make grants of land. The necessity for the exercise of such a power

by the governors, if the Crown desired the distant provinces to be settled, is the greater because of their distance from the source of power. By the royal order of August 22, 1776, the northern and northwestern provinces of Mexico were formed into a new and distinct organization, called the Internal Provinces of New Spain. This organization included California. It conferred ample powers, civil, military and political, on the commandant general. The archives of the former government also show that as early as 1786 the governors of California had authority from the commandant general to make grants, limiting the number of sitios which should be granted. In 1792 California was annexed to the viceroyalty of Mexico, and so continued till the Spanish authority ceased. An attempt to trace the obscure history of the various decrees, orders and regulations of the Spanish Government on this subject would be tedious and unprofitable. It is sufficient for the case that the archives of the Mexican Government show that such power has been exercised by the governors under Spain, and continued to be exercised so under Mexico; and that such grants made by the Spanish officers have been confirmed and held valid by the Mexican authorities."

4. *U. S. v. Vallejo*, 1 Black (U. S.) 541.

Section 2 of the act provides that the lands of the nation, which are not

ment, acting under the 16th section of this law, established, November 21, 1828, regulations for the granting and colonization.¹

The act of 1824 and the regulations of 1828 are the only laws, with the exception of those relating to missions and towns, that were in force in the territories of Mexico for the disposition of public lands.² The act of 1824 and the regulations of 1828 were

the property of any individual, corporation or town, are the subject of the law, and may be colonized. Section 3 provides that for this purpose the congress of the States shall, with the least delay, enact laws and regulations for colonizing within their respective boundaries, conforming in all respects to the constitutive act, the General Constitution, and the rules established in this law; and section 4 prohibits the colonization of any lands within twenty leagues of the sea coast without the consent of the supreme government. Section 8: In the distribution of the lands preference shall be given to Mexican citizens. Section 12: No person shall be allowed to obtain a grant of more than eleven leagues. Section 15: No person who may obtain a grant under the act shall retain it if he resides out of the limits of the republic; and section 16 provides that the executive shall proceed in conformity with the principles established in the act, to the colonization of the territories of the republic. Rockwell's Spanish and Mexican Law, p. 451; U. S. v. Vallejo, 1 Black (U. S.) 541.

1. U. S. v. Vallejo, 1 Black (U. S.) 541.

These regulations provided: *First*, that the governors of the territories should be authorized (in compliance with the act of 1824) to grant vacant lands in other territories to such contractors, families, or private persons, whether Mexican or foreigners, as might ask for them. *Second*, that every person soliciting lands shall address to the governor of the respective territory, a petition, expressing his name, country, profession and religion, and describing as distinctly as possible, by means of a map, the land asked for. *Third*, the governor shall proceed immediately to obtain the necessary information whether the petition embraces the proper conditions required by the law of 1824, both as regards the land and the petitioner, in order that the applicant may be at once attended

to, or, if it be preferred, the municipal authority may be consulted, whether there be any objection to the making of the grant. *Fourth*, this being done, the governor will accede or not to such petition in conformity to the laws on the subject. *Fifth*, the grants made to families or private persons shall not be held to be definitely valid without the previous consent of the territorial deputation, to which end the respective documents (*espedientes*) shall be forwarded to it. *Sixth*, when the governor shall not obtain the approbation of the territorial deputation, he shall report to the supreme government, forwarding the necessary documents for its decision. *Seventh*, the grants made to *empresarias* for them to colonize with many families shall not be held to be definitely valid until the approval of the supreme government be obtained; to which the necessary documents must be forwarded, along with the report of the territorial deputation. *Eighth*, the definite grant asked for being made, a document signed by the governor shall be given, to serve as a title to the party interested, wherein it must be stated that said grant is made in exact conformity with the provisions of the laws, in virtue whereof possession shall be given. *Ninth*, the necessary record shall be kept, in a book destined for the purpose, of all the petitions presented, and grants made, with the maps of the lands granted, and the circumstantial report shall be forwarded quarterly to the supreme government. *Fifteenth*, the land given for a house lot shall be 100 varas. *Seventeenth*, in those territories where there are missions, the lands occupied by them cannot be colonized at present, nor until it be determined whether they are to be considered as the property of the establishments of the Neophytes, Catechumens, and Mexican colonists. Rockwell's Spanish and Mexican Law, p. 453; U. S. v. Cambuston, 20 How. (U. S.) 59.

2. U. S. v. Vigil, 13 Wall. (U. S.) 449; U. S. v. Vallejo, 1 Black. (U. S.)

limitations upon the power of the governor to make grants. They were also considered to be directions to petitioners for land before they could get titles.¹ The public lands could not be sold for money, nor granted away in consideration of past public services, nor on condition of making public improvements of use to the travelling community, or of general benefit to the State.² The avowed purpose of the Mexican congress in enacting the law of 1824, and of the supreme government in carrying it into effect, was to colonize the public domain and to preserve it for settlement and cultivation.³

b. WHAT COULD BE GRANTED.—More than eleven leagues could not be granted to one individual.⁴ The authority conferred by the act and regulations was limited and restrained to the granting of unoccupied public lands,⁵ though islands were excepted and could not be granted,⁶ as were also mines.⁷ Public establishments of the departments could not be granted under those laws;⁸ nor lands occupied by the Catholic missions;⁹ nor

541; *U. S. v. Workman*, 1 Wall. (U. S.) 745; *Bouedín v. Phelps*, 12 Sawy. (U. S.) 306; 30 Fed. Rep. 547.

1. *Fuentes v. U. S.*, 22 How. (U. S.) 443. Authority to make the grants is there expressly conferred on the governors, and conditions prescribed on which they shall be made. The court must look to these laws for both the power to make the grant, and for the mode and manner of its exercise; and they are to be substantially complied with, except so far as modified by the usages and customs of the government under which the titles are derived, the principles of equity and the decisions of this court. *U. S. v. Cambuston*, 20 How. (U. S.) 59.

2. *U. S. v. Vigil*, 13 Wall. (U. S.) 449.

3. This policy recognized the obligation resting on the government to hold the public lands as a public trust, to be administered for the benefit of those who would settle upon them or cultivate them. The power to cede them depended entirely on the usages to which they were to be put, and these were cultivation on settlement. The legal right to dispose of them for other objects was withdrawn from the local authorities, and rested alone with the supreme government. *U. S. v. Vigil*, 13 Wall. (U. S.) 449.

4. *U. S. v. Hartnell*, 22 How. (U. S.) 288.

5. *U. S. v. Workman*, 1 Wall. (U. S.) 745.

6. *Castillero v. U. S.*, 2 Black (U. S.) 1.

On July 20, 1838, the minister of

the interior, by order of the Mexican president, addressed a communication to the governor of the territory of California, authorizing him to grant and distribute the lands of the desert islands adjacent to that department to the citizens who might solicit the same. Grants made by the governor under the power thus conferred required the concurrence of the departmental assembly, and, if made without such concurrence, were void. *U. S. v. Osio*, 23 How. (U. S.) 273; *U. S. v. Castillero*, 23 How. (U. S.) 464; *Bouldin v. Phelps*; 12 Sawy. (U. S.) 306; 30 Fed. Rep. 547.

7. *Castillero v. U. S.*, 2 Black (U. S.) 1. Grants of land made under those laws did not convey to the grantee the minerals in the soil or any interest in them, and there is no ground whatever to hold that the supreme government ever conferred upon any of the local tribunals any jurisdiction upon the subject. Mines under Mexican laws, whether situated in public or private lands, belonged to the supreme government, and private persons could only acquire a title in one by conforming substantially to the conditions ordained in the provisions of the mining ordinance of May 22, 1783. *Castillero v. U. S.*, 2 Black (U. S.) 1. *Moore v. Shaw*, 17 Cal. 260.

8. *U. S. v. Workman*, 1 Wall. (U. S.) 745.

9. *U. S. v. Workman*, 1 Wall. (U. S.) 745; *U. S. v. Jones*, 1 Wall. (U. S.) 766; *Beard v. Federy*, 3 Wall. (U. S.) 490.

lands which were in the lawful possession and occupancy of persons claiming provisional title from the government.¹

c. WHO COULD GRANT.—The power to grant, conferred by the regulations, was vested in the governors of the territories.² The departmental assembly possessed no power to make grants of lands. Its power was restricted to approval or disapproval of the grant made.³

d. HOW GRANTS OBTAINED.—By the regulations, every person soliciting lands was required in the first place to address a petition to the governor, setting forth his name, country, profession and religion, and also to describe the land asked for as distinctly as possible by means of a *diseño*, or map, which was usually annexed to the petition in order that the governor might have the means of ascertaining whether the tract solicited was vacant and so situated that it might properly be granted to the applicant.⁴ The petitioner was not required to prove his representations, but it was the duty of the governor to obtain the necessary information to enable him to determine whether the case, as presented in the petition, fell within the conditions specified in the regulations, both as regarded the land and the

The supreme government, on August 17, 1833, issued a decree secularizing the missions in California, and, on November 3, of the same year, the congress of Mexico passed an act authorizing the measures which should secure their colonization. Various regulations were promulgated by the governor, but on November 7, 1835, the supreme government issued a decree suspending the secularization act until the curates should take possession of their parishes as had been provided by the second section of the act. On November 7, 1840, the president by his decree directed that a general order be issued to the governor for the restoration of the lands, and such decree remained in full force at the treaty of peace between the two countries. *U. S. v. Workman*, 1 Wall. (U. S.) 745.

1. *U. S. v. Workman*, 1 Wall. (U. S.) 745.

2. *U. S. v. Vigil*, 13 Wall. (U. S.) 449; *Vanderslice v. Hanks*, 3 Cal. 38; *Hornsby v. U. S.*, 10 Wall. (U. S.) 224; *U. S. v. Cambuston*, 20 How. (U. S.) 63; *Ferris v. Coover*, 10 Cal. 615.

It is true the grant was not complete until the approval of the assembly, and in this sense the assembly and the governor acted concurrently, but the initiative must be taken by the governor. He was required to act in the first instance to decide whether the petitioner was a fit person to receive the grant

and whether the land itself could be granted without prejudice to the public or individuals. *U. S. v. Vigil*, 13 Wall. (U. S.) 449.

3. *U. S. v. Workman*, 1 Wall. (U. S.) 745; *Beard v. Federy*, 3 Wall. (U. S.) 478; *U. S. v. Vigil*, 13 Wall. (U. S.) 449; *Ferris v. Coover*, 10 Cal. 615; *Hornsby v. U. S.*, 10 Wall. (U. S.) 224; *Mora v. Foster*, 3 Sawy. (U. S.) 472.

The departmental assembly, in respect to the grant of lands, was an advisory body to the governor, and sustained the same relation to him that the senate of the United States does to the president in the matter of appointments and treaties. Its power was restricted to approval or disapproval of the grant made. *U. S. v. Workman*, 1 Wall. (U. S.) 745; *Beard v. Federy*, 3 Wall. (U. S.) 491; *U. S. v. Vigil*, 13 Wall. (U. S.) 451; *Ferris v. Coover*, 10 Cal. 615.

4. *U. S. v. Moorehead*, 1 Black (U. S.) 242; *Castillero v. U. S.*, 2 Black (U. S.) 1.

See *supra*, this title, *Mexican Grants—The Law Authorizing.*

The provision that a map should accompany the petition was not enforced in all cases. The governors exercised a discretionary power of dispensing with it under special circumstances. No motive existed for insisting upon the presentation when the information it was designated to impart was already in the public archives, open to the

applicant.¹ The information was obtained by a formal reference to the local magistrate, and a report from him was the course usually adopted, but it was not essential.²

c. APPROVAL.—A right and title passed by the governor's grant, but its definite validity was suspended for the approval of the assembly, and so it continued to be suspended until its approbation had been given.³ It was the duty of the governor on making the grant to submit it to the departmental assembly for their approval.⁴ If the approval of the assembly was refused, it did not take away nor in any way qualify the grantee's title, but only kept its final validity in suspense until the grant had been refused by the supreme government of the republic.⁵

inspection of the governor. *Hornsby v. U. S.*, 10 Wall. (U. S.) 237.

1. *U. S. v. Moorehead*, 1 Black. (U. S.) 242.

2. *Hornsby v. U. S.*, 10 Wall. (U. S.) 237. The regulations did not prescribe any particular mode by which this information should be acquired. It might have been obtained by the governor from his own investigations, or he might, as stated in the regulations, if that course were preferred, consult the appropriate municipal authority, which was that of the district, whether any objection existed to making the grant. *Hornsby v. U. S.*, 10 Wall. (U. S.) 237.

3. *Fremont v. U. S.*, 17 How. (U. S.) 563; *U. S. v. Reading*, 18 How. (U. S.) 7; *Hornsby v. U. S.*, 10 Wall. (U. S.) 238; *Ferris v. Coover*, 10 Cal. 618; *U. S. v. Osio*, 23 How. (U. S.) 273; *Henshaw v. Bissell*, 18 Wall. (U. S.) 255; *Harrison v. Ulrichs*, 14 Sawy. (U. S.) 164; 39 Fed. Rep. 654.

The provisions subjecting the grant to the approval of the assembly did not prevent the title from passing to the grantee upon the execution of the instrument. Such approval was not a condition precedent to the vesting of the title. *Roland v. U. S.*, 7 Wall. (U. S.) 748; *Hornsby v. U. S.*, 10 Wall. (U. S.) 238; *Ferris v. Coover*, 10 Cal. 621; *Harrison v. Ulrichs*, 14 Sawy. (U. S.) 164; 39 Fed. Rep. 654.

4. *Hornsby v. U. S.*, 10 Wall. (U. S.) 224; *Vanderslice v. Hanks*, 3 Cal. 38; *Taylor v. Escanden*, 50 Cal. 428; *U. S. v. Osio*, 23 How. (U. S.) 273; *Harrison v. Ulrichs*, 14 Sawy. (U. S.) 164; 39 Fed. Rep. 654.

The regulations contemplated an approval to precede the issue of the formal grant; so where the grantee received the document the concession should be considered final. For a long

time after the adoption of the regulations this course of proceeding was followed; but afterwards, and for some years previous to the conquest, a different practice prevailed, and the former title papers were issued without waiting for the action of the assembly, a clause being inserted to the effect that the grant was subject to the approval of that body. *Pico v. U. S.*, 2 Wall. 281.

The neglect of the governor to submit the grant to the assembly suspended the . . . validity of the grant, that is, it prolonged the liability of the State to be defeated by the action of the assembly, and of the supreme government thereon, but no other consequence followed. His neglect was not permitted to operate to divest the grantee of the estate already vested in him. *Fremont v. U. S.*, 17 How. (U. S.) 555; *U. S. v. Reading*, 18 How. (U. S.) 7; *Hornsby v. U. S.*, 10 Wall. (U. S.) 224; *Ferris v. Coover*, 10 Cal. 616.

5. *U. S. v. Reading*, 18 How. (U. S.) 7; *Ferris v. Coover*, 10 Cal. 617.

After its action, whether of approval or disapproval, it became the duty of the governor to forward the necessary documents with the report of the assembly to the supreme government. Until the approval of the supreme government the grant was subject to be defeated. With such approval it was discharged of the defeasance and became definitively, that is, finally valid, and passed the estate to the grantee, beyond even the power of the government to divest, except by proceedings to work a forfeiture for breach of its conditions subsequent. *Ferris v. Coover*, 10 Cal. 616; *U. S. v. Reading*, 18 How. (U. S.) 7.

Where the archives of the territory of the Californias do not show that the governor's grants of land had been

f. EFFECT.—If the assembly approved the grant it was the duty of the governor to deliver it to the grantee, as evidence of his title.¹ Upon the delivery, the grant became definitively valid.² The grant is *prima facie* evidence that the governor performed his duty, and consequently, that the grant had the approbation of the assembly.³

When the governor had once exercised his discretion and made the grant, he could not recall it or nullify it.⁴

The absence of the conditions from the grant does not affect the validity of it.⁵

The conditions of cultivation and occupancy annexed to the grants were conditions subsequent, for the non-performance of which the estate might be defeated, by proceedings of the government to that end; but, until such proceedings were had, and a forfeiture declared thereon, the estate remained perfect and complete in the grantee.⁶ Such proceedings had their inception in

sent to the assembly, or that, having been sent, they had been rejected, and that, after such rejection, they had not been sent by the governor to the supreme executive government for a final decision, the titles of the grantees are just what they were in their beginning, and are sufficient, now that the territory has been transferred to the United States, for confirmation under the act of March 3, 1851. U. S. v. Reading, 14 Sawy. (U. S.) 164.

Such grants so circumstanced are equitable titles protected by the treaty of Guadalupe Hidalgo, and by the laws and usages of nations concerning the rights of property of the inhabitants of a ceded or conquered country. U. S. v. Reading, 14 Sawy. (U. S.) 164; 18 How. (U. S.) 1.

And they are protected by the usages of Mexico in respect to such grants, the archives of *California* showing that a very large portion of the lands in the occupation of its inhabitants was held by titles wanting the approval of the assembly. U. S. v. Reading, 14 Sawy. (U. S.) 164; 18 How. (U. S.) 1.

1. Vanderslice v. Hanks, 3 Cal. 38; Ferris v. Coover, 10 Cal. 616.

2. Ferris v. Coover, 10 Cal. 616.

This document was intended as the evidence that the conditions annexed to the grant had been complied with. It was not required in order to give the grantee a vested interest, but to show that the estate conveyed by the original grant upon certain conditions was no longer subject to them, and that the grantee had become definitively the owner without any conditions annexed

to the continuance of the estate. Fremont v. U. S., 17 How. (U. S.) 560.

3. Vanderslice v. Hanks, 3 Cal. 39.

4. U. S. v. Reading, 18 How. (U. S.) 7; Ferris v. Coover, 10 Cal. 616.

5. U. S. v. Yorba, 1 Wall. (U. S.) 423.

6. Fremont v. U. S., 17 How. (U. S.)

557; Ferris v. Coover, 10 Cal. 589;

U. S. v. Reading, 18 How. (U. S.) 6;

Vanderslice v. Hanks, 3 Cal. 44;

Hornsby v. U. S., 10 Wall. (U. S.) 224;

Henshaw v. Bissell, 18 Wall. (U. S.)

255. The public had no interest in

forfeiting the grants, unless some

other person desired and was ready to

occupy them, and thus carry out the

policy of extending settlements. They

seem to have been intended to stimulate

the grantee to prompt action in

settling and colonizing the land, by

making it open to appropriation by

others in case of his failure to perform

them. Fremont v. U. S., 17 How.

(U. S.) 557.

It has been said that these were con-

ditions subsequent, non-performance

of which does not necessarily avoid the

grant. This is the case as to some of

them, but even as to such, when a

grantee allows years to pass after the

date of his grant without any attempt

to perform them, and without any

explanation for not having done so,

and then for the first time claims the

land after it had passed by treaty from

the national jurisdiction which granted

it to the United States, such a delay

is unreasonable, and amounts to evi-

dence that the claim to the lands has

been abandoned. Fuentes v. U. S., 22

How. (U. S.) 443.

what was termed a denouncement by a party desirous of obtaining the land. An investigation then followed whether or not the conditions had been complied with or so disregarded as to justify a decree of forfeiture. Without such inquisition and decree the title did not revert to the government, nor was the land subject to be re-granted.¹

g. JURIDICAL POSSESSION.—When the approval of the departmental assembly was obtained to the grant, there was another proceeding to be taken which was essential to the complete investiture of title. Such proceeding was a formal delivery of possession of the property by a magistrate of the vicinage, called the delivery of juridical possession.² This proceeding was essential to the complete investiture of title where there was any uncertainty as to the precise boundaries of the lands granted, and until performed the grant was regarded as inchoate and incomplete.³ This proceeding had a double operation: First, to make a formal tradition or livery of seisin of the property, and, second, to measure off and segregate the specific quantity granted, and establish its boundaries.⁴ The proceeding involved an ascertainment and settlement of the boundaries of the lands granted by the officers of the government specially designated for that purpose.⁵

h. SPECIFIC GRANTS; GRANTS BY QUANTITY.—Grants of the public domain of Mexico, made by governor of the department of California were of three kinds. First. Grants by specific boundaries, where the donee was entitled to the entire tract described. Second. Grants of quantity, as of one or more leagues situated at some designated place or within a large tract described by out-boundaries, where the donee was entitled out of the general tract only to the quantity specified. Third. Grants of places by name, where the donee was entitled to the tract named according to the limits as showed by its settlement and possessions, or other competent evidence.⁶ In the cases of grants belonging to the second class mentioned, the grant, as between the government and the grantee, created in the latter a vested interest in the specific land conveyed.⁷ Until juridical possession was given, title remained in the government until the segregation of the quantity designated

1. *Hornsby v. U. S.*, 10 Wall. (U. S.) 224; *Ferris v. Coover*, 10 Cal. 615.

2. *Van Reynegan v. Bolton*, 95 U. S. 35; *Leese v. Clark*, 18 Cal. 574; *More v. Steinbach*, 127 U. S. 70; *Graham v. U. S.*, 44 Wall. (U. S.) 259; *U. S. v. Castro*, 5 Sawy. (U. S.) 625; *Bouldin v. Phelps*, 12 Sawy. (U. S.) 308.

3. *Van Reynegan v. Bolton*, 95 U. S. 35; *Bouldin v. Phelps*, 12 Sawy. (U. S.) 308; 30 Fed. Rep. 547; *Leese v. Clark*, 18 Cal. 574; *Johnson v. Van Dyke*, 20 Cal. 228; *Thornton v.*

Mahoney, 24 Cal. 569; *Steinback v. Moore*, 30 Cal. 508.

4. *Mahoney v. Van Winkle*, 21 Cal. 579.

5. *U. S. v. Pico*, 5 Wall. (U. S.) 539; *Van Reynegan v. Bolton*, 95 U. S. 35; *Leese v. Clark*, 18 Cal. 574.

6. *Higuera v. U. S.*, 5 Wall. (U. S.) 827; *Alviso v. U. S.*, 8 Wall. (U. S.) 337; *Hornsby v. U. S.*, 10 Wall. (U. S.) 224.

7. *Fremont v. U. S.*, 17 How. (U. S.) 558; *Hornsby v. U. S.*, 10 Wall. (U. S.)

by the grant, charged with the interest and equity of the grantee;¹ and the latter was entitled only to the specific quantity named, but what portion of the general tract should be set apart for him could only be determined by a survey under the authority of the government. Until then the grantee and the government were tenants in common of the whole tract.² Until the segregation of the quantity designated by the grant, the grantee was entitled as against all but the government, to the possession of the entire tract, and no third person could interfere with such possession.³

The rights to make the survey rested exclusively with the government, and could only be exercised by its officers.⁴ The grantee could not himself make the measurement so as to bind the government.⁵ He might, however, make a selection and location under such circumstances as to estop him from asserting any right to the remainder.⁶ If, after a grant of quantity was made, another party obtained a grant from the government by specific boundaries within the lands where the first grant was to be located before the former grant was surveyed, the title of the latter grantee was superior to that of the former.⁷ As between two floating grants of quantity within the same general tract, which is sufficiently large to satisfy both, where neither grantee had received official delivery of possession, under the former government, the party whose claim is first surveyed and patented will hold the better right to the land covered by his patent, and

233; *Rutherford v. Green*, 2 Wheat. (U. S.) 196.

1. *Emeric v. Penniman*, 26 Cal. 123.

2. *Frasher v. O'Connor*, 115 U. S. 107; *Estrada v. Murphy*, 19 Cal. 270; *Mound City Land, etc., Assoc. v. Philip*, 64 Cal. 495.

3. *Van Reynegan v. Bolton*, 95 U. S. 36; *Frasher v. O'Connor*, 115 U. S. 107; *Ferris v. Coover*, 10 Cal. 621; *Cornwall v. Culver*, 16 Cal. 429; *Riley v. Heisch*, 18 Cal. 199; *Mahoney v. Van Winkle*, 21 Cal. 577; *Thornton v. Mahoney*, 24 Cal. 579; *Love v. Shartzler*, 31 Cal. 493; *Mound City Land, etc., Assoc. v. Philip*, 64 Cal. 495; *Shanklin v. McNamara*, 87 Cal. 380.

In *Van Reynegan v. Bolton*, 95 U. S. 36, the court, by Field, J., said: "No third person could be permitted to determine, in advance of such segregation, that any particular locality would fall within the surplus, and thereby justify his intrusion upon it. If one person could, in this way, appropriate a particular parcel to himself, all persons could do so, and thus the conferee would soon be stripped of the land which was intended by the gov-

ernment as a donation to its grantees. If the law were otherwise than as stated, the conferees would find their possessions limited, first in one direction and then in another, each intruder asserting that the parcel occupied by him fell within the surplus, until, in the end, they would be excluded from the entire tract." *Shanklin v. McNamara*, 87 Cal. 382.

4. *Van Reynegan v. Bolton*, 95 U. S. 33; *Frasher v. O'Connor*, 56 Cal. 499.

5. *U. S. v. Armijo*, 5 Wall. (U. S.) 449; *Hornsby v. U. S.*, 10 Wall. (U. S.) 234; *Van Reynegan v. Bolton*, 95 U. S. 35; *Frasher v. O'Connor*, 115 U. S. 107; *Rose v. Davis*, 11 Cal. 141; *Biddle Boggs v. Merced Min. Co.*, 14 Cal. 279; *Riley v. Heisch*, 18 Cal. 200; *Leese v. Clark*, 18 Cal. 574; *Estrada v. Murphy*, 19 Cal. 270; *Mahoney v. Van Winkle*, 21 Cal. 578; *Thornton v. Mahoney*, 24 Cal. 580; *Love v. Shartzler*, 31 Cal. 494; *Yates v. Smith*, 38 Cal. 66.

6. *Mahoney v. Van Winkle*, 21 Cal. 572.

7. *Fremont v. U. S.*, 17 How. (U. S.) 558; *Miller v. Dale*, 92 U. S. 476; *Yates v. Smith*, 38 Cal. 66.

the other party will be compelled to have his claim located outside of that patent.¹

4. **Surveys**—*a.* IN GENERAL, ACT OF 1851.—If the Mexican Government failed to locate a grant, the power of locating the same passed to the United States to be exercised in such manner, and at such times as the United States might deem expedient.² By the act of March 3, 1851, the United States designated the manner and conditions under which the right and power of location would be exercised, and declared the effect which should be given to the proceedings had.³ The act confers the power of locating the claim upon the surveyor-general, his survey being subject to revision by the executive officers authorized to supervise and direct the surveyor's action. It did not require the return of the survey or plat to the commissioners, or into court.⁴

b. ACT OF 1860.—The act of June 14, 1860, allowed surveys, where objection was made to their correctness, to be brought before the district court and subjected to examination, and required them to be corrected, if found to vary from the specific directions of the decrees upon which they were founded; or if the decree contained no specific directions from the general rules governing in such cases.⁵ The object of the act in respect to surveys was not to settle the question of title, but to insure conformity of the survey with the decree upon which it was made.⁶ The act applies solely to surveys subsequently made, and to surveys previously made and approved by the surveyor-general, which had been at the passage of the act returned into the district court, or in relation to which proceedings were then pending for the purpose of contesting or reforming the same.⁷ By the act, when a survey had been made and plotted it was the duty of the surveyor-general to publish notice of the fact for four weeks. In the mean time the survey and plot were to be retained in his office subject to inspection. If, upon the expiration of the publication no application was made for the return of the survey into the district court for examination and adjudication, or, if made, the application was refused, the survey became final. On the other hand, if the survey was ordered into court, it did not become final until it had been approved, or had been modified and reformed by the decree of the court. Until the survey was established in one of these ways, it was without any binding force. Until then it is only a mere preliminary pro-

1. *Henshaw v. Bissell*, 18 Wall. (U. S.) 255. 270; *Teschemacher v. Thompson*, 18 Cal. 27; 79 Am. Dec. 151.

2. *Fremont v. U. S.*, 17 How. (U. S.) 565; *U. S. v. Armijo*, 5 Wall. (U. S.) 450; *Hornsby v. U. S.*, 10 Wall. (U. S.) 235; *Moore v. Wilkinson*, 13 Cal. 486; *Leese v. Clark*, 18 Cal. 574; *Love v. Shartzer*, 31 Cal. 494; *Yates v. Smith*, 38 Cal. 66; *People v. San Francisco*, 75 Cal. 401; *Estrada v. Murphy*, 19 Cal. 270; *Teschemacher v. Thompson*, 18 Cal. 27; 79 Am. Dec. 151.

3. *Leese v. Clark*, 18 Cal. 574.

4. *People v. San Francisco*, 75 Cal. 397; *U. S. v. Sepulveda*, 1 Wall. (U. S.) 107.

5. *Miller v. Dale*, 92 U. S. 477.

6. *Miller v. Dale*, 92 U. S. 477.

7. *U. S. v. Sepulveda*, 1 Wall. (U. S.) 106.

ceeding, amounting in effect to no more than a mere report of the action of the surveyor, filed in his office for the inspection of all parties interested, or returned by him into court by its order for examination and adjudication.¹ The approval had as against claimants under floating grants, the force and conclusiveness of a judicial determination in a suit *in rem*, and all such claimants were concluded by it.² The approval of a court establishes the fact that the survey is in conformity with the decree of confirmation; or if the decree is for quantity only, that the survey was authorized by it, and, in either case, the approval renders the survey conclusive as to the location of the land against all floating grants not previously located.³ The survey thus approved had the effect and validity of a patent.⁴

The act of Congress of June 2, 1862,⁵ as to surveys, did not repeal the act of 1860.⁶

5. Effect of Conquest.—The authority of the Mexican Government ceased in California July 7, 1846, the date on which the American forces captured Monterey; and all grants made after that time are void.⁷ The conquest did not affect the character of the interests of the inhabitants in lands derived from the former government.⁸ The treaty of Guadalupe Hidalgo did not impair the rights of the inhabitants to lands acquired from the former government. Such rights were preserved and protected by the treaty,⁹ which placed Mexican citizens on the same footing as citizens of the United States.¹⁰ By the treaty, the

1. Southern Pac. R. Co. v. Garcia, 64 Cal. 517; Mahoney v. Van Winkle, 21 Cal. 583; Van Reynegan v. Bolton, 95 U. S. 36; McGarrahan v. Maxwell, 28 Cal. 94.

2. Henshaw v. Bissell, 18 Wall. (U. S.) 255.

3. Miller v. Dale, 92 U. S. 473; Adam v. Norris, 103 U. S. 594.

The proceedings had under this act after the return of the survey and plot are strictly judicial in their character. The parties interested have an opportunity to be heard, and those appearing actually are heard, and their rights liquidated and adjudicated, and when thus finally determined they are *res adjudicata*, and the determination is final and conclusive upon the rights of the parties. Treadway v. Semple, 28 Cal. 659; Semple v. Wright, 32 Cal. 666; Yates v. Smith, 38 Cal. 63; Semple v. Ware, 42 Cal. 621.

4. Miller v. Dale, 92 U. S. 473; Seale v. Ford, 29 Cal. 106; Merrill v. Chapman, 34 Cal. 253; Southern Pac. R. Co. v. Garcia, 64 Cal. 518; Southern Pac. R. Co. v. Dull, 10 Sawy. (U. S.) 515.

5. 12 U. S. Stat. at Large 410.

6. McGarrahan v. Maxwell, 28 Cal. 91.

7. Castillero v. U. S., 2 Black. (U. S.) 149; U. S. v. Pico, 23 How. (U. S.) 324; U. S. v. Yorba, 1 Wall. (U. S.) 423; Stearns v. U. S., 6 Wall. (U. S.) 590; Mumford v. Wardwell, 6 Wall. (U. S.) 425; Hornsby v. U. S., 10 Wall. (U. S.) 239; Alexander v. Roulet, 13 Wall. (U. S.) 386; Scott v. Dyer, 54 Cal. 432; More v. Steinbach, 127 U. S. 70.

8. Vanderslice v. Hanks, 3 Cal. 37; Teschemacher v. Thompson, 18 Cal. 22; 79 Am. Dec. 151; Leese v. Clark, 20 Cal. 421; Ward v. Mulford, 32 Cal. 370; Beard v. Federy, 3 Wall. (U. S.) 491; Hornsby v. U. S., 10 Wall. (U. S.) 242.

9. Fremont v. U. S., 17 How. (U. S.) 557; U. S. v. Moreno, 1 Wall. (U. S.) 404; Hornsby v. U. S., 10 Wall. (U. S.) 241; Teschemacher v. Thompson, 18 Cal. 11; 79 Am. Dec. 151; Estrada v. Murphy, 19 Cal. 270; Leese v. Clark, 20 Cal. 421; Ward v. Mulford, 32 Cal. 370; Thompson v. Doaksum, 68 Cal. 596; Newhall v. Sanger, 92 U. S. 764.

10. U. S. v. Percheman, 7 Pet. (U. S.)

United States became vested with the title to all the lands in California not held in private ownership by a legal or equitable title.¹

6. **Act of 1851—*a*. PURPOSE OF ACT.**—By the act of March 3, 1851, the United States declared the conditions under which it would discharge its political obligations to Mexican grantees.² The power to decide upon the validity of any claim presented to land in California by virtue of any right or title derived from the Spanish or Mexican government, as matter of original jurisdiction, is, by the act, exclusively conferred upon the commissioners appointed under the act.³ The main purpose of the statute was to separate and distinguish the lands, which the United States owned as property, which could be sold to others, from those lands which belonged either equitably or legally to private parties under a claim of right derived from the Spanish or Mexican Governments.⁴ The effect of the act of 1851 was to reserve all lands in California covered by grants made by the former government so as to afford a reasonable time for the asserting of rights thereto before the tribunal provided by the act.⁵

b. **EMBRACED CLAIMS LEGAL AND EQUITABLE.**—The act embraced not only equitable titles, but legal titles also, and required them all to undergo examination and to be passed upon by the court.⁶ A title derived from the Mexican Government was not

51; *U. S. v. Clarke*, 8 Pet. (U. S.) 465; *U. S. v. Wiggins*, 14 Pet. (U. S.) 349; *U. S. v. Arredondo*, 6 Pet. (U. S.) 691; *Henderson v. Poindexter*, 12 Wheat. (U. S.) 543; *U. S. v. Reynes*, 9 How. (U. S.) 144; *Dent v. Emmeger*, 14 Wall. (U. S.) 308.

1. *Thompson v. Doaksum*, 68 Cal. 596; *Botiller v. Dominguez*, 130 U. S. 238.

2. *Beard v. Federy*, 3 Wall. (U. S.) 490; *Estrada v. Murphy*, 19 Cal. 270; *Leese v. Clark*, 20 Cal. 415; *De Arguello v. Greer*, 26 Cal. 628; *Thompson v. Doaksum*, 68 Cal. 597; *More v. Steinbach*, 127 U. S. 70; *Leese v. Clark*, 18 Cal. 574; *Peralta v. U. S.*, 3 Wall. (U. S.) 434; *Townsend v. Greeley*, 5 Wall. (U. S.) 335.

In the execution of the treaty, obligations with respect to property claimed under Mexican laws, the United States might adopt such modes of procedure as it deemed expedient. It might act by legislation directly upon the claims preferred, or it might provide a special board for their determination, or it might require their submission to the ordinary tribunals. It was the sole judge of the propriety of the mode, and having the plenary power of confirmation, it may annex any conditions to the confirma-

tion of a claim resting upon an imperfect right which it may choose. It may declare the action of the special board final; it may make it subject to appeal; it may require the appeal to go through one or more courts, and it may arrest the action of the board or courts at any stage. *Grisar v. McDowell*, 6 Wall. (U. S.) 379; *Trenouth v. San Francisco*, 100 (U. S.) 255; *Teschmacher v. Thompson*, 18 Cal. 25; 79 Am. Dec. 151; *Leese v. Clark*, 18 Cal. 571; 20 Cal. 421.

3. *Castillero v. U. S.*, 2 Black (U. S.) 1.
4. *Botiller v. Dominguez*, 130 U. S. 238; *Castro v. Hendricks*, 23 How. (U. S.) 438; *Townsend v. Greeley*, 5 Wall. (U. S.) 335.

The object of the inquiry provided for by the act was to discover forfeitures or to enforce rigorous conditions. The declared purpose was to authenticate titles and to afford the solid guaranty to rights which ensues from their full acknowledgment by the supreme authority. *U. S. v. Fossatt*, 21 How. (U. S.) 446; *U. S. v. Auguisola*, 1 Wall. (U. S.) 352.

5. *Newhall v. Sanger*, 92 U. S. 761.
6. *Fremont v. U. S.*, 17 How. (U. S.) 553; *U. S. v. Fossatt*, 21 How. (U. S.) 446; *More v. Steinbach*, 127 U. S. 70.

The object of the provision appears

perfect while any further action was required on the part of such government or its successor, in order to invest the claimant with the entire legal title to, and the absolute possession of the specific lands granted.¹ Inchoate or equitable titles required further action of the granting power for their protection and their presentation was necessary to enable the new government to discharge its political obligations in this respect.² The act is not subject to any constitutional obligation so far as it applies to grants of an imperfect character, which require further action of the political department to render them perfect.³ Legal titles—such as were perfect under the former government—did not need any action of the new government for their protection, but their presentation was necessary to enable the new government to ascertain the extent of the property it had acquired by the accession of the country.⁴ The holders of legal titles, such as were perfect under the former government, were not compelled to submit them to the board of commissioners appointed under the act, nor did they forfeit their lands by a failure to present them to such board for confirmation.⁵

C. MERE POSSESSORY CLAIMS NOT EMBRACED.—Mere possession of land with the consent of the Mexican Government, no matter how long continued, created no right in the possession which the United States was required to recognize or which was permitted to be confirmed by the act of 1851.⁶

to be to place the titles to lands in California upon a stable foundation, and to give the parties who possessed them an opportunity of placing them on the records of the country in a manner and form that will prevent future controversy. *Fremont v. U. S.*, 17 How. (U. S.) 453.

1. *Beard v. Federy*, 3 Wall. (U. S.) 489; *Carpenter v. Montgomery*, 13 Wall. (U. S.) 488; *Teschemacker v. Thompson*, 18 Cal. 27; 79 Am. Dec. 151; *Thornton v. Mahoney*, 24 Cal. 579; *De Arguello v. Greer*, 26 Cal. 628; *Steinbach v. Moore*, 30 Cal. 508; *Stevenson v. Bennett*, 35 Cal. 432; *Banks v. Moreno*, 39 Cal. 235; *Chipley v. Farris*, 45 Cal. 538; *Wickins v. McCue*, 46 Cal. 661; *Gardiner v. Miller*, 47 Cal. 570.

2. *Leese v. Clark*, 20 Cal. 422; *Minturn v. Brower*, 24 Cal. 644; *Steinbach v. Moore*, 30 Cal. 507; *Banks v. Moreno*, 39 Cal. 246; *Chipley v. Farris*, 45 Cal. 538; *Thompson v. Doaksum*, 68 Cal. 593; *Estrada v. Murphy*, 19 Cal. 269; *Rico v. Spence*, 21 Cal. 511; *Stevenson v. Spence*, 35 Cal. 432.

3. *Beard v. Federy*, 3 Wall. (U. S.) 490; *Estrada v. Murphy*, 19 Cal. 269; *Minturn v. Brower*, 24 Cal. 662; *De*

Arguello v. Greer, 26 Cal. 628. The government must take some steps to determine the extent of its own possessions, and, for that purpose, may require the presentation of claims which are asserted by individuals, and, as a consequence, may prescribe the penalty of non-presentation. And as to the political obligations assumed by the treaty, it must determine for itself, for no other power can determine for it, or control its action in that respect—the mode and manner in which they shall be discharged. *Estrada v. Murphy*, 19 Cal. 271.

4. *Leese v. Clark*, 20 Cal. 422.

5. *Minturn v. Brower*, 24 Cal. 663; *Phelan v. Poyoreno*, 74 Cal. 452; *Dominguez v. Botiller*, 74 Cal. 457; *Thompson v. Doaksum*, 68 Cal. 597.

There is nothing in the language of the statute to imply any such exclusion of perfected claims from the jurisdiction of the commission. The act requires all claims to be presented, perfect as well as imperfect claims. *Botiller v. Dominguez*, 130 U. S. 247.

6. *U. S. v. Garcia*, 22 How. (U. S.) 280; *Serrano v. U. S.*, 5 Wall. (U. S.) 461; *De Haro v. U. S.*, 5 Wall. (U. S.) 626.

d. INDIAN CLAIMS.—Mission and Pueblo Indians were not required by the act to present their claims, and are not affected by their failure to present them.¹ All other Indians were required to present their claims to the commissioners, and claims not so presented are lost.²

e. ASSIGNEE'S CLAIMS.—The assignee of a grantee might present his claim, but where there were many assignees the proper party to the proceeding was the original grantee who could produce the documents of title and best knew how to establish it.³

f. EFFECT OF FAILURE TO PRESENT CLAIM.—All claims not presented to the board of commissioners provided for by the act during the time fixed by the act for their presentation, are treated by the act as non-existent, and the land as belonging to the public domain.⁴

g. PROOF OF GRANT.—The record required to be kept by section 11 of the Regulations of 1828 is the evidence of the grant, and the grant must be established by such record evidence as found in the archives, or which, having been there, has been lost.⁵

h. COMMISSIONERS—(1) *Duty*.—The duty of the commissioners appointed under the act was confined to determining the validity of grants made by the Mexican Government as between the claimant and the United States.⁶

1. *Byrne v. Alas*, 74 Cal. 639.

2. *Thompson v. Doaksum*, 68 Cal. 597; *Byrne v. Alas*, 74 Cal. 640.

3. *U. S. v. Grimes*, 2 Black (U. S.) 612; *Beard v. Federy*, 3 Wall. (U. S.) 490.

4. *U. S. v. Fossatt*, 21 How. (U. S.) 446; *Estrada v. Murphy*, 19 Cal. 269; *Rico v. Spence*, 21 Cal. 504; *Bouldin v. Phelps*, 30 Fed. Rep. 547; 12 Sawy. (U. S.) 309. The act required all claims to lands to be presented within two years from its date, and declared, in effect, that if upon such presentation they are found by the tribunal, created for their consideration and by the courts on appeal to be valid, the government will recognize and confirm them and take such action as will result in rendering them perfect titles. But it has also declared in effect by the same act that if the claims be not presented within the period designated, it will not recognize nor confirm them, nor take any action for their protection, but that the claims will be considered and treated as abandoned. *Beard v. Federy*, 3 Wall. (U. S.) 490.

5. *U. S. v. Bolton*, 23 How. (U. S.) 341; *Peralta v. U. S.*, 3 Wall. (U. S.) 434; *Romero v. U. S.*, 1 Wall. (U. S.) 721; *Bouldin v. Phelps*, 30 Fed. Rep. 547; 12 Sawy. (U. S.) 325. It was an

essential part of the system of Mexico to preserve full record evidence of all grants of the public domain and of the various proceedings by which they were obtained. Where, therefore, a claim to land is asserted under an illegal grant from the Mexican Government, reference must in the first instance be had to the archives of the country embracing the period when the grant purports to have been made. If they furnish no information on the subject a strong presumption naturally arises against the validity of the instrument produced, which can only be overcome, if at all, by the clearest proof of its genuineness, accompanied by open and continued possession of the premises. *Pico v. U. S.*, 2 Wall. (U. S.) 279; *U. S. v. Teschmaker*, 22 How. (U. S.) 392; *U. S. v. Pico*, 22 How. (U. S.) 406; *Fuentes v. U. S.*, 22 How. (U. S.) 443; *U. S. v. Castro*, 24 How. (U. S.) 346; *Luco v. U. S.*, 23 How. (U. S.) 515; *Peralta v. U. S.*, 3 Wall. (U. S.) 434; *White v. U. S.*, 1 Wall. (U. S.) 660.

6. *Brown v. Brackett*, 21 Wall. (U. S.) 387. Where the grants were by metes and bounds, or where a juridical delivery of possession had established the boundaries, it was proper for the board to declare them in its decree. But in case of a grant of a specified

(2) *Decision*.—The decision of the commission was not conclusive upon either party to the proceeding. Either party was entitled to appeal therefrom to the United States district court with the ultimate right of appeal to the supreme court.¹

(3) *Judgment; Effect of*.—The judgment of the board of commissioners upon the validity of a grant presented to them, if not appealed from, or if, on appeal, affirmed, is conclusive against the United States and those claiming under the United States.² Claimants under titles subsequent to the acquisition of the country by the United States took in subordination to its action in reference to claims existing at the date of the acquisition, and are bound by the proceedings had under the act, although not parties to such proceedings, or given notice of them.³

i. *EFFECT OF CONFIRMATION*.—A confirmation vests the legal title in the conferee, subject, however, to any equitable rights under the title confirmed which existed at the time of the confirmation.⁴

j. *EQUITABLE RIGHTS; HOW ENFORCED*.—The holders of equitable titles must seek their rights by a proceeding appropriate to their nature and condition. They cannot maintain an action of ejectment against the conferees or those claiming under them, but must go into equity where their rights can be properly investigated with a due regard to the rights of others.⁵

k. *THIRD PERSONS*.—Under the 15th section of the act, "third persons" are not bound by any of the proceedings had under the act, or by a patent issued in pursuance of such proceedings.⁶ The term "third persons," as used in the act, does

quantity of land lying within exterior boundaries embracing a much larger tract, and in relation to which no proceedings were ever taken by the Mexican government for the measurement and segregation, a confirmation of the claim was only a judicial determination of the right of the claimant to have a specific quantity set apart to him out of a general tract, and the duty of the board was discharged by a confirmation of the claim in the general terms of the grant, leaving the specific quantity designated to be surveyed and set off by the proper officers of the government to whom the subject of surveys was intrusted. *U. S. v. Sepulveda*, 1 Wall. (U. S.) 107.

1. *U. S. v. Circuit Judges*, 3 Wall. (U. S.) 673; *Newhall v. Sanger*, 92 U. S. 764.

2. *Gregory v. McPherson*, 13 Cal. 574; *Mott v. Smith*, 16 Cal. 550; *Mathoney v. Van Winkle*, 21 Cal. 576; *Kimball v. Semple*, 25 Cal. 454; *Soto v. Kroder*, 19 Cal. 87; *Semple v. Hagar*, 27 Cal. 168; *Bernal v. Lynch*, 36 Cal. 143.

3. *Teschemacher v. Thompson*, 18 Cal. 25; 79 Am. Dec. 151; *Leese v. Clark*, 20 Cal. 422; *Merrill v. Chapman*, 34 Cal. 253; *People v. San Francisco*, 25 Cal. 400.

4. *Townsend v. Greeley*, 5 Wall. (U. S.) 326; *Carpenter v. Montgomery*, 13 Wall. (U. S.) 494; *O'Connell v. Dougherty*, 32 Cal. 462; *Banks v. Moreno*, 39 Cal. 246; *Mound City Land, etc., Assoc. v. Philip*, 64 Cal. 497; *Byrne v. Alas*, 74 Cal. 639; *Bouldin v. Phelps*, 30 Fed. Rep. 547; 12 Sawy. (U. S.) 311; *Estrada v. Murphy*, 19 Cal. 72; *Clark v. Lockwood*, 21 Cal. 222; *Emeric v. Penniman*, 26 Cal. 124; *Hartley v. Brown*, 51 Cal. 465.

5. *Carpenter v. Montgomery*, 13 Wall. (U. S.) 494; *O'Connell v. Dougherty*, 32 Cal. 462; *Bouldin v. Phelps*, 12 Sawy. (U. S.) 312; 30 Fed. Rep. 547; *Estrada v. Murphy*, 19 Cal. 272; *Clark v. Lockwood*, 21 Cal. 220, 222; *Emeric v. Penniman*, 26 Cal. 124.

6. *Leese v. Clark*, 20 Cal. 424; *Hale v. Akers*, 69 Cal. 166; *Byrnes v. Alas*, 74 Cal. 637.

not embrace all persons other than the United States and the claimants, but only those who hold independent titles arising previous to acquisition of the country, and whose titles at that date were such as to enable them to resist successfully any subsequent action of the government affecting them.¹

1. EFFECT OF REJECTION OR NON-PRESENTATION.—The final rejection of the claim in the proceedings had under the act operated *proprio vigore* to restore the lands claimed to the public domain without any further action by the government.² So also did a failure to present the claim within the required time.³

m. PATENT—(1) *Operation and Effect*.—A patent issued upon confirmation of a Mexican grant takes effect as of the date of the filing of the petition with the board of commissioners, and is to be regarded as executed on that day, and passes whatever interest the United States may then have had in the premises.⁴ It operates, in consequence, as an absolute bar to all claims under the United States having their origin subsequent to the petition.⁵ The patent is also a record of the government showing its action and judgment with respect to the title of the claimant as it existed upon the acquisition of the country. It is conclusive evidence of the validity of the original grant, and of the recognition and

1. *Beard v. Federy*, 3 Wall. (U. S.) 493; *Waterman v. Smith*, 13 Cal. 420; *Moore v. Wilkinson*, 13 Cal. 488; *Leese v. Clark*, 20 Cal. 424; *Teschmacher v. Thompson*, 18 Cal. 27; *Leese v. Clark*, 20 Cal. 572; *Biddle Boggs v. Merced Min. Co.*, 14 Cal. 362; *Minturn v. Brower*, 24 Cal. 668; *De Arguello v. Greer*, 26 Cal. 626; *Miller v. Dale*, 44 Cal. 576; *Hale v. Akers*, 69 Cal. 166; *People v. San Francisco*, 75 Cal. 399.

2. *Newhall v. Sanger*, 92 U. S. 764; *Page v. Fowler*, 37 Cal. 107; *Hutton v. Frisbie*, 37 Cal. 481; *Rush v. Casey*, 39 Cal. 342; *McGary v. Hastings*, 39 Cal. 368; *Dodge v. Perez*, 2 Sawy. (U. S.) 653.

3. *Newhall v. Sanger*, 92 U. S. 764.

4. *Beard v. Federy*, 3 Wall. (U. S.) 491; *Adam v. Norris*, 103 U. S. 593; *Moore v. Wilkinson*, 13 Cal. 488; *Biddle Boggs v. Merced Min. Co.*, 14 Cal. 362; *Stark v. Barrett*, 15 Cal. 366; *Ely v. Frisbie*, 17 Cal. 259; *Teschmacher v. Thompson*, 18 Cal. 26; *Leese v. Clark*, 18 Cal. 571; *Touchard v. Crow*, 20 Cal. 160; 81 Am. Dec. 108; *Morrill v. Chapman*, 35 Cal. 88. Mines of gold and silver existing on the premises pass by the patent. *Moore v. Shaw*, 17 Cal. 224; *Fremont v. Seals*, 18 Cal. 433; *Ah Hee v. Chippen*, 19 Cal. 497. The United States in dealing with claimants of land under Mexican grants, which

had come into its political control by the treaty of Mexico, never made pretense that it was the owner of the lands so granted by Mexico. When, therefore, guided by the tribunals which the government had established to pass upon the validity of these alleged grants, it issued a patent to the claimant, it was in the nature of a quitclaim, an admission that the rightful ownership had never been in the United States, but, at the time of the session, it had passed to the claimant or to those under whom he claimed. *Adam v. Norris*, 103 U. S. 591.

5. *Stark v. Barrett*, 15 Cal. 366; *Leese v. Clark*, 18 Cal. 571. In addition to this, being conclusive upon the question of the existence and validity of the grant, it necessarily establishes the title of the patentees from the date of the grant, the character of such title depending upon the issuance of the patent, upon the nature of the grant and the proceedings of the former government in relation thereto; whether the grants were of a specific tract separated from other land by defined boundaries, or whether the grants were of a certain quantity of land lying in a large tract; and, in the latter case, whether juridical possession had been given to the grantee. *Stark v. Barrett*, 15 Cal. 366.

confirmation, and of the survey and of its conformity with the confirmation, and the relinquishment to the patentee of all the interest of the United States in the land.¹

(2) *How Vacated; Collateral Attack.*—It can only be vacated and set aside by direct proceedings instituted by the United States, or by parties acting in its name and by its authority.² If the authority to issue the patent depends upon the existence of particular facts in reference to the condition or location of the property, or the performance of certain antecedent acts, and officers have been appointed for the ascertainment of these matters in advance, who have passed upon them and given their judgment, then the patent, though the judgment of the officers be in fact erroneous, cannot be attacked collaterally by parties showing title subsequently from the same source, much less by those who show no color of title in themselves.³ It cannot be attacked collaterally, even for fraud, whether charged to have existed in the procurement of the original grant or in the proof of its execution, or in

1. *Boyle v. Hinds*, 2 Sawy. (U. S.) 527; *Mora v. Nunez*, 7 Sawy. (U. S.) 463; *Beard v. Federy*, 3 Wall. (U. S.) 492; *More v. Steinbach*, 127 (U. S.) 70; *Moore v. Wilkinson*, 13 Cal. 487; *Biddle Boggs v. Merced Min. Co.*, 14 Cal. 362; *Stark v. Barrett*, 15 Cal. 366; *Leese v. Clark*, 18 Cal. 571; *Ely v. Frisbie*, 17 Cal. 259; *Teschmacher v. Thompson*, 18 Cal. 25; 79 Am. Dec. 151; *Miller v. Dale*, 44 Cal. 578; *Turner v. Donnelly*, 70 Cal. 604.

By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and it is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent. *Beard v. Federy*, 3 Wall. (U. S.) 492; *Manning v. San Jacinto Ins. Co.*, 7 Sawy. (U. S.) 418; *Yount v. Howell*, 14 Cal. 470; *Ploche v. Paul*, 22 Cal. 111; *Kimball v. Semple*, 25 Cal. 454; *Chipley v. Farris*, 45 Cal. 538; *Cruz v. Martinez*, 53 Cal. 243; *People v. San Francisco*, 75 Cal. 398; *Mott v. Smith*, 16 Cal. 548; *Ely v. Frisbie*, 17 Cal. 259; *Leese v. Clark*, 18 Cal. 572; *Teschmacher v. Thompson*, 18 Cal. 25; 79 Am. Dec. 151; *Miller v. Dale*, 44 Cal. 578; *Turner v. Donnelly*, 70 Cal. 604.

chemacher v. Thompson, 18 Cal. 25; 79 Am. Dec. 151; *Miller v. Dale*, 44 Cal. 578; *Turner v. Donnelly*, 70 Cal. 604.

In *Beard v. Federy*, 3 Wall. (U. S.) 493, the court by Field, J., said: "It is in this effect of the patent, as a record of the government, that its security and protection chiefly lie. If parties asserting interests in lands, acquired since the acquisition of the country, could deny and controvert this record, and compel the patentee in every suit for his land, to establish the validity of his claim, his right to its confirmation and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be as it was intended it should be—an instrument of quiet and security to the possessor. The patentee would find his title recognized in one suit and rejected in another; and if his title were maintained, he would find his land located in many different places as the varying prejudices, interests, or notions of justice of witnesses and jurymen might suggest. Every fact upon which the decree and patent rests would be open to contestation. No construction which will lead to such results can be given to the act of March 3, 1857."

2. *Ely v. Frisbie*, 17 Cal. 259; *Leese v. Clark*, 18 Cal. 572; *Miller v. Dale*, 44 Cal. 578; *Turner v. Donnelly*, 70 Cal. 604.

3. *Doll v. Meador*, 16 Cal. 325; *Dodge v. Perey*, 2 Sawy. (U. S.) 654.

the making of the survey.¹ If, however, the patent be void on its face, or was issued without authority, or was prohibited by statute, or the government had no title, it may be impeached collaterally in an action at law.² The patent is *prima facie* valid, and the burden is upon the party attacking it to show that under no circumstances was its issuance authorized.³ Such collateral attack can only be made by one in privity with the common source of title,⁴ or by one lawfully in possession of the lands under the pre-emption laws of the United States sustaining such privity with the government.⁵

7. **Pueblo Lands**—*a.* RIGHTS OF PUEBLO.—By the laws of Spain, which laws were continued in force by Mexico when that country came into possession of California, pueblos were entitled, for their benefit, and the benefit of their inhabitants, to the use of the lands constituting the sites of such pueblos, and of adjoining lands within certain prescribed limits.⁶ No formal grants were made to the pueblos, but their rights or title to the land vested *ipso facto* on the formation or official regulation of the town.⁷

b. ASSIGNMENT TO PUEBLO.—These laws and ordinances provided for the assignment to the pueblos, when once established and officially recognized, for their use and the use of their inhabitants, of such lands, to the extent of four square leagues.⁸ The lands to which the pueblos thus became entitled were required to be measured off in a square or prolonged form, according to the nature of the country.⁹ Until the lands were definitively assigned and measured off the title of the pueblo was to them imperfect.¹⁰ Such measurement and segregation could be made by the government only, and could not be made by the pueblo so as to bind

1. Biddle Boggs v. Merced Min. Co., 14 Cal. 362; Fremont v. Seals, 18 Cal. 435; Turner v. Donnelly, 70 Cal. 604.

2. Dolan v. Carr, 125 U. S. 625; Doll v. Meador, 16 Cal. 324; Kile v. Tubbs, 23 Cal. 443; Terry v. Megerle, 24 Cal. 629; Durfee v. Plaisted, 38 Cal. 83; McGarahan v. New Idria Min. Co., 49 Cal. 335; Carr v. Quigley, 57 Cal. 394; United Land Ass'n v. Knight, 85 Cal. 459.

3. Collins v. Bartlett, 44 Cal. 381; Lewiston v. Ryan, 75 Cal. 297; Burling v. Thompkins, 77 Cal. 262; Southern R. Co. v. Purcell, 77 Cal. 69.

4. Doll v. Meador, 16 Cal. 325; Terry v. Megerle, 24 Cal. 629; Durfee v. Plaisted, 38 Cal. 83; Burrell v. Haw, 40 Cal. 377; Thompson v. True, 48 Cal. 610; Schieffery v. Tapia, 68 Cal. 186.

5. Foss v. Hinkell, 78 Cal. 163.

6. Townsend v. Greeley, 5 Wall. (U. S.) 336; Grisar v. McDowell, 6

Wall. (U. S.) 372; San Francisco v. Le Roy, 138 U. S. 656; U. S. v. Pico, 5 Wall. (U. S.) 540; Montgomery v. Berans, 1 Sawy. (U. S.) 653; Trenouth v. San Francisco, 100 U. S. 252; Hart v. Burnett, 18 Cal. 530; Hale v. Akers, 69 Cal. 166.

7. U. S. v. Pico, 5 Wall. (U. S.) 540; Hart v. Burnett, 15 Cal. 542; Stevenson v. Bennett, 35 Cal. 433; Hale v. Akers, 69 Cal. 167.

8. Townsend v. Greeley, 5 Wall. (U. S.) 336; Grisar v. McDowell, 6 Wall. (U. S.) 373; Hale v. Akers, 69 Cal. 167; U. S. v. Pico, 5 Wall. (U. S.) 540; San Francisco v. Le Roy, 138 U. S. 656; Montgomery v. Bevens, 1 Sawy. (U. S.) 653.

9. Grisar v. McDowell, 6 Wall. (U. S.) 373; Hart v. Burnett, 15 Cal. 530.

10. Grisar v. McDowell, 6 Wall. (U. S.) 373; Stevenson v. Bennett, 35 Cal. 430; Bernal v. Lynch, 36 Cal. 135; People v. Holladay, 68 Cal. 441.

the government.¹ If the Mexican government never acted in the matter, the right and power to locate the lands passed to the United States, and could be exercised by them in such manner as they might deem expedient.²

c. TITLE OF PUEBLO.—The pueblos held the pueblo lands in trust, their title being merely a right to alienate portions thereof to their inhabitants for building or cultivation, and to use the remainder for commons, for pasture lands, as a source of revenue or for other public purposes.³

d. DISPOSITION BY PUEBLO.—(1) *Before the Conquest*.—The power of the pueblos to dispose of the pueblo lands was limited to the granting of them for the purposes named. This granting power was exercised by the alcaldes of the pueblos.⁴ The records kept by the alcaldes of the grants made by them are original evidence of such grants.⁵ Justices of the peace had no power to make grants of pueblo lands;⁶ nor had prefects.⁷ The pueblo lands, until disposed of by the pueblo to private parties, were subject to the control and disposition of the government, and could be granted to individuals by the governor of the department.⁸ A grant once made by an alcalde could not be revoked by the latter at his mere will.⁹ The conditions inserted in the grants made by alcaldes are conditions subsequent, and a failure of the grantee to comply with them did not work a forfeiture of the grant.¹⁰

1. *Leese v. Clark*, 18 Cal. 574; *Leese v. Clark*, 20 Cal. 413.

2. *Leese v. Clark*, 18 Cal. 574; *Leese v. Clark*, 20 Cal. 414.

3. *Townsend v. Greeley*, 5 Wall. (U. S.) 336; *Grisar v. McDowell*, 6 Wall. (U. S.) 373; *Alexander v. Roulet*, 13 Wall. (U. S.) 388; *Hart v. Burnett*, 15 Cal. 568; *San Francisco v. Canavan*, 42 Cal. 555; *Baker v. Brickell*, 87 Cal. 333; *United Land Assoc. v. Knight*, 85 Cal. 469; *Redding v. White*, 27 Cal. 285.

4. *Trenouth v. San Francisco*, 100 U. S. 252; *Welch v. Sullivan*, 8 Cal. 197; *Broad v. Broad*, 40 Cal. 496; *Cohas v. Raisin*, 3 Cal. 449; *San Francisco v. Le Roy*, 138 U. S. 656.

5. *Palmer v. Low*, 98 U. S. 14; *Downer v. Smith*, 24 Cal. 121; *Donner v. Palmer*, 31 Cal. 508; *Sill v. Reese*, 47 Cal. 348. The entire proceedings were first to be entered in the officer's book, required to be kept for that purpose, signed and attested in due form by the proper officer. A copy or summary statement of the proceedings as contained in the official book also duly signed and attested by the proper officer was then to be given to the grantee as evidence of his title, and, in the event of its loss, the officer in

whose official custody the books might be at the time was authorized and requested to give him another like copy of the original proceedings. The record so kept became an official and public record of the transactions of the alcaldes in the matter of granting town lots, and, as such, primary evidence of the acts there recited. *Donner v. Palmer*, 31 Cal. 508.

6. *Hubbard v. Barry*, 21 Cal. 325.

7. *Alexander v. Roulet*, 13 Wall. (U. S.) 387.

8. *Grisar v. McDowell*, 6 Wall. (U. S.) 373; *Alexander v. Roulet*, 13 Wall. (U. S.) 388; *Carr v. U. S.*, 98 U. S. 433; *Hart v. Burnett*, 15 Cal. 548; *People v. Holladay*, 68 Cal. 442; *Baker v. Brickell*, 87 Cal. 334; *Leese v. Clark*, 18 Cal. 573; 20 Cal. 413; *Bernal v. Lynch*, 36 Cal. 145; *U. S. v. Carr*, 3 Sawy. (U. S.) 482; *United Land Association v. Knight*, 85 Cal. 470.

9. *Lick v. Diaz*, 30 Cal. 72; *Montgomery v. Bevans*, 1 Sawy. (U. S.) 653.

10. *Holliday v. West*, 6 Cal. 527; *Donner v. Palmer*, 31 Cal. 516. In *Donner v. Palmer*, 31 Cal. 516, the court by Sanderson J., said: "It has never been held, so far as we are advised, that the payment of the municipal tax by the grantee was a condition precedent to

(2) *After the Conquest.*—The conquest of *California* by the American forces July 7, 1846, terminated the authority of the Mexican department officials over public lands.¹ It did not suspend the power or authority of the officers of the pueblos to make grants of such lands.² The fact that the officers of a pueblo after the conquest were Americans, or held their offices under American authority, did not change the powers and obligations, which by the existing laws of the country, belonged to such municipal officers.³ The power to grant pueblo lands was never vested in the military governors of California.⁴ The conquest did not affect the validity of grants of the pueblo lands previously made.⁵ The treaty of Guadalupe Hidalgo did not divest the pueblos of any rights of property nor alter the character of their interests in the pueblo lands.⁶ The estates of the pueblos in their lands at the time of the treaty were not indefeasible, but simply a limited right of disposition and use, subject in all particulars to the control of the government of the country, and before such estates could become absolute and indefeasible, some action was required on the part of the *United States*.⁷

the exercise of the granting power. No such condition is imposed by the regulations of 1789, nor by any other to which our attention has been called. The grant was intended to be a gift and not a sale made for the purpose of encouraging new settlements. The money paid by the grantee was a tax or fee and not a price for the lot. The power was long exercised, so far as we are advised, before the tax was imposed, and when it was imposed we do not understand that it was intended to restrict in any sense the granting power as it had previously existed, but merely to authorize the Ayuntamientos to make a charge for the grant in the nature of a fee or tax, for the purpose of municipal revenue, not differing in any respect from other municipal fees or taxes. *Donner v. Palmer*, 31 Cal. 516.

1. *Mumford v. Wardwell*, 6 Wall. (U. S.) 435; *Alexander v. Roulet*, 13 Wall. (U. S.) 387; *Scott v. Dyer*, 54 Cal. 432.

2. *Hart v. Burnett*, 15 Cal. 559; *Payne v. Treadwell*, 10 Cal. 228; *Scott v. Dyer*, 54 Cal. 432.

3. *Cohas v. Raisin*, 3 Cal. 452; *Dewey v. Lambier*, 7 Cal. 347; *Welch v. Sullivan*, 8 Cal. 197; *Hart v. Burnett*, 15 Cal. 559; *Payne v. Treadwell*, 10 Cal. 228; *White v. Moses*, 21 Cal. 40; *Scott v. Dyer*, 54 Cal. 432.

4. *Mumford v. Wardwell*, 6 Wall. (U. S.) 435; *Alexander v. Roulet*, 13 Wall. (U. S.) 388.

5. *Vanderslice v. Hanks*, 3 Cal. 37; *Leese v. Clark*, 20 Cal. 421; *Ward v. Mulford*, 32 Cal. 370.

6. *Townsend v. Greeley*, 5 Wall. (U. S.) 334; *Hart v. Burnett*, 15 Cal. 562; *Tripp v. Spring*, 5 Sawy. (U. S.) 214. The treaty of Guadalupe Hidalgo does not purport to divest the pueblo, existing at the site of the city of San Francisco, of any rights of property or to alter the character of the interests it may have held in any lands under the former government. It provides for the protection of the rights of the inhabitants of the ceded country to their property, and there is nothing in any of its clauses inducing the inference that any distinction was to be made with reference to property claimed by towns under the Mexican Government. The subsequent legislation of Congress has treated the claims of towns as entitled to protection the same as the claims of individuals, and has authorized their presentation to the board of commissioners for confirmation. *Townsend v. Greeley*, 5 Wall. (U. S.) 334.

7. *Palmer v. Low*, 98 U. S. 16; *Stevenson v. Bennett*, 35 Cal. 433; *People v. Halladay*, 68 Cal. 442; *People v. San Francisco*, 75 Cal. 394; *Baker v. Brickell*, 87 Cal. 333.

(3) *Act of 1851*.—The act of Congress of March 3, 1851, did not change the nature of estates in land held by pueblos.¹ The act did not operate as a grant of lands to the pueblos, but merely made proof of the existence of a pueblo on July 7, 1846, *prima facie* evidence that a grant had therefore been made to it.² It was necessary for pueblos to present their claims for confirmation under the act.³ The act requires claims of individuals to pueblo lands based upon grants from the pueblo to be presented for confirmation under the act by the authorities of the pueblo.⁴ A confirmation by the commissioners of a claim presented by a pueblo took effect upon the title of the pueblo as if it existed upon the acquisition of the country by the *United States*, and validated it as of such date.⁵ A patent issued in pursuance of a confirmation by the commissioners of the claim of a pueblo is not an original grant, but is a mere acknowledgment that the pueblo had little from the Mexican government, and a release of all claim on the part of the *United States* to the land.⁶ The act did not require a claim to pueblo lands under a grant from the governor to be presented in the name of the pueblo. Such a claim was required to be presented by the grantee.⁷ Such claimants were not benefited by confirmation of the pueblo claim, and the confirmation of the pueblos' title did not inure to the benefit of such grantees.⁸

VI. GRANTS IN ALABAMA.—The king of Spain, in virtue of the bulls of Pope Alexander VI, became the proprietor of the Spanish possessions in America, and could grant the shore of navigable waters in his American colonies. And the power possessed by the king, in this particular, might be exercised by his viceroys and other subordinates within their respective jurisdictions.⁹

1. *Townsend v. Greeley*, 5 Wall. (U. S.) 335; *San Francisco v. Le Roy*, 138 U. S. 656; *Hart v. Burnett*, 15 Cal. 573.

2. *Hart v. Burnett*, 15 Cal. 573.

3. *Grisar v. McDowell*, 6 Wall. (U. S.) 374; *Alexander v. Roulet*, 13 Wall. (U. S.) 388.

4. *Leese v. Clark*, 18 Cal. 567; *Stevenson v. Bennett*, 35 Cal. 430; *Lynch v. Bernal*, 9 Wall. (U. S.) 321. The object of section 14 of the act was to give to lot-holders deriving title from a common source from the authorities of a pueblo, or town, or from an individual—who was originally the grantee of the land upon which the pueblo or town is situated—the benefit of the examination by the board of the general title under which they hold, and relieve the commissioners from the necessity of considering a multitude of separate claims for small tracts depending upon the validity of the same original title. It intended that the

corporate authorities should present under one general claim not only the interest of the city, town or village, which they represent, but also the separate interest of individuals holding under conveyances from them. The confirmation of the common title to these authorities would, of course, inure to the benefit of parties holding under them. *Lynch v. Bernal*, 9 Wall. (U. S.) 321.

5. *Hart v. Burnett*, 15 Cal. 577; *United Land Assoc. v. Knight*, 85 Cal. 458; *San Francisco v. Le Roy*, 138 U. S. 656.

6. *United Land Assoc. v. Knight*, 85 Cal. 457.

7. *Leese v. Clark*, 18 Cal. 567; *Steinbach v. Moore*, 30 Cal. 505; *Merle v. Dixey*, 31 Cal. 130; *Lynch v. Bernal*, 9 Wall. (U. S.) 321.

8. *Leese v. Clark*, 18 Cal. 567; *Steinbach v. Moore*, 30 Cal. 505.

9. *Mayor, etc. v. Eslava*, 9 Port. (Ala.) 594. The bulls of the pope, on which

While a grant is void unless the grantor has the power to make it, it is not void because the grantee does not prove or produce it; the law supplies this proof by legal presumption, arising from the full, legal and complete execution of the official grant, under all the solemnities known or proved to exist, or to be required by the law of the country where it is made and the land is situated.¹ When a grant of lands is made by a public and responsible officer of a foreign government, the presumption is in favor of his authority and of the validity of the grant.²

A Spanish grant made after the treaty of St. Ildefonso in 1800, whereby the Louisiana Territory was ceded to France by Spain, conveyed no title to lands within the limits of the present State

Spain founded its right, bestowed all the regions which had been or should be discovered, on Ferdinand and Isabella and their successors. From them all grants of land flowed. Mayor, etc., of Mobile *v.* Eslava, 9 Port. (Ala.) 594. The viceroys who represented the person of their sovereign, possessed his regal prerogatives within the precincts of their own government, in their utmost extent. Like him, they exercised supreme authority in every department of the government, military, civil, and criminal. And, as their dominions were too extensive for their personal supervision, they, in turn, were represented by various orders of magistrates—some appointed by the king, others by the viceroys—all of whom were amenable to the jurisdiction of the latter; unless they were required to execute their duties, without the limits of either of the viceroyalties. (Robinson's Am. 350, 351, 352; 2 vol. Prescott's Ferdinand and Isabella 172, 173, 174, 486, 493, 494, 495;) Mayor, etc., of Mobile *v.* Eslava, 9 Port. (Ala.) 594; Antones *v.* Eslava, 9 Port. (Ala.) 543.

1. Mayor, etc., of Mobile *v.* Eslava, 9 Port. (Ala.) 596; U. S. *v.* Arredondo, 6 Pet. (U. S.) 728; Mayor, etc., of New Orleans *v.* U. S., 10 Pet. (U. S.) 727. See also Polk *v.* Wendell, 9 Cranch. (U. S.) 99; Polk *v.* Wendell, 5 Wheat. (U. S.) 303. In the absence of all proof, every particular intendment is to be made in favor of a grant, bearing on its face the evidences of regularity and authenticity. Mayor, etc., of Mobile *v.* Eslava, 9 Port. (Ala.) 596.

2. Mayor, etc., of Mobile *v.* Eslava, 9 Port. (Ala.) 596. So it will be presumed that the intendant of the province of West Florida, during the time the Spanish Government was the proprie-

tor of the country, possessed the power necessary to have authorized an inquiry and decree for a sale of parsonage and church lots, on the ground that he was a public officer of his government, and the act was seemingly regular. Antones *v.* Eslava, 9 Port. (Ala.) 544; citing, U. S. *v.* Arredondo, 6 Pet. (U. S.) 728; Mayor, etc., of New Orleans *v.* U. S., 10 Pet. (U. S.) 727.

A certificate of confirmation of an inchoate title to lands claimed under the government of Spain, issued by the commissioners appointed under the act of Congress, to investigate such claims, is *prima facie* valid, and cannot be assailed by one having no right or interest in the land. Richardson *v.* Hobart, 1 Stew. (Ala.) 505; 18 Am. Dec. 70.

Such certificate will override a title founded on possession alone, not existing long enough to bar an entry under the Statute of Limitations. Hallett *v.* Eslava, 2 Stew. (Ala.) 115.

The power given to the registers and receivers by the different acts of Congress, to determine between conflicting and interfering claims, and to direct the manner of locating and surveying them applies only to confirmation of imperfect grants made by the former proprietors of the country. These officers had no power to locate and direct the survey of a disputed line, where one of the parties claims by virtue of a complete and unconditional grant. Mayor, etc., of Mobile, *v.* Farmer, 6 Ala. 740; affirmed in 9 How. (U. S.) 469. Where Congress confirms the title to the same land to two individuals, the confirmation is merely a disavowal by the United States in favor of both parties. Each, therefore, must rely upon the strength of his own title. Eslava *v.* Farmer, 7

of Alabama.¹ But while the Spanish authorities could not make a valid title of land, yet the grant was capable of confirmation by Congress.² The term "new grant" in the act of Congress of the 26th of May, 1824, embraced grants made by the local authorities of Spain after the acquisition of Louisiana by the United States, and before the cession of Florida, and such claims were capable of confirmation.³ An inchoate grant by Spain previous to the treaty of St. Ildefonso only imposes upon the United States a political obligation to validate it so far as it is binding in conscience; but until it is confirmed, it confers upon the grantee no right which an American court will recognize. A confirmation by Spain subsequent to the treaty, by which it yields up its right to the soil, is wholly inoperative to affect the title of others acquired after the original grant.⁴ Concessions of lands now within the State of Alabama, confirmed in 1713 by the then governor of Louisiana

Ala. 559. See also *U. S. v. Arredondo*, 6 Pet. (U. S.) 738.

If the United States has no interest in the premises, in consequence of a previous disposition, or other cause, it has no power to either grant or confirm a title. *Doe v. Bebee*, 8 Ala. 914; affirmed in 13 How. (U. S.) 25. See also *Doe v. Greitt*, 8 Ala. 930.

1. *Goodtitle v. Kibbe*, 9 How. (U. S.) 471; *Innerarity v. Byrne*, 8 Port. (Ala.) 176, 180; *Eslava v. Bolling*, 22 Ala. 737; *U. S. v. Reynes*, 9 How. (U. S.) 127. It is the settled doctrine of the judicial department of the government that the treaty of 1819 with Spain, ceded to the United States no territory west of the river Perdido, as it had already been acquired under the Louisiana treaty of 1803 with France; and therefore all grants of land within such territory made by Spain after the latter date, are void. *Pollard v. Files*, 2 How. (U. S.) 602. In this case Catron, J., said: "It was thus held in *Foster v. Neilson*, 2 Pet. (U. S.) 254, and again in *Garcia v. Lee*, 12 Pet. (U. S.) 515, and it is not now open to controversy in this court." But in the interval between the Louisiana purchase and the time, some nine years later, when the United States took possession of the country west of the Perdido, the Spanish Government had the right to grant permits to settle and improve by cultivation, or to authorize the erection of establishments for mechanical purposes; and these incipient concessions were not disregarded by Congress, but are recognized in the acts of 1804, 1812 and 1819, and as claims are within the act of 1824; yet this last act gave a title to the owners of old water

lots, in Mobile, only where an improvement was made on the east side of Water street, and made by the proprietor of the lot on the west side of that street. See *Mayor, etc., of Mobile v. Eslava*, 9 Port. (Ala.) 588, and affirmed in 16 (U. S.) 247. Nor could such person claim as riparian proprietor or where his lot had a definite limit on the east. *Pollard v. Files*, 2 How. (U. S.) 603. See also *Pollard v. Kibbe*, 14 Pet. (U. S.) 363.

2. *Pollard v. Files*, 2 How. (U. S.) 603; reversing *Pollard v. Files*, 3 Ala. 47.

3. *Pollard v. Kibbe*, 14 Pet. (U. S.) 363; reversing *Pollard v. Kibbe*, 9 Port. (Ala.) 712.

4. *Kennedy v. Jones*, 11 Ala. 79. Such incomplete claim to land under Spanish authority may be admitted as evidence for the purpose of showing that Spain had asserted a title to the premises in controversy, or for the purpose of laying a predicate from which it may be presumed that the defendant and those under whom he claims has been in possession for twenty years, so as to give him a title by prescription; although the evidence of title had only been recorded as directed by the acts of Congress of 1805, 1806, 1807, 1812. *Doe v. Eslava*, 11 Ala. 1038. And it is intimated in *Haller v. Eslava*, 3 Stew. & P. (Ala.) 122, that evidences of an incomplete claim under Spanish authority should be received for the purpose indicated.

The legislative acts of 1803, 1816 and 1818, in respect to the keeping and translating of the Spanish records, make duly authenticated copies of such records evidence, and dispense

may constitute a complete grant to the donee, and vest in him a perfect title, and a title of this sort will especially be sustained, despite objections to its want of certainty, where Congress has confirmed the concession, and possession has been maintained for a century and a half.¹ Confirmation, by Congress, of titles to lands claimed under the crown of Spain, whether regarded as a substantive grant of the land or as a mere relinquishment of the title of the United States, does not affect the possession.² As a general rule the party claiming a benefit from a foreign law must prove its existence; but when the laws of one State or nation are operative in another, this rule does not apply. The courts of this country will therefore judicially notice the laws of Spain, which regulated the conveyance of real property in Mobile and the country adjacent, when the territory was subject to the dominion of that nation; and under this influence are bound to know

with the production of the originals. *Farmer v. Eslava*, 11 Ala. 1039.

1. *Trenier v. Stewart*, 101 U. S. 807. In this case the court, by Clifford, J., says: "Most of these views are much strengthened by historical researches of the court below, as exhibited in the opinion of the State court given in support of the judgment brought here by the present writ of error," *Trenier v. Stewart*, 55 Ala. 458.

Where a party obtained in 1803 from the military commandant at Mobile a permit to take possession of a lot of ground near that place, and made a contract with another person that the latter should improve it, so as to lay the foundation of a perfect title, on obtaining which they were to divide the lot equally, the latter, upon procuring a confirmation of his title under the acts of the commissioners appointed pursuant to an act of Congress, became a trustee for the former to the extent of one-half the lot; and the assignee of the latter took the title charged with such trust, of which he had knowledge. *Hallett v. Collins*, 10 How. (U. S.) 182.

To the same point, see *Chastang v. Armstrong*, 20 Ala. 609.

2. *Mim v. Higgins*, 1 Ala. 676. If the possession was acquired during the dominion of the Spanish crown, to sustain the defense of the Statute of Limitations, the time will be computed from the day possession accrued, and not from the act of Congress of 1812 abrogating the Spanish laws, and extending the laws of the Mississippi Territory over the country, nor from the day of the actual occupation of the

territory of the United States. *Innerness v. Mim*, 1 Ala. 660; *Tillotson v. Kennedy*, 5 Ala. 407.

When a claimant of lands situated within the territory of Louisiana has appeared before the commissioner appointed under the authority of the act of Congress of April 12, 1812, and presented his petition claiming title by grant from the Spanish Government, and the commissioner reports favorably to his claim, which is afterwards confirmed by the act of Congress of May 8, 1822, the title of the claimant is founded upon the report of the commissioner and the act of Congress confirmatory thereof, and not upon any supposed Spanish grant. *Chastang v. Dill*, 19 Ala. 430. See also *Menard v. Massey*, 8 How. (U. S.) 293; *Bissell v. Penrose*, 8 How. (U. S.) 317. And see also *Hall v. Root*, 19 Ala. 396, to the point that a party may successfully assert the title against the United States Government, if the grant has not been rendered inoperative as an instrument of evidence by his failure to exhibit it for registration as required by the act of Congress. And see *Baker v. Chasting*, 18 Ala. 417; as to effect of confirmations, see *Mim v. Higgins*, 39 Ala. 1.

But a concession of lands amounting to no more than an order to survey made by the Spanish authorities at Mobile in the year 1806, cannot be given in evidence to support an ejectment in the courts of the United States where the same has not been recorded, or passed upon by the board of commissioners or register of the land office established by the acts of Congress relating to land titles in that

what documentary evidence of title were records of the province, so as to allow copies to be admitted in evidence.¹

VII. GRANTS IN FLORIDA—1. Source and Character.—There were three classes of Spanish land grants in Florida: Absolute grants in consideration of services already performed, which were made by the governors in special cases, either by virtue of special power recognized by the laws of the Indies, or by authority given in particular decrees coming directly or indirectly from the sovereign; grants in consideration of services to be performed, and deemed especially important for the improvement of the province, and gratuitous grants in moderate quantities for purposes of actual occupation and cultivation. By far the greatest number were of the latter class, to which were applicable the general system of Spanish land law in America.² Spanish land grants or concessions in Florida appear to have been of two kinds—those granting an incipient title, and those giving a complete title. The greater number appear to have been of the first description. Many of them contained conditions on the performance of which the right to demand a complete title depended.³

2. Ratification by Treaty and Statute.—The treaty of 1819 between the United States and Spain whereby cession was made of the Floridas to this country, ratifies grants made prior to that time by the Spanish Government; but this ratification applies only to grants of lands in Florida, and not to those of Louisiana lands; and lands lying in the disputed territory between the two countries which the United States regards as within the true boundary of Louisiana and alleged to have been granted by the Spanish authorities in 1806, fall within the provision of the act of Congress declaring void all grants of land made after the treaty of 1803 with France, whereby Louisiana was ceded to the United States.⁴

country. *De la Croix v. Chamberlain*, 12 Wheat. (U. S.) 600.

1. *Farmer v. Eslava*, 11 Ala. 1041.

2. *Doe v. Latimer*, 2 Fla. 82; *citing* *U. S. v. Clarke*, 8 Pet. (U. S.) 450; 2 *White's New Rec.* 38, 48, 50, 51, 62, 64, 71, 234, 235, 244, 280, 282, 286, 289, 290; *U. S. v. Miggins*, 14 Pet. (U. S.) 340.

3. *Doe v. Latimer*, 2 Fla. 81; *citing* *U. S. v. Clarke*, 8 Pet. (U. S.) 450; *White's New Rec.* 234, 235.

Who Entitled to Execute Grants.—The power to grant lands was, in October, 1798, re-conferred upon the intendant (from whom it had been withdrawn), so far as respected Louisiana and West Florida, but this order did not extend to East Florida, where it remained with the governor. *Doe v. Latimer*, 2 Fla. 80; *citing* *U. S. v. Clarke*, 8 Pet. (U. S.) 452.

4. *Garcia v. Lee*, 12 Pet. (U. S.) 515; *Foster v. Neilson*, 2 Pet. (U. S.) 309;

Doe v. Roe, 13 Fla. 611; *citing* *Ma-Gee v. Doe*, 9 Fla. 382; *U. S. v. Percheman*, 7 Pet. (U. S.) 86; and citing upon the obvious proposition that one nation cannot grant away the territory of another, *Poole v. Fleegeer*, 11 Pet. (U. S.) 210.

This disputed territory comprises the region lying between the Perdido and Mississippi Rivers. See *Pollard v. Kibbe*, 14 Pet. (U. S.) 364, except the island of New Orleans; nor was the view taken concerning Spanish grants of lands situated therein affected by the act of Congress of 1844, which extended thereto the act of 1824, since the latter act was regarded as merely giving a means of completing inchoate and imperfect grants. *U. S. v. Lynde*, 11 Wall. (U. S.) 643; *U. S. v. Reynes*, 9 How. (U. S.) 127; *U. S. v. Mayor, etc., of Philadelphia, etc.*, 11 How. (U. S.) 609; *Montault v. U. S.*, 12 How. (U.

But by the act of June 22, 1860, the grants made by the Spanish Government in the disputed territory, while that government was in possession of such territory, and claimed sovereignty over it, were confirmed; and such a grant made during that period by the Spanish intendant of West Florida, although rejected and declared void under previous conditions of the laws, was held to be confirmed and validated by the act of 1860.¹ Under the Florida treaty no grants of land made after the date thereof were valid; nor could a survey be valid on lands other than those authorized by the grant;² yet the power to survey in conformity to the concessions existed up to the change of flags;³ and where a grant made before the treaty was for the land mentioned in the petition, or for any other lands that were vacant, three surveys were held valid where they were made of lands within the quantity granted, though not at the place specially mentioned in the grant, but at other places.⁴ Under the same treaty, the owners of conditional grants, who have been prevented from fulfilling all the conditions of their grants, have time extended to them, running from the ratification of the treaty, to complete such conditions; but the treaty declares that if the conditions are not complied with within the terms limited in the grant, the grants shall be null and void; and this restriction applies to a grant for land in Florida by the Spanish governor, on condition that the grantee build a mill within a period fixed by the grant, where the grantee has not performed the condition, or shown sufficient reason for its non-performance.⁵

S.) 47; U. S. v. Castant, 12 How. (U. S.) 437.

1. U. S. v. Lynde, 11 Wall. (U. S.) 647. See also U. S. v. Watkins, 97 U. S. 220.

Conclusive Admissions in Ratification of Treaty.—Where, by the ratification by the king of Spain of the treaty by which Florida was ceded to the United States, it was admitted that certain grants of land in Florida to the Duke of Alagon, and to two other individuals, concerning nearly all the ceded domain, were annulled and declared void, such admission is conclusive. *Clark v. Branden*, 16 How. (U. S.) 656.

2. U. S. v. Huertas, 9 Pet. (U. S.) 173; U. S. v. Breward, 16 Pet. (U. S.) 146.

3. U. S. v. Acosta, 1 How. (U. S.) 27.

4. U. S. v. Clarke, 16 Pet. (U. S.) 233; U. S. v. Arrendon, 6 Pet. (U. S.) 691; U. S. v. Sibbald, 10 Pet. (U. S.) 321.

A conditional concession was held to be a grant of land, and not a mere privilege of cutting timber, but not

held good as to excess in surveys over land granted in the concession. U. S. v. Richard, 8 Pet. (U. S.) 474.

A survey was confirmed, though not strictly conforming to the place designated in the grant, on the ground of the greater latitude allowed in surveys in the province of Florida, and the fact that the surveyor-general had returned that the survey was made according to the grant, and the failure of the United States to prove the contrary, in U. S. v. Law, 16 Pet. (U. S.) 167. The exclusion of water covered and marsh land from the quantity granted, on the basis of an alleged custom in the government of East Florida was not sustained, especially as a new location was made of equivalent land so as to vary from the grant, in U. S. v. Levy, 13 Pet. (U. S.) 83.

5. U. S. v. Kingsley, 12 Pet. (U. S.) 479, reviewing as to conditional grants or concessions, U. S. v. Arrendondo, 6 Pet. (U. S.) 745; U. S. v. Seton, 10 Pet. (U. S.) 311; U. S. v. Sibbald, 10 Pet. (U. S.) 313; and U. S. v. Sequi, 10 Pet. (U. S.) 306. In the

3. **Confirmation.**—The Supreme Court of the United States, and the courts of Florida, have uniformly held, in construing the 8th article of the treaty of February 22, 1819, between the United States and Spain, so far as it is intended to protect or provide for the confirmation of private land grants made by the Spanish authorities in Florida previous to January 24, 1818, that the 8th article is to be considered as operating to confirm such grants *in presenti*, and the language of the Spanish side or Spanish copy of the treaty is substantially adopted as the true rule, reading, viz: That such grants "shall stand or remain ratified and confirmed," etc.¹ Under the treaty of 1819 it was not contemplated that the Government of the United States should convey titles upon purchases made of Spain before January 24, 1818, but only that the United States, after a change of dominion, should respect such purchases as were made of the Spanish Government before that time, and ratify and confirm the right which had, before that time, been acquired of the Spanish Government.² The report and abstract of decision of the Board of Land Commissioners appointed under the act of Congress, approved May 8, 1822, in regard to claims and titles to lands in Florida, whether under grants from the Spanish Government or by purchase from said government, are not final, and cannot have the force of *res adjudicata*, nor deprive the claimants of any right which they may have had previous to said report and abstract or decision. The object for which said commissioners were appointed was to enable the government to ascertain the Spanish grants and sales, and their location, so that they might be separated from the public domain, and not sold as public lands. For this purpose they "constituted a board of inquiry, and not a court exercising judicial power and deciding finally on titles."³ After the acquisition of Florida by the United States, in virtue of the treaty of 1819, various acts of Congress were passed for the adjustment of private claims to lands within the ceded territory; but the tri-

last of these cases the court refused to attach a grant in absolute property with a promise of title in form, a condition implied from the consideration being in part the erection of a saw-mill.

As to conditions express and implied, see *Doe v. Latimer*, 2 Fla. 84, citing *U. S. v. Arredondo*, 13 Pet. (U. S.) 134.

1. *U. S. v. Arredondo*, 6 Pet. (U. S.) 745; *U. S. v. Percheman*, 7 Pet. (U. S.) 89; *MaGee v. Doe*, 9 Fla. 392.

In adjusting land titles, derived from the Spanish Government in Florida prior to the date fixed by the treaty of 1819, the acts of Congress confirming grants are not construed as grants *de novo*. *MaGee v. Doe*, 9 Fla. 397, citing *Chouteau v. Eckhart*, 2 How.

(U. S.) 345, and *distinguishing* *Strother v. Lucas*, 12 Pet. (U. S.) 412.

Special act construed to the same point, see *MaGee & Doe*, 9 Fla. 398.

2. *U. S. v. Percheman*, 7 Pet. (U. S.) 89; *MaGee v. Doe*, 9 Fla. 398; *U. S. v. Arredondo*, 6 Pet. (U. S.) 745.

The eighth article of the treaty of 1819, between the United States and Spain, by which the Floridas were acquired, must be construed to stipulate expressly for the security to private property which the laws and usages of nations would, without express stipulation, have conferred. *U. S. v. Arredondo*, 6 Pet. (U. S.) 745.

3. *MaGee v. Doe*, 9 Fla. 395; citing *U. S. v. Percheman*, 7 Pet. (U. S.) 86.

bunals appointed to decide on them were not authorized to settle any which exceeded a league square; and on claims exceeding that quantity, such tribunals were directed to report especially their opinion for the future action of Congress.¹

Where a concession of land in 1817 by the Spanish authorities of West Florida was made "subject to the conditions prescribed in the regulations of 17th of July, 1799," and the decree of concession concluded with an order "that the land be surveyed and marked by the surveyor, to be submitted to the superior authority—costs to be taxed;" and no further steps appeared to have

1. The lands embraced in the larger claims were defined by surveys and plats returned; and they were reserved from sale, and remained unsettled until some resolution should be adopted for a final adjudication on their final validity, which was done by the law of the 23d May, 1828, U. S. v. Arrendondo, 6 Pet. (U. S.) 707, setting forth such law in which incorporation was made by reference to the law of 1824, passed to enable claimants to lands within the limits of Missouri and Arkansas to institute proceedings to try the validity of their claims to lands prior to the consummation of the cession of the territory acquired by the United States by the Louisiana treaty. The case sustains the validity of a claim for land in Florida, embraced by the treaty, not finally settled, containing the requisite quantity of land, not reported on as antedated or forged, nor annulled by the treaty, and presented to and acted on by the commissioners according to law.

Rejection of Claims by Commissioners Not Final.—A rejection of a claim to two thousand acres of land in Florida by a board of commissioners to ascertain claims and titles to lands in East Florida, was not a final action on a claim in the sense in which these words are used in the act of May 26, 1830; but it was still necessary that Congress should pass upon the matter. U. S. v. Percheman, 7 Pet. (U. S.) 94, *et seq.* See also U. S. v. Clarke, 8 Pet. (U. S.) 446, *et seq.*, discussing jurisdiction of such tribunals, etc., *MaGee v. Doe*, 9 Fla. 395.

Lands Within the Indian Territory.—A grant of land in Florida within the Indian boundary by the governor, acting under the crown of Spain, before the cession of Florida to the United States, which was confirmed to the grantee by the decree of the judge of the eastern district of Florida, has been

sustained on appeal to the Supreme Court of the United States as within the power of the governor, although the lands had not by any official act been decreed to form a part of the royal domain. U. S. v. Fernandez, 10 Pet. (U. S.) 304.

"This subject," says the court, by Baldwin, J., "has been so fully and ably considered in *M'Intosh v. Johnson*, that we have only to refer to the language of the court to show that every European government claimed and exercised the right of granting lands, while in the occupation of the Indians." *Johnson v. M'Intosh*, 8 Wheat. (U. S.) 579." See the opinion, U. S. v. Fernandez, 10 Pet. (U. S.) 304.

Concerning Indian title to Spanish fort, see *Mitchel v. U. S.*, 15 Pet. (U. S.) 80, *et seq.* This case arose upon the mandate of the United States Supreme Court in *Mitchel v. U. S.*, 9 Pet. (U. S.) 711, in reference to which application was made of the doctrines declared in *Sibbald v. U. S.*, 12 Pet. (U. S.) 493, and *The Santa Maria*, 10 Wheat. (U. S.) 431.

Lands Not Surveyed or Improved, etc.

—The United States as successor to Spain is not bound to confirm the title claimed under a grant from the Spanish authorities, to land at New River, in Florida, where no survey was made of the land, and nothing done for the purpose of using or improving the land claimed to have been granted. U. S. v. Desespine, 15 Pet. (U. S.) 333; applying the rule recited in U. S. v. Clarke, 8 Pet. (U. S.) 461, and recognized as authority in U. S. v. Wiggins, 14 Pet. (U. S.) 351.

Nor where the claimant abandons his first location can he rest his rights upon a new and independent concession from an inferior tribunal, which could only be intended to expedite the formal title. U. S. v. Desespine, 15 Pet. (U. S.) 333.

been taken to comply with the conditions, or to complete the grant, anterior to the cession of the Floridas by Spain to the United States, such concession is not evidence of title.¹

The *ganancial* rights of husband and wife, as to property acquired during coverture, under the Spanish law in force in Florida at the exchange of flags, have been secured and will be acknowledged.²

VIII. GRANTS IN LOUISIANA—1. Titles Originating During Spanish Sovereignty.—The treaty of Paris with France ceding Louisiana to the United States, protected the property of the people of the province, both as to complete and inchoate titles only so far as to cover rights founded in justice and good faith, and based upon competent authority; and, if it could be supposed to refer to titles or claims derived from Spain, it could embrace such only as had their origin while Spain was the rightful sovereign over the territory.³ Nor did the treaty change

1. *Doe v. Latimer*, 2 Fla. 84; *citing* U. S. v. Clarke, 8 Pet. (U. S.) 450; 2 White's New Rec. U. S. v. Kingsley, 12 Pet. (U. S.) 486; U. S. v. Forbes, 15 Pet. (U. S.) 183; U. S. v. Miranda, 16 Pet. (U. S.) 160.

Certificate as Evidence of Grant.—Where a claim was made for a square of four miles of land, under a grant from a Spanish governor of East Florida, the certificate of the copy of the grant, given by the secretary of the government and province, and stating each copy to be "faithfully drawn from the original" in the secretary's office under his charge, was sufficient evidence in support of the grant. U. S. v. Delespine, 15 Pet. (U. S.) 229, stating that such proof had been ruled to be sufficient in U. S. v. Wiggins, 14 Pet. (U. S.) 346, and U. S. v. Rodman, 15 Pet. (U. S.) 137. See also U. S. v. Acosta, 1 How. (U. S.) 26. But compare U. S. v. Breward, 16 Pet. (U. S.) 147.

Recitals in Grant.—A grant of ten thousand two hundred and fifty acres of land, by the Spanish governor of Florida, which recited, among other things, that it was made under a royal order of the king of Spain, of 29th March, 1815, which order was not in conformity with the grant, but was made in the exercise of other powers to grant lands which had been vested in the governor, was not made invalid by the recital of the royal order as authority for the grant. U. S. v. Delespine, 15 Pet. (U. S.) 231, relying upon U. S. v. Percheman, 7 Pet. (U. S.) 51, and upon the recital of an additional

consideration in the way of the surrender of another grant previously made for services.

2. *MaGee v. Doe*, 9 Fla. 398. In this case the court by Forward, J., said: "The verdict of the jury found the fact to be that Constance Alba, one of the lessors of the plaintiff, was the wife of Peter Alba, Jr., at the time of his purchase of these lots of land of the Spanish Government, and that as the same were acquired during their marriage, the lots being an onerous increase or gain-come under the Spanish laws enforced at that time in the province of West Florida, into partition, and therefore that she is the legal owner of one undivided half of said lots."

The courts of Florida have frequently adjudicated upon these rights under the Spanish law. *MaGee v. Doe*, 9 Fla. 398; *citing* White's New Recopilation 61.

A claimant of a *ganancial* right under the laws existing in the province of Florida, while it was a part of the Spanish dominion, takes subject to the debts contracted during the marriage, which are to be paid out of the common property, and he cannot take such property and leave the debts unpaid. To recover an interest of this kind there should be a representative of the estate. *McHardy v. McHardy*, 7 Fla. 308; *citing* 1 White's New Recop. 63, 66.

3. U. S. v. Reynes, 9 How. (U. S.) 151, holding that a Spanish grant dependent on a decree of September 1, 1803, is inoperative within the prov-

the character of inchoate Spanish titles; but it imposed upon the Government of the United States only an obligation to perfect such titles;¹ nor under the acts of Congress of May 26,

since or territory of Louisiana, as made after 1800, from which date Spain's possession of parts of Louisiana was treated as wrongful by the United States. See also *Garcia v. Lee*, 12 Pet. (U. S.) 515; 21 Myers' Fed. Dec. 26.

The treaty of St. Ildefonso, by which Spain ceded Louisiana to France, became operative to transfer the sovereignty on the 1st of October, 1780, which was the day of its date. *Davis v. Police Jury of Concordia*, 9 How. (U. S.) 288.

French Grants.—A grant of land in Louisiana, issued by the representatives of the king of France in 1765, was void (see also as to grant in 1764, *U. S. v. Ducros*, 15 How. (U. S.) 41) as the province of Louisiana had been ceded by the king of France to the king of Spain in 1762; and the title to the land described in such a void grant was vested in the king of Spain, and remained in him until the treaty of St. Ildefonso, when it passed to France, and by the treaty of Paris became vested in a claimant who did not comply with the conditions of confirmation implied by the act of Congress. *U. S. v. D'Auterive*, 10 How. (U. S.) 622, *et seq.*

Furthermore not only are French grants of land in Louisiana made after the treaty of Fontainebleau, by which Louisiana was ceded to Spain, void unless confirmed by the Spanish authorities, before the cession to the United States; but even if there has been continued possession under the grants so as to lay the foundation for presuming a confirmation by Spain, this would indicate the existence of an absolute title and not of an inchoate or imperfect one; and therefore the cases are not included under the acts of Congress of 1824 and 1844 which look only to inchoate and equitable titles; so that the district court of the United States has no jurisdiction in such cases. *U. S. v. Pillerin*, 13 How. (U. S.) 10.

1. *Chouteau v. Eckhart*, 2 How. (U. S.) 375, holding further that the Federal Government being unable to confirm the title to two adverse claimants, must to some extent determine between the conflicting titles. An imperfect

title to land in Louisiana derived from Spain before the cession, without confirmation by act of Congress, cannot be supported against a party claiming under a grant from the United States. *U. S. v. King*, 3 How. (U. S.) 787.

In case of incomplete titles to lands in Louisiana the treaty conferred the fee on the United States, with the equity attached in the claimant, which equity was clothed with the fee by the confirming act. *McDonogh v. Millandon*, 3 How. (U. S.) 706; *Morrison v. Whetstone*, 5 La. Ann. 636. No time was fixed by the treaty within which conditions appertaining to imperfect grants of land might be performed; but this was left to the justice and discretion of our government; and when in a due exercise of that discretion the acts of Congress of 1804 and 1824 were passed, and authority was conferred on the courts to determine questions of title between the Government and individuals, the limits of the jurisdiction were prescribed by the provision that no act done by the Spanish authorities, or by an individual claimant after the 3d day of March, 1804, should have any effect on the title by its condition at that date. *Glenn v. U. S.* 13 How. (U. S.) 260. See, also, to like general effect, *DeVilemont v. U. S.*, 13 How. (U. S.) 266; *Murdock v. Gurley*, 5 Rob. (La.) 457. But see *Lobdell v. Clark*, 4 La. Ann. 100.

The power of the commandants of posts in the Spanish colonies to make inchoate titles to lands within their jurisdiction, has been repeatedly acknowledged by the Supreme Court of the United States; but the power of completely severing the subject of the grant from the public domain was retained by the central jurisdiction and belonged to the civil and military governors; so that concessions of lands, made in the country known as the neutral territory by the commandant of the Spanish post, which were not ratified by the civil and military governors, must be treated as imperfect, and dependent upon the sanction of the United States. *U. S. v. Davenport*, 15 How. (U. S.) 7.

Nor will a grant of land be sustained where it is based on a receipt

1824,¹ and June 17, 1844,² have courts of the United States power to decide upon complete or perfect titles to land.³

2. Full Grant Distinguished from Contract.—A complete Spanish grant uniformly gave to the grantee, in plain, direct, and unequivocal language the whole ownership to the land granted, for himself and his successors, with power to sell the same at his will,⁴ and materially differed from a mere contract that a large district should be designated on lands belonging to the public domain, whereon a party might exercise certain exclusive privileges.⁵

3. Need of Actual Survey or Fixed Boundaries.—To sustain a claim under a Spanish grant of Louisiana lands it is requisite among other things that the land should be identified by an actual survey with metes and bounds, or the description in the grant must be such that judgment can be rendered with precision by such metes and bounds, natural or otherwise, without any element of

given for the purchase price of lands by an intendant, who had not at the time the power to grant any part of the Spanish king's domain; where, from non-compliance with the conditions as to making mounds or levees and ditching, the presumption is that there was a surrender of the purchase and refunding of the price; where the claim is presumptively barred by the lapse of time; and where a decree concerning the lands in the court below, even on the assumption of the validity of the claim, was in part erroneous. *U. S. v. Moore*, 12 How. (U. S.) 217.

1. 4 U. S. Stat. at Large 52.

2. 5 U. S. Stat. at Large 676.

3. *U. S. v. Mayor, etc., of Philadelphia, etc.*, 11 How. (U. S.) 647, following *U. S. v. Reynes*, 9 How. (U. S.) 127.

4. *U. S. v. Mayor, etc., of Philadelphia, etc.*, 11 How. (U. S.) 652, referring to an instance of such grant given in connection with the case of *Menard v. Massey*, 8 How. (U. S.) 314.

5. *U. S. v. Mayor, etc., of Philadelphia, etc.*, 11 How. (U. S.) 652. In this case a territory of twelve leagues' square was "destined and appropriated" by the Spanish governor in order that the party to whom they were designated "might settle the land" and establish in Louisiana his colony of five hundred wheat-growing families; and the interest of the colonizer was intended to be in the monopoly of manufacturing flour and exporting it to Havana and other places, under the jurisdiction of the Spanish crown; with which view he obtained separate grants for the bayous or mill-seats, and

was bound to erect at least one mill within two years from the date of the grant. See pp. 649-651. This contract was regarded as identical in character and governed by the same principles, with those considered in *U. S. v. King*, first reported in 3 How. (U. S.) 773, but as finally decided in 1849, reported in 7 How. (U. S.) 833.

Purpose of Grant.—Grants for the purpose of grazing cattle in Louisiana in the country formerly held by Spain, lying to the east of the Sabine River, are more than mere licenses to use the lands. *U. S. v. Davenport*, 15 How. (U. S.) 7, relying upon confirmation of grant in *U. S. v. Huertas*, 8 Pet. (U. S.) 475, which does not appear to touch this point.

Compliance with Regulations or Conditions.—Among the objections to the validity of concessions made by the lieutenant governor of Upper Louisiana which have not been sustained, are those involving a failure to comply with regulations of the governor-general of Louisiana, concerning the number of tame cattle to be possessed by the applicant and the quantity of land to be granted to an individual. *Choteau v. U. S.*, 9 Pet. (U. S.) 153.

A claim buried for half a century is not good against the United States where it is based on an order of the Spanish governor to establish a petitioner on land in Louisiana, and during the ten years that the province remained in the hands of Spain the party to whom this gratuitous concession was made neither had a survey nor took possession, nor did any other

discretion or uncertainty,¹ and such a grant will not avail against the United States, where the concession contains no lines or boundaries by which the specific tract of land may be definitely determined.²

4. **Instrument of Title.**—It has been settled by repeated decisions of the Supreme Court of the United States and in cases, too, where the instrument upon which a claim to land was founded contained clear words of grant, that if the description was vague and indefinite, and there was no official survey to give it a certain location, it could create no right of private property in any particular parcel of land, which could be maintained in a court of justice.³ A certificate of survey brought forward to sustain a grant which was officially recognized by the Spanish authorities of Louisiana will be regarded as *prima facie* genuine; but this presumption will not prevent its impeachment when it is shown to be antedated or fraudulent.⁴

5. **Indian Titles.**—In the Spanish colonies, land was not assigned to the Indians by actual survey; they were permitted to occupy a specified spot, and to have one league around it. But by this was meant one league square, and not one league around their village in every direction.⁵ On the discovery of the American continent, the principle was acknowledged by all European nations that discovery, followed by actual possession, gave title to the soil to the government by whose subjects or authority it was

act showing an intention of fulfilling the known condition by which such concessions could be converted from an inchoate into a complete title, although there were regulations which required parties so situated to have their titles made out. *U. S. v. Simon*, 12 How. (U. S.) 434, *quoting* as to object and effect of such concessions, *U. S. v. Boisdore*, 11 How. (U. S.) 96.

1. *Dauterive v. U. S.*, 101 U. S. 706; 21 Myers' Fed. Dec. 40, *citing* *Scull v. U. S.*, 98 U. S. 418, and *Smith v. U. S.*, 10 Pet. (U. S.) 334. See also as to grants of ceded Louisiana territory, *Clamorgan v. U. S.*, 101 U. S. 828; 21 Myers' Fed. Dec. 32, 34.

2. *Dauterive v. U. S.*, 101 U. S. 706. An order of survey with actual settlement forms a better title than an older order without it. *Baker v. Thomas*, 4 La. 417.

This doctrine has been applied to a claim for a large tract of land in Western Louisiana, commonly known as Maison Rouge claim.

3. *U. S. v. King*, 3 How. (U. S.) 786.

A paper offered as a grant from the Spanish authorities for some land in Louisiana will be rejected as such,

where it is nothing more than the preamble usually inserted in Spanish grants, especially where there is no evidence of the taking of possession or the exercise of acts of ownership during a period of nearly seventy years. *U. S. v. Le Blanc*, 12 How. (U. S.) 436.

So the presentation of a petition to a Spanish intendant, praying for a grant, and referred to the surveyor-general to report thereon, but on which no further action had been had at the transfer of the territory to the United States, the petitioner never having had actual possession, can confer no title. *Lafayette v. Blanc*, 3 La. Ann. 59; *affirmed* in 11 How. (U. S.) 104.

4. *U. S. v. King*, 3 How. (U. S.) 785. As to presumption that marks of cancellation were made by cutting the paper in gashes at the time the paper, which was a receipt for the purchase money of lands sold in Louisiana, by the intendant thereof, was presented at the royal treasury in Spain. See *U. S. v. Moore*, 12 How. (U. S.) 222.

5. *Reboul v. Nero*, 5 Mart. (La.) 492; *Maes v. Gillard*, 7 Martin N. S. (La.) 315.

made, not only against other European Governments but the natives themselves. While respecting the rights of the natives as occupants, they all asserted the ultimate title to be in themselves.¹ Indian tribes in Louisiana with lands allotted by the laws of Spain were never invested with absolute ownership. They could not dispose of the lands unless expressly authorized by the government. If all died or removed permanently, the lands reverted to the crown, not by forfeiture but the implied right of reversion; or, if the population of the Indian villages were greatly reduced, the remnants of several villages were united into one, and they held as much of the land originally set apart as they needed.²

IX. GRANTS IN MISSISSIPPI.—The law of Spain continued in force in Mississippi until after the territorial government was actually organized, under the act of Congress of April 7, 1798; this government was not actually organized until the beginning of the year 1799.³ Spain never had a right of soil in this State above the thirty-first degree of north latitude; and all grants and dispositions of land made by Spain above that line were in their inception void for want of title in that government.⁴ Spanish grants, made after the treaty of peace of 1782, between the United

1. *Breaux v. Johns*, 4 La. Ann. 142; *Martin v. Johnson*, 5 Mart. (La.) 659; *Johnson v. M'Intosh*, 8 Wheat. (U. S.) 573; *Fletcher v. Peck*, 6 Cranch (U. S.) 124.

2. *Breaux v. Johns*, 4 La. Ann. 143, and cases there cited. Nor were the Caddo tribe of Indians recognized as the proprietors of any lands, either by the Spanish or American Governments. *Brooks v. Norris*, 6 Rob. (La.) 182.

3. *Chew v. Calvert*, 1 Walk. (Miss.) 57.
British and Spanish Grants North of the 31st Parallel of North Latitude.—The boundary line between Georgia and West Florida was the 31st parallel of north latitude. But if the district between that line and a line drawn east from the mouth of the Yazoo River ever constituted a part of West Florida, while the latter was a British province, still a grant of land in that district made by the British governor of West Florida in 1772 would be void, because the proclamation of George III, made in 1763, creating the province of West Florida as a colonial government, a grant of land in that district by the governor was prohibited until the Indian title was extinguished, which did not take place till 1777. And a grant of land in that district by the Spanish Government, would also be void, because the title of Spain never extended north of the 31st parallel.

Montgomery v. Ives, 13 Smed. & M. (Miss.) 172.

A grant of land lying in the present State of Mississippi will not be sustained where the original grant is alleged to have been issued by the Spanish governor of Louisiana in 1781, but the only evidence of it was a copy taken from a notary's book, and the governor at that time was merely the military commandant of the region in question; and this conclusion is reached, apart from questions concerning the jurisdiction to pass upon the claim and the failure to record it under the requirements of acts of Congress. *U. S. v. Power*, 11 How. (U. S.) 576.

4. *Doe v. Beaumont*, 6 How. (Miss.) 249.

The treaty of 1795, by which the line between the United States and the provinces of East and West Florida was established or recognized at the thirty-first degree of latitude, was a settlement of territorial limits according to pre-existing rights. Spain did not cede any territory above the boundary then acknowledged, but admitted that the territory above that parallel had previously constituted a part of the territory of the United States. As a consequence of this adjustment, it followed that the possession by Spain of territory to which she had no right was wrongful, and grants or titles derived

States and Great Britain, within the territory east of the river Mississippi and north of a line drawn from that river at the 31st degree of north latitude, east to the middle of the river Appalachicola, have not any intrinsic validity; but the holders must depend for their titles exclusively on the laws of the United States.¹ By the treaty of 1795 between the United States and Spain, Spain admitted that she had no title north of the thirty-first degree of north latitude, and her previous grants of lands were, of course, void; but the transfer of the country, including land belonging to Georgia, which was ceded to the United States in 1802, was with a reservation that all persons who were actual settlers on the 27th of October, 1795, should have their grants confirmed; and on the 3d of March, 1803, Congress passed an act² establishing a board of commissioners to examine these grants, whose certificate in favor of the claimant should amount to a relinquishment forever, on the part of the United States.³ If a government by mere act of power revokes a valid grant of land, and then gives title to another, the courts will respect the title of the first grantee.⁴ The certificate of the confirmation of a Spanish grant made by the board of commissioners constitutes

from the Spanish Government to such territory were invalid for want of title in the granting power. *Doe v. Beaumont*, 6 How. (Miss.) 249.

1. No Spanish grant made while the country was wrongfully occupied by Spain can be valid, unless it was confirmed by the compact between the United States and the State of Georgia of the 24th of April, 1802, or has been laid before the board of commissioners constituted by the act of Congress of the 3d of March, 1803, ch. 340, and of March 27, 1804, ch. 414. *Henderson v. Poindexter*, 12 Wheat. (U. S.) 530.

2. 2 U. S. Stat. at Large 229.

3. *Robinson v. Minor*, 10 How. (U. S.) 642. But in order that a claimant may bring himself within the protection of the act of cession by Georgia to the United States, he must show that the ancestor or person under whom he claims was "actually settled" on the land on the 27th of October, 1795, the date mentioned in the Cession act. *Hickie v. Starke*, 1 Pet. (U. S.) 98; *Doe v. Beaumont*, 6 How. (Miss.) 249.

Spanish Order of Survey.—A Spanish order of survey of land in West Florida, afterwards confirmed by the United States, when they acquired title, constitutes of itself a legal title without any patent from the United States. *Winn v. Cole*, 1 Walk. (Miss.) 125.

Order of Survey Signed by Deputy Governor—Effect of Vesting Title.—A Spanish order of survey signed by a deputy governor, is presumed *prima facie* to be issued by competent authority and valid. And such order vests such a right as can only be divested by the alienation of the grantee, or his voluntary abandonment, or by an entire failure to perform the conditions of the grant, or by some act against the government which would justify confiscation. *Winn v. Cole*, 1 Walk. (Miss.) 121; *Stark v. Mather*, 1 Walk. (Miss.) 190; 12 Am. Dec. 553.

The report of the surveyor-general of the Spanish Government stating land so located to be vacant, and the allegation of that fact in a subsequent grant to another party, does not amount to confiscation, or the revocation of the grant, and if it be a revocation, it would be an act of capricious tyranny, and ought to be disregarded. *Winn v. Cole*, 1 Walk. (Miss.) 121.

4. Hence, where A received a grant of land from the Spanish Government, which was revoked by a mere arbitrary act of power, and the land then granted to B, and then A was driven from the country, and B's title confirmed by the board sitting under the act of Congress, B will be declared to hold as trustee for A. *Stark v. Mather*, 1 Walk. (Miss.) 190; 12 Am. Dec. 553.

title to the land embraced in it,¹ and is conclusive against the United States, but not as between individuals.² The confirmation of a Spanish grant by Congress relates back to the date of the grant;³ and the performance of the conditions imposed in a Spanish grant on the grantee is either dispensed with or admitted by a confirmation of it by Congress.⁴

X. GRANTS IN MISSOURI.—The State of Missouri was formerly a part of the territory first of France, next of Spain, then of France, which ceded it to the United States by the treaty of 1803, in full propriety, sovereignty and dominion, as she had acquired and held it; and thereby this government put itself in place of the former sovereigns, and became invested with all their rights, subject to their concomitant obligations to the inhabitants.⁵ The act of Congress of May 25, 1824, gives to the district court of the United States authority to hear and determine all questions arising in any cause brought before it upon the petition of any persons claiming lands within the State of Missouri, by virtue of any French or Spanish grant, concessions, etc., legally made or issued before the 10th day of March, 1804, by the proper authorities, to any person or persons resident in the province of Louisiana, etc., and which might have been perfected into a complete title, under and in conformity to the laws and usages and customs of the government under which the same originated, had not the sovereignty of the country been transferred to the United States,⁶ and a concession made in regular form by special order of the governor-general of the province will not be invalidated because it was not made in pursuance of regulations which were intended for the general government of subordinate officers, and not to control and limit the power of the person from whose will they emanated.⁷ In repeated decisions, the Supreme Court of the United States has affirmed the authority of local governors, under the crown of Spain, to make grants of lands in the Louisiana region, and has also affirmed the validity of descriptive

1. *Surget v. Doe*, 24 Miss. 130.

2. *Winn v. Cole*, 1 Walk. (Miss.) 126; *Ross v. Barland*, 1 Walk. (Miss.) 492. For effect of confirmation of void grants, see *Montgomery v. Ives*, 13 S. Med. & M. (Miss.) 181. As to right of settler to sell his claim, see *Nixon v. Carco*, 28 Miss. 426, and cases there cited.

3. *Stark v. Mather*, 1 Walk. (Miss.) 189; 12 Am. Dec. 553.

4. *Winn v. Cole*, 1 Walk. (Miss.) 124.

5. *Strother v. Lucas*, 12 Pet. (U. S.) 435.

Indian Grants.—By the laws of Spain, the Indians had a right of occupancy; but they could not part with this right except in the mode pointed out by the Spanish laws; and where these laws

and usages did not sanction a grant to Missouri lands, it will not be sustained. *Chouteau v. Molony*, 16 How. (U. S.) 229.

6. *Delassus v. U. S.*, 9 Pet. (U. S.) 131.

7. *Delassus v. U. S.*, 9 Pet. (U. S.) 135. As to when title to land in Missouri claimed under original permission of the Spanish Government was not vested or confirmed by acts of Congress of 1807 and 1804, or maintainable under long-continued possession, see *Burgess v. Gray*, 16 How. (U. S.) 65. As to conflicting surveys, provisions of act of Congress concerning confirmations of incomplete titles, etc., see *Morrison v. Jackson*, 92 U. S. 655.

grants, though not surveyed before March 10, 1804, in Missouri, or January 24, 1818, in Florida.¹ Under the third section of the act of Congress, relating to claims to Missouri lands, persons who had claims of a certain class under France or Spain to land upon which they were settlers or housekeepers, might have a right of pre-emption if they would relinquish their claims; and this right was not affected by the confirmation of an adjoining town-lot claimed by the same party; nor did it depend on actual residence and housekeeping in the case of a person whose claim under a Spanish or French grant was still undetermined.² A recorder of land titles had no authority to investigate titles of French and Spanish grants in Louisiana, where the claimants were not in actual possession, or where the claim had been passed on by the commissioners.³

XI. GRANTS IN NEW MEXICO.—Previous to 1821 the king of Spain, by virtue of his prerogative, had the power of disposition of the public domain. Upon the assertion of these prerogatives in Mexico the power passed to the sovereign of the latter country.

1. *Mackey v. U. S.*, 10 Pet. (U. S.) 341. A general and unlocated concession granted by the Spanish governor prior to the transfer of Louisiana, whereof a private survey made after the transfer was recognized by the commissioners appointed under the act of 1805, before whom the claim was filed, and so designated and located as to be reserved from sale by virtue of the act of 1811, and consequently no New Madrid certificate could be located upon it, *Bissell v. Penrose*, 8 How. (U. S.) 331, *following Stoddard v. Chambers*, 2 How. (U. S.) 284; and examining and explaining the cases of *Mackey v. Dillon*, 4 How. (U. S.) 421; *Les Bois v. Bramell*, 4 How. (U. S.) 449 and *Jourdan v. Barrett*, 4 How. (U. S.) 169. Grant void for want of authority of officer to make, see *Wright v. Thomas*, 4 Mo. 590. And for uncertainty in description, see *Ashley v. Turley*, 13 Mo. 434.

But though the lieutenant-governor of Upper Louisiana had the authority, as a sub-delegate, to grant concessions, direct surveys, and place grantees in possession, yet no perfect title to the land, such as the Spanish Government could disavow, passed until the concession and a copy of the survey were delivered to the intendant-general at New Orleans, and also a process-verbal attesting the fact that the survey was made in the presence of the commandant, or in that of a syndic and two neighbors; and an imperfect concession of lands in the present

State of Missouri lacking such prerequisites to the perfecting and recording of the title could not avail against patents for the same land, unless Congress had, by some law, protected the land from the location of patents. *Menard v. Massey*, 8 How. (U. S.) 303, giving (p. 314) the form of a Spanish title.

2. *O'Brien v. Perry*, 1 Black (U. S.) 139; *Lytle v. Arkansas*, 9 How. (U. S.) 314; *Cunningham v. Ashley*, 14 How. (U. S.) 377; *Minter v. Crommelin*, 18 U. S. 87.

As to steps necessary to the procurement of the complete Spanish grant, see *Tyler v. Wells*, 2 Mo. App. 526.

3. By the act of Congress of the 13th of June, 1812 (2 Stat. 748) power was vested in the recorder of land titles to investigate and report on certain Spanish and French claims in the State of Missouri. His authority was confined to two classes of cases; first, to the claims of persons who were then actual settlers on the land they claimed, and whose claims had not been before that time filed with the recorder of land titles. Such persons were allowed to file a notice in writing, stating the nature and extent of their claims, and the written evidences thereof, and were directed to be recorded. Second, to claims which had been presented to the board of commissioners, but had not been decided on by that board. (2 Stat. 748.) *Winter v. U. S.*, *Hempst.* (U. S.) 349; *Strother v. Lucas*, 12 Pet. (U. S.) 454.

All the power which governors of provinces, intendants, or other persons had to dispose of public domain, ceased upon the independence of Mexico, and grants made by them, unless they were expressly sanctioned by the new power, were of no effect.¹

Rights of individuals to property in the territory of the United States were not affected by the change of sovereignty and jurisdiction. They were entitled to protection whether the party had the full and absolute ownership of the land, or merely an equitable interest therein, which required some further act of the government to vest in him a perfect title.²

Under the act of 1854, a report by the surveyor-general that a certain Mexican grant had not been surveyed, but is "reported" to contain a certain number of acres will be sustained, the legal effect of this decision by the surveyor-general being to segregate from the public domain all the lands covered by the grant as reported on by him.³

No jurisdiction over such claims was conferred upon the courts of this State; but the surveyor-general in the exercise of the authority with which he was invested by act of Congress,⁴ decides them in the first instance, and the final action on each claim is reserved to Congress.⁵ But such decision of the surveyor-general is not binding upon the courts of New Mexico until confirmed by Congress.⁶

1. *Pino v. Hatch*, 1 N. Mex. 128. But a grant of land executed by the political chief of New Mexico in 1823, though not sufficient to pass the absolute title, for want of legal authority to make it, is nevertheless admissible in evidence as against one having no better right to show the time and mode of gaining possession and the point from which the adverse occupation is to be reckoned. *Pino v. Hatch*, 1 N. Mex. 129; but see the dissenting opinion of Brocchus, J., pp. 133-145.

2. *Tameling v. U. S. Freehold, etc., Co.*, 93 U. S. 661; *Pino v. Hatch*, 1 N. Mex. 145.

Power to Settle Land Titles in New Mexico was, by the eighth section of the act of 1854, expressly enjoined upon the surveyor-general of that territory. He was empowered for that purpose to issue notices, summon witnesses, administer oaths and perform all necessary acts in the premises. He was directed to make a full report with his decision, as to the validity or invalidity of each claim, under the laws, usages, and customs of the country before its cession to the United States. That report, according to a form to be prescribed by the Secretary of the Interior, was to be laid before Congress for such action as might be

deemed just and proper. *Tameling v. U. S. Freehold, etc., Co.*, 93 U. S. 662.

3. *Whitney v. McAfee*, 3 N. Mex. 38. And a homestead entry thereon is void as against the claimants under the Mexican grant. *Whitney v. McAfee*, 3 N. Mex. 38.

4. 1 Stat. at Large 308.

5. *Tameling v. U. S. Freehold, etc., Co.*, 93 U. S. 662.

6. *Stoneroad v. Stoneroad*, 4 N. Mex. 61; following *Tameling v. U. S. Freehold, etc., Co.*, 93 U. S. 662, referring to the leading cases, and *overruling* *Whitney v. McAfee*, 3 N. Mex. 39, where it is held that the power and authority of review rests with Congress alone, and until reversed or modified by that body, a decision by the surveyor-general is binding upon courts, and must be regarded as *res judicata*. The doctrine laid down in *Stoneroad v. Stoneroad*, 4 N. Mex. 61, is followed in the later case of *Chaves v. Whitney*, 4 N. Mex. 180.

In 1823 the Mexican Government conveyed certain lands in New Mexico by grant calling for specific boundaries. On the cession of the territory to the United States the holder of the grant presented his claim to the surveyor-general of the territory for investigation and decision, under the act of Con-

Where there is sufficient evidence of fraud and mistake a patent will be canceled.¹

An act of Congress confirming to a claimant his title to a tract of land granted to him by the Mexican Government under the colonization laws of Mexico and Spain, and a patent issued in accordance therewith, conveys no title to the mineral lands included in such grant.²

XII. GRANTS IN TEXAS.—The authority to grant land previous to the Mexican revolution was vested in the intendants or in the military commandants and governors, subject to confirmation by the intendants. These offices were abrogated and suspended by the consummation of the independence of Mexico, and the public domain became thereby vested in the supreme government until the formation of the States, and its transfer by the supreme government to them, during which time authority to grant lands emanated from it.³ The Texas revolution of 1836 did not divest Mexicans of their title to lands acquired before that event.⁴ The division of a country into separate governments

gress July 22, 1854. The surveyor-general, in a report which followed the boundaries called for by the grant, recommended that Congress confirm the grant, and by act of Congress approved June 21, 1860, the same was confirmed according to the report of the surveyor-general. The surveyor-general afterwards had the grant surveyed, and the survey was approved by him, but no notice of this survey was given to the claimants, some of whom were minors and married women. The survey called for boundaries, which did not correspond with those of the grant, but were far within the lines. *Held*, that the courts were not concluded by the survey from determining the extent and validity of the grant by the Mexican Government by specific boundary calls, and afterwards duly examined into, approved, and confirmed; and that the persons holding title under the grant might maintain an action of ejectment to recover lands lying outside the boundaries shown by the survey, but within the boundaries of the grant. *Stoneroad v. Stoneroad*, 4 N. Mex. 60.

But in the absence of an actual ouster, or any intrusion upon one's actual possession, ejectment will not lie in New Mexico in favor of one claiming under a Mexican grant approved, surveyed, and recommended for confirmation by the surveyor-general, but not as yet confirmed, as against one claiming under a Spanish grant submitted to that officer, but disapproved,

the jurisdiction of the courts of that territory under the act of Congress of July 22, 1854, § 8 (10 Stat. 308), being confined until confirmation, to the preservation of the *status in quo* of the estates and parties. *Chaves v. Whitney*, 4 N. Mex. 178.

1. *U. S. v. San Pedro, etc., Co.*, 4 N. Mex. 229.

2. *U. S. v. San Pedro, etc., Co.*, 4 N. Mex. 297.

3. *Jones v. Muisbach*, 26 Tex. 237.

A grant issued by the primero vocal or political chief of the department of Texas in 1824 passed no title to the grantee. *Holliday v. Harvey*, 39 Tex. 674.

Although he had no power previous to the colonization law, yet he may have had a special commission to grant titles to particular lands, and it seems that if objection be not made such commission may be proved by parol testimony. *Norton v. Mitchell*, 13 Tex. 51.

After the passage of the national colonization law of the 13th of August, 1824, the states of the Mexican confederation possessed the property in the soil, and had alone the power, by direct agency, of appropriating lands to individuals. *Republic v. Thorn*, 3 Tex. 505.

4. The division of an empire works no forfeiture of a right of property previously acquired. This doctrine is laid down by Nelson, J., in *Jones v. McMasters*, 20 How. (U. S.) 8 and approved in *Airhart v. Massieu*, 98

does not of itself divest the citizens of either of titles to land in the other.¹ In an early case the opinion was expressed that under the laws of Spain, which remained in force in Mexico after her independence, and those subsequently enacted by her, an alien could not acquire real property in that republic;² and in a subsequent case the invalidity of a sale of land was expressly adjudged;³ but in a later case, where land had been sold in 1833 to citizens

U. S. 494; *Hancock v. Walsh*, 3 Woods (U. S.) 351. Neither the constitution of Texas nor statutes enacted since its adoption divest Mexicans of titles to land in Texas, acquired before its independence, unless proceedings for forfeiture equivalent to "office found" have been carried into effect. *Airhart v. Malissieu*, 98 U. S. 494; *Phillips v. Moore*, 111 U. S. 211.

The original constitution of *Texas*, adopted March 17, 1836, fifteen days after the Declaration of Independence, provides as follows: "All persons who shall leave the country for the purpose of evading a participation in the present struggle, etc., shall forfeit all rights of citizenship and such lands as they may hold in the republic." Gen. Prov., §8. By the tenth section it was declared that aliens should not hold land in *Texas*, but a reasonable time was given them to come in or dispose of their lands. By an act of the Congress of *Texas*, passed Jan. 28, 1840, it was provided: "In making titles to lands by descent it shall be no bar to a party that any ancestor through whom he derives his descent, from the intestate, is or hath been an alien, and every alien to whom any land may be devised or may descend shall have nine years to become a citizen of the republic, and take possession of such land; or shall have nine years to sell the same before it shall be declared to be forfeited, or before it shall escheat to the government."

This statute was re-enacted in 1848, and the State constitution of 1845 effected no change in rights of property, but expressly established existing rights. Art. 6, § 20. By an act passed Feb. 13, 1854 (*Pasch. Dig.*, arts. 45-47), it was further provided in favor of aliens that they should have the same rights as are accorded to Americans, citizens by the laws of the nation to which such aliens belong. *Hancock v. McKinney*, 7 Tex. 384; *Swift v. Herrera*, 9 Tex. 263; *Johnson v. Smith*, 21 Tex. 722; *Luter v. Mayfield*, 26 Tex. 325.

1. The owners of land, acquired under the colonization laws, before the separation of Texas from the states of the Mexican Confederacy, did not, consequently, incur the penalty of a forfeiture of their titles, as prescribed in the 30th article of the State colonization law of the 24th of March, 1825, against those who should establish themselves in a foreign country, by becoming or remaining domiciled in Mexico, after the dismemberment of the government. *Kilpatrick v. Sissneros*, 23 Tex. 130; *Sabrieiro v. White*, 30 Tex. 581; *Andrews v. Spear*, 48 Tex. 579; *Airhart v. Massieu*, 98 U. S. 495.

In the case last cited the court by Bradley, J., says: "In some of the early cases in *Texas*, as in *Holliman v. Peebles* (1 Tex. 673), and in *Yates v. Iams* (10 Tex. 168), it was argued, though not expressly decided, that by the general Spanish law, and if not by that law, at least by the colonization laws of Mexico and of Coahuila and Texas, a non-resident alien could not hold real estate. The same views were expressed in the case of *McKinney v. Saviego*, 18 How. (U. S.) 240. But the laws referred to had respect to the case of aliens, who, when they were such, acquired, or attempted to acquire, lands in Spain or her colonies, and not to the case of citizens or subjects who, on the division of an empire, happened to hold lands in the section in which they did not reside, and therefore had good title thereto when, by operation of law, they became aliens as to such section. It must be admitted that aliens of this class stand on a different footing, in equity, at least, from those who, being aliens, attempt, against the law, to acquire real estate in a foreign country," citing *Jones v. McMasters*, 20 How. (U. S.) 8; *White v. Burnley*, 20 How. (U. S.) 235.

2. *Holliman v. Peebles*, 1 Tex. 673; *Yates v. Iams*, 10 Tex. 168; *Hornsby v. Bacon*, 20 Tex. 556; *Blythe v. East-erling*, 20 Tex. 565.

3. *Clay v. Clay*, 26 Tex. 24.

of the United States, then non-resident aliens, it was held that, unless there was an adjudication by some court of political authority upon their alienage, while it existed, their rights were not divested.¹ And it was competent for one alien enemy to convey to another land situated in the country with which theirs is at war.² And such alien had a right to sue for lands in Texas, alienage being no bar to an action if the title of the alien was good.³ Several cases, however, have decided that an alien cannot sue for lands in Texas, but these presented the naked questions of alienage as a bar.⁴ A certified copy of the protocol of a Mexican title is competent evidence of that title.⁵

1. Barrett v. Kelly, 31 Tex. 476; Phillips v. Moore, 100 U. S. 210.

2. This point was settled in the case of Conrad v. Waples, 96 U. S. 279, and cited with approval in Airhart v. Massieu, 98 U. S. 497.

3. Jones v. McMasters, 20 How. (U. S.) 8; Airhart v. Massieu, 98 U. S. 497.

4. White v. Sabariego, 23 Tex. 243. But see the later case of Sabriego v. White, 30 Tex. 576.

5. By the act of the Congress of Texas, passed December 14, 1837, it was declared, "that it shall be the duty of every person or persons who may have in his or her possession or control any titles or documents whatever which relate to lands, and which, by the laws now or hereafter existing in Texas, have been and are considered archives, to deliver the same to the commissioner of the general land office, or his order, within sixty days after the final passage of the act." Pasch. Dig., art. 70.

The sixth section of the same act constituted the land office the proper depository of all books, records, papers, and original documents appertaining to the titles of land denominated archives. Pasch. Dig., art. 71.

A certified copy of a title from the land office was *prima facie* evidence of its existence, for it would be presumed that the original was an archive of the land office. Airhart v. Massieu, 98 U. S. 500.

Recording of Title.—Until a title is deposited in the land office of Texas, or duly recorded, *bona fide*, purchasers holding a junior Mexican title will be protected. The act of Dec. 20, 1836, "organizing inferior courts," provided among other things, § 37, that "any person who owns or claims land of any description, by deed, lien, or other color of title, shall, within twelve

months from the first of April next, have the same proven in open court, and recorded in the office of the clerk of the county court in which said land is situated; but if a tract of land lies on the county lines, the title may be recorded in the county in which part of said land lies."

"Sec. 40. No deed, conveyance, lien or other instrument in writing shall take effect, as regards the interests and rights of third parties, until the same shall have been duly proven and presented to the court, as required by the act for the recording of land titles. And it shall be the duty of the clerk to note particularly the time when such deed, conveyance, lien or other instrument is presented, and so record them in the order in which they are presented." Pasch. Dig., arts. 4980, 4983.

The limit of the time prescribed in the thirty-seventh section was repealed in 1838. As most original titles in Texas, originating before the revolution, were public archives, the parties holding only *testimonios* thereof, the following law was passed, Jan. 19, 1839: "Copies of all deeds, etc., when the originals remain in the public archives, and were executed in conformity with the laws existing at their dates, duly certified by the proper officers, shall be admitted to record in the county where such land lies." Pasch. Dig., art. 4984.

Under these laws failure to record a grant rendered it inoperative as against an innocent purchaser without notice. Guilbeau v. Mays, 15 Tex. 410; Musquis v. Blake, 24 Tex. 461; Nicholson v. Horton, 23 Tex. 47; Wilson v. Williams, 25 Tex. 54.

Buying with actual notice of a previous title, or under circumstances which make it a duty to take notice, is a fraud, and deprives the purchaser of

Under a Mexican grant to an empresario the contract of the latter obliged him to introduce colonists into a specified district. But if there were no colonists and the empresario opposed no objection, sales of land within the district might be made by the government.¹ Sales of land could only be made to Mexicans, and no inquiries as to their character were required. The alcalde was a competent and proper person to complete the titles on a contract of sale, where no organization of the colony had taken place.² Such grant could not be defeated by proof that the principal surveyor did not in person perform the work of making surveys, or because the survey was made before the order directed to the surveyor by the alcalde was entered on the grant.³ It was a common practice in Texas for empresarios and others to have their surveys completed in anticipation of the arrival of the colonists, or the measures requisite for the procurement of the final title. The return of such surveys by a surveyor, and their recognition by the commissioner or alcalde, was treated as a substantial compliance with the law.⁴

the immunity arising from the fact that such title is not recorded nor deposited in the land office. *Crosby v. Huston*, 1 Tex. 203; *Grumbles v. Sneed*, 22 Tex. 565; *Airhart v. Massieu*, 98 U. S. 501.

By a law passed Oct. 20, 1866, a title not deposited in land office, and not recorded, will no longer avail as against certain descriptions of title without actual notice. Pasch. Dig., art. 5825.

Prohibition of Grants Within the Littoral or Coast Leagues.—In constructing the articles of the colonization law of August 14, 1824 (see translation of the general colonization law of August 18, 1824, in appendix to Halleck's Report, Executive Documents, Senate, of 1849), the Supreme Court of Texas has repeatedly held that it operated as a prohibition of any grant of land within the littoral or coast leagues within the twenty frontier leagues bordering on the United States, without the previous assent of the Federal executive of Mexico; that such assent was essential to the validity of a grant within those limits, and that such assent was not to be inferred from the existence of the grant but must be affirmatively established. *Smith v. Power*, 14 Tex. 146; *Smith v. Power*, 23 Tex. 29; *Edwards v. Davis*, 3 Tex. 321; 10 Tex. 316; *Republic v. Thorn*, 3 Tex. 499; *Jones v. Borden*, 5 Tex. 410; *Bissell v. Haynes*, 9 Tex. 556; *Christy v. Pridgeon*, 4 Wall. (U. S.) 204; *League v. Egery*, 24 How. (U. S.) 266; *Foote v. Egery*, 24 How. (U. S.) 268.

1. *Spencer v. Lapsley*, 20 How. (U. S.) 271.

2. *Clay v. Holbert*, 14 Tex. 189; *Watrous v. McGrew*, 16 Tex. 512; *Ryan v. Jackson*, 11 Tex. 374; *Hancock v. McKenney*, 7 Tex. 384; *Jenkins v. Chambers*, 9 Tex. 167.

3. *Spencer v. Lapsley*, 20 How. (U. S.) 271.

4. *Jones v. Menard*, 1 Tex. 789; *Howard v. Perry*, 7 Tex. 259; *Horton v. Pace*, 9 Tex. 81; *Jenkins v. Chambers*, 9 Tex. 167; *Doswell v. De la Lanza*, 20 How. (U. S.) 29.

Authentication of Grant by Deputy Secretary.—A deputy secretary of a Mexican State was competent in 1835 to sign decrees of the government under which title to land is claimed. *Stroud v. Springfield*, 28 Tex. 649; *Viesca v. Wyche*, 3 Woot's (U. S.) 339.

Mexican League in Neutral Ground.—Spanish grants made in Texas lands in the region known as the "Neutral Ground," east of the Sabine, from 1790 to 1800, are valid. *U. S. v. Perot*, 98 U. S. 429, relying on *U. S. v. Davenport*, 15 How. (U. S.) 1.

And the Mexican league applicable to grants of such lands, being a square of 5,000 varas on each side, has always been estimated at 4,428.4 acres, the vara being considered $33\frac{1}{2}$ American inches. *U. S. v. Perot*, 98 U. S. 429, relying, as to judicial notice taken of laws of countries acquired by the United States, upon *Fremont v. U. S.*, 17 How. (U. S.) 557.

Definition.

SPARE—SPECIAL ASSUMPSIT.

Definition.

SPARE.—A "spare conductor," whose duties were various, and who, when killed, was acting as brakeman, was deemed a brakeman, not a conductor, within a certificate in a beneficiary association.¹

SPARKS FROM LOCOMOTIVES.—See FIRES, vol. 8, p. 1.

SPARRING MATCH.—See PRIZE FIGHT.

SPEAKER.—See note 2.

SPEAKING.—See note 3.

SPEAKING DEMURRER.—(See also DEMURRER, vol. 5, pp. 522, 560).—A speaking demurrer is one which introduces some new fact or averment, which is necessary to support the demurrer, and which does not appear distinctly upon the face of the bill.⁴

SPECIAL.—Relating to or designating a species, kind, or sort; designed for a particular purpose; confined to a particular purpose, object, person, or class. The opposite of "general."⁵

SPECIAL ACCEPTANCE.—(See also BILLS AND NOTES, vol. 2, p. 377).—The qualified acceptance of a bill or note as an acceptance payable at a particular place, and there only.

SPECIAL ACTS.—See CONSTITUTIONAL LAW, vol. 3, p. 696; LOCAL, vol. 13, p. 980; MUNICIPAL CORPORATIONS, vol. 15, p. 979; STATUTES.

SPECIAL ADMINISTRATION.—See EXECUTORS, vol. 7, p. 165; PROBATE, vol. 19, p. 218.

SPECIAL AGENT.—See AGENCY, vol. 1, p. 348.

SPECIAL ASSUMPSIT.—(See also ASSUMPSIT, vol. 1, p. 885).—An action of assumpsit brought on a special contract which the plaintiff declares upon, setting out its particular language or its legal effect.⁶

1. *Aldrich v. Mercantile Mut. Accident Assoc.*, 149 Mass. 459.

2. In *Colorado*, it has been held that the Speaker of the House of Representatives is not a "State officer" liable to removal by impeachment, and that the house of representatives has the power by a vote of the majority of the whole number of members elected to remove its speaker from office and to elect another in his stead. *In re Speakership*, 15 Colo. 520.

3. *Pilot Speaking a Vessel.*—By the "speaking" of a vessel by a pilot is meant a plain and distinct offer by the pilot of his services, so made that the master of the vessel may have it in his power to employ or refuse him. *The Mascotte*, 39 Fed. Rep. 871. See also *PILOTS*, vol. 18, p. 448.

Speaking with Prosecutor.—See *CRIMINAL LAW*, vol. 4, p. 659.

4. *Brooks v. Gibbons*, 4 Paige (N. Y.) 375.

A speaking demurrer is one which seeks to introduce by way of demurrer, matter foreign to the allegations of the bill. *Ramage v. Towles*, 85 Ala. 589.

5. Black's L. Dict.

"Special" is used in opposition to general, and thus means a designating of a species or sort—a separation of a part from the whole. *Beecher v. Allen*, 5 Barb. (N. Y.) 175.

"In legal phrases, the word 'special' is most frequently used as denoting something particular or limited in contradistinction to general or permanent." *In re Senate Resolution*, 12 Colo. 188.

Special Benefits.—See *IMPROVEMENTS*, vol. 10, p. 295.

6. *Bouv. Law Dict.*

SPECIAL BAIL.—(See BAIL, vol. 2, p. 37; IMPRISONMENT FOR DEBT, vol. 10, p. 213; POOR DEBTORS, vol. 18, p. 823; RECOGNIZANCE; SUPPLEMENTARY PROCEEDINGS.)

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| <p>I. Retrospective View; in the English Courts, 892.</p> <p>II. In the Federal Courts, 894.</p> <p>1. <i>In General</i>, 894.</p> <p>2. <i>In Admiralty; Fide-jussores</i>, 895.</p> <p>III. In the State Courts, 895.</p> <p>1. <i>In General; New England, etc.</i>, 895.</p> <p>2. <i>Under the New Codes; New York, etc.</i>, 897.</p> | <p>3. <i>Under the Louisiana Code</i>, 898.</p> <p>IV. Discharge, 898.</p> <p>1. <i>In General; the Roman Law</i>, 898.</p> <p>2. <i>Surrender of the Principal; Frustration</i>, 899.</p> <p>3. <i>Insolvency of the Principal</i>, 900.</p> <p>4. <i>Death of the Principal</i>, 901.</p> <p>V. Excessive Bail, 901.</p> |
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I. RETROSPECTIVE VIEW; IN THE ENGLISH COURTS.—Although this subject has already been considered,¹ it may be of practical use to present, after a brief retrospect of the common law thereon, some recent statutory modifications of the procedure. As has been observed, in *England*, the bail in a civil action was required (in absence of waiver by consent),² to be either a freeholder or housekeeper,³ liable to the ordinary process of courts of justice, and worth double of the sum sworn to, or one thousand pounds beyond that sum, if it exceeded one thousand pounds after payment of his debts. If there were more than two bail, they must, respectively, be possessed, after the liquidation of their debts, of double the aliquot portion of the amount for

General and Special Count in Assumpsit.—"The statement of the cause of action in assumpsit is either general, where certain very comprehensive formulæ, founded upon an alleged indebtedness from defendant to plaintiff, for goods sold, work done, money lent, etc., are applicable; or special, where the cause of action must be set out in terms more precisely adapted to the special circumstances of the case, being employed in all other instances of a promise, not under seal, except the single one stated above, of indebtedness for goods sold, work done, money lent, etc.; as, for example, for not accepting goods bought; for not doing work according to agreement, etc.; on promissory notes, or bills of exchange, for all which, as well as for any other like cases, the cause of complaint must be set out in language corresponding to the facts." 4 *Minor's Inst.* (2d ed.) 575.

1. See BAIL, vol. 2, p. 37.

2. As to the plaintiff's waiver, see *Saggers v. Gordon*, 5 Taunt. 174. A beneficial householder was admitted by consent. *Anonymous*, 2 Chitty B. Ct. R. 96.

3. One who, by death in the family of an outgoing tenant, was prevented from taking possession, was held not to be a housekeeper. *Bold's Bail*, 1 Chitty B. Ct. R. 502. So also one who merely rented and lodged in a tap adjoining a tavern. *Walker's Bail*, 1 Chitty B. Ct. R. 316. Otherwise, one living in apartment chambers and liable for his separate taxes. *Lomax's Bail*, *Petersdorf*, B. 275. So also was one deemed a householder while temporarily occupying a house owned by the water commissioners, by whom he was employed, although he paid no rent nor taxes. *Williams v. Dethick*, 2 Price 8.

A foreigner having few effects in England, was admitted as bail for an alien defendant. *Christie v. Filleul*, 2 W. Bl. 1323. Also a foreigner having none. *Colson v. Carhordy*, cited in *Tidd*, Pr. 295. But one's mere ownership of land in Jamaica was held not to qualify him. *Boddy v. Leyland*, 4 Burr. 2526; *Anonymous*, Lofft. 34. A beneficed clergyman was rejected, though having property in Trinidad. *Wightwick v. Pickering*, *Forrest* 138.

which they became responsible. There was also a restriction founded on personal position or character. Persons exempt from the ordinary process of the law were incompetent to justify as bail—*e. g.*, the king, the royal family, his servants, peers of the realm, ambassadors and their servants, members of the House of Commons, officers of the different courts of justice, and persons living within the verge of the palace.¹ It was also a rule in all the courts, that no attorney or any other person practicing as such, should be bail in any action pending therein. This was to protect attorneys against importunity of their clients. It was also deemed advantageous to the suitor.² It seems that ignorance was no disqualification, in one otherwise well qualified.³ By the statute 8 Geo. II, "no sheriff's officer, bailiff, or other person concerned in the execution of process should be permitted to become bail in any action depending therein." Infants, married women, and infamous persons were disqualified.⁴ Ordinarily, bail once rejected could not afterwards be accepted; and this, whether in the same, or in an inferior court.⁵ As to the *English* procedure, a formal memorandum called a "bailpiece" was, by the persons offering to be special bail, signed and acknowledged before the clerk, judge, or commissioner, and certified and filed in the court in which the action was pending. Thereupon, this completed undertaking was called a "recognizance." This was "absolute" if the plaintiff consented to the bail; or *de bene esse*, if they were subject to his afterwards excepting to them.⁶ By the statute of 1889, any commissioner for oaths may "take any bail or recognizance in or for the purpose of any civil proceeding in the supreme court, including all proceedings on the revenue side of the queen's bench division." The statute of 1869, abolishing arrest on mesne process, except where the defendant was about to quit *England*, or where the action was for a penalty other than in respect of any contract, rendered obsolescent much of the *English* common law relating to special bail.⁷ A knowledge thereof,

1. See IMPRISONMENT FOR DEBT, vol. 10, p. 234, *n.* 3. As to who are persons acting "in a fiduciary capacity" within the Debtors' Act of 1869, § 4, pl. 3, and liable to imprisonment, see SUPPLEMENTARY PROCEEDINGS.

2. 1 Chitty B. Ct. R. 715, *n.* The rule was relaxed as to an attorney, who, having ceased practice, was divested of privilege from arrest; also as to any attorney's clerk temporarily accepted as bail without opposition; certain "niceties" in practice were abandoned as "mischievous." Bell *v.* Gate, 1 Taunt. 164.

3. Jameson's Bail, 2 Chitty B. Ct. R. 97.

4. But one whose period of transportation had expired, was adjudged

to be requalified. Anonymous, 2 Chitty B. Ct. R. 98.

5. Monk's Bail, 1 Chitty B. Ct. R. 676.

Otherwise, where the ground of rejection was merely the having been indemnified by the defendant's attorney; the reason of rejecting one so indemnified being simply to avoid evasion of the rule that no attorney be bail. Hallett's Bail, 1 Dowl. & R. 488.

6. Chitty, Prac. 727.

As to the practice under the statutes 4 & 5 Anne, ch. 16, and 4 W. & M., ch. 4, of taking "bail below" by the sheriff, when "bail above" had not been put in "to the action," see 3 Bl. Com. (Sharswood ed.) 291.

7. See BAIL, vol. 2, p. 35, note upon "Bail Below."

however, is deemed essential to a clear understanding of American statutes prescribing that some procedure being legislated upon "shall be as heretofore,"¹ etc.; or that an undertaking shall be executed by "sufficient bail,"² or that the persons offering be examined under oath "to a reasonable extent."³

II. IN THE FEDERAL COURTS—1. In General.—Such also has been, in the *United States*, the effect of State statutes abolishing imprisonment for debt,⁴ and such also the effect of legislation by Congress conformably thereto.⁵ But special bail is required in suits to recover Federal penalties, begun before the State abolished imprisonment for debt.⁶ Also upon removal of suits from a State court.⁷ And special bail originally given continues in force after the suit has been transferred to the Federal court.⁸

Where a defendant giving bail in one district is committed in another, the judge, upon return of the marshal's certificate of commitment, "may direct that an *exoneretur* be entered upon the bailpiece, where special bail shall have been found, or otherwise discharge such bail."⁹

1. *E. g.*, the *Massachusetts* statute quoted *infra*, this title, note, *In the State Courts*.

2. *E. g.*, the *New York* statute (§ 25) quoted *infra*, this title, note 3, p. 897.

3. *E. g.*, the *New York* statute (§ 26) quoted *infra*, this title, note 3, p. 897.

4. See *BAIL*, vol. 2, p. 36.

5. "No person shall be imprisoned for debt in any State, on process issuing from a court of the United States, where, by the laws of such State, imprisonment for debt has been or shall be abolished." And State restrictions thereon shall apply to process issuing from the Federal courts. U. S. Rev. Stat., § 990.

In States where no statute exists regulating special bail, it may be required in the Federal courts in cases of tort as well as of contract, and without affidavit as to the true amount of the debt or damages. *Parkhurst v. Kinsman*, 3 Woodb. & M. (U. S.) 168. (See in *Whiting v. Putnam*, 17 Mass. 175—decided in 1821—a criticism upon the then defective *Massachusetts* law hereon.)

6. "In all suits or prosecutions for the recovery of duties or pecuniary penalties prescribed by the laws of the United States, commenced in any State where, by the laws thereof, imprisonment for debt shall not have been abolished, the person against whom process is issued, shall be held to special bail, subject to the rules

which prevail in civil suits in which special bail is required." U. S. Rev. Stat., § 942.

In a Federal court in *Virginia*, in 1795, in the case of the *U. S. v. Mundel*, 6 Call (Va.) 245, there were two writs of *capias ad respondendum* against Mundel, one for a statutory penalty and the other for a duty on stills. The marshal demanded bail on both, but Mundel refused, and resisted the marshal's attempt to imprison him for want thereof. It was held that he was not indictable for so resisting; the court, by Iredell, J., saying that although the marshal was authorized to demand bail for the duty, he could not demand it upon the writ for the penalty, notwithstanding the United States district attorney's indorsement; an indorsement, even by a judge, is extrajudicial, if the State act regulating the practice does not authorize it.

7. The petitioner must give surety for his entering the proceedings, etc., in the Federal court, "and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein." U. S. Rev. Stat., § 639, pl. 3.

8. U. S. Rev. Stat., § 641.

9. In absence of such discharge, the defendant may be holden sixty days after a rendition of judgment in the suit in which the bail was procured, in order that he may be charged in execution. U. S. Rev. Stat., §§ 943, 944.

2. In Admiralty; *Fide-jussores*.—A stipulation securing one's appearance to answer a libel in admiralty is not to be considered as a bail bond at common law, but is governed wholly by the rules of admiralty practice. The function and liability of such bail are rather analogous to that of the *fide-jussores* of the civil law.¹

III. IN THE STATE COURTS—1. In General; New England, etc.—In those of the older States whose statutes regulating practice are not specially codified, the provisions as to special bail, being derived from those of England above noted, are quite homogeneous.²

Bail in civil cases may be taken by a commissioner of the court for the district. U. S. Rev. Stat., § 945. A clerk of court may take a recognizance of special bail *de bene esse*, in case of absence or disability of the judge. U. S. Rev. Stat. 947.

1. *Lane v. Townsend*, 1 Ware (U. S.) 286. See *infra*, this title, *Discharge; the Roman Law*.

After final decree for the libellant in a suit *in personam* where the respondent gave bail to appear, but has gone beyond seas, the court may grant the libellant a monition for the bail to appear and show cause; and the fact that no execution has been returned *non est inventus*, is no ground for refusing a decree that the bail satisfy the original decree for damages. *Snow's Bail*, 2 Curt. (U. S.) 485.

On what contingencies the Federal courts may deliver prize goods on bail, see U. S. Rev. Stat., § 4626; Roberts, Adm. (ed. of 1869), p. 437.

For form of bail-piece for the respondent's appearance to answer to the libel, see Pugh, Adm. (ed. of 1890), p. 251; and for form of bail bond, p. 148.

As to the English Admiralty practice for bail in actions *in rem*, to be given the principal registry, see Bruce, Adm. (ed. of 1886), p. 289.

The bail for arrested property must not be partners. The *Mars* (dec. in 1873), cited in Bruce Adm. 288.

2. As to the procedure for bailing under the poor debtor laws of the New England States, see—besides POOR DEBTORS, vol. 18, p. 833, note 4—*Massachusetts Stat.* 1888, ch. 419, §§ 5 and 6.

In *Massachusetts*: "Bail in a civil action shall be taken as heretofore practiced, by a bond to the sheriff, if the writ is served by him or his deputy, otherwise to the officer by whom the writ is served, with condition that the

defendant shall appear and answer to the plaintiff, abide the final judgment of the court, and shall not avoid." *Massachusetts Pub. Stat.* 1882, p. 852, § 2. The bond is void if made out to a deputy sheriff. *Conant v. Sheldon*, 4 Gray (Mass.) 300. So also if made out to the sheriff of another county, although the action was brought in that county. *Smith v. Adams*, 12 Met. (Mass.) 564. A bail bond was sustained which had the correct firm name of the plaintiffs, although it had wrong both of their Christian names. *Colburn v. Downes*, 10 Mass. 20. Where, in a suit of A against B and C, a bail bond is given by B, a discontinuance by A as to C will not operate to release the sureties. *Sanderson v. Stevens*, 116 Mass. 133.

"An officer shall not be required to accept a bail-bond unless with two sureties at least, each of them having sufficient property within the Commonwealth." *Massachusetts Pub. Stat.* 1882, p. 952, § 3. The sheriff would be answerable for accepting only one surety, although at the time, having a large fortune. *Long v. Billings*, 9 Mass. 479.

"The bond may be approved by a judge of a court of record, or of a police, district, or municipal court, or by a master in chancery, commissioner of insolvency, trial justice, or justice of the peace, and when so approved, the sureties shall be deemed sufficient." *Massachusetts Pub. Stat.* 1882, p. 952, § 4. "A bail bond shall bind the persons who execute it, though taken with one surety only." § 5. Where a bail bond signed by Snow and Atwood recited substantially: We, Snow, as principal, "and ———, sureties," are holden, etc., Atwood was held to be bound as surety; it not appearing that, at the time of executing it, he understood that it was to be executed

by any other person as surety. *Danker v. Atwood*, 119 Mass. 146.

In *Maine* also, the bond binds the obligors, although signed by only one surety, or by several sureties not having sufficient property in the county. *Maine Rev. Stat.* 1883, p. 727, § 3.

In *Vermont*, in case of insufficiency discovered pending suit, the court may order new bail. *Vermont Rev. Laws*, 1880, § 1175.

"If it is made to appear to the court by a person who is bail for a party in a suit pending therein, that such person was induced to enter bail by misrepresentations, or by promise of indemnity which has not been performed on reasonable request, the court may on application of the bail and consent of the party for whose security the bail is taken, discharge such bail, and order new bail on reasonable terms." § 1176.

"When a surety indorses a writ of attachment as bail, the officer shall deliver to him a bail-piece." § 1464. On its presentation, a justice shall deliver to a sheriff or constable, commanding him to assist the surety in apprehending the principal. § 1465. So also shall the jail keeper, upon request, give the surety a bail-piece, on admitting the principal to the liberties of the jail yard. § 1505.

In case of a female plaintiff, the bail is not affected by her marriage. § 2338.

In *Connecticut*: "The officer shall assign the bail bond to the plaintiff on his request, and no action shall be maintained against the officer who took the bail, unless he shall refuse to assign the bail bond to the plaintiff, on request." *Connecticut Gen. Stat.* 1888, § 961.

No recovery can be had against a sheriff for refusing to assign a bail bond that is unenforceable. So held, where there had been an attempt to entrap the bail, against the justice of the case. *Newell v. Hoadley*, 8 Conn. 381.

In *New Hampshire*, an officer may take bail by their indorsing their names on the writ. *New Hampshire Pub. Stat.* 1891, p. 619, § 6.

In *New Jersey*, the sheriff indorses the names, in case of a *capias ad respondendum*. *New Jersey Rev. St.* 1877, p. 856, § 52. There a female defendant cannot be arrested. § 54.

In *Pennsylvania* freeholders are privileged from arrest in any civil action. *Pennsylvania Brightly's Pur. Dig.* of Stat. 1885, p. 63, § 47. There the

officer taking a bail bond must give a bail-piece in the form prescribed on p. 60, § 26. There, moreover, a bail bond forfeited shall not stand as a security, where the plaintiff can be put in as good a condition as if he had never been delayed. *Bank of Pennsylvania v. Lasell*, 2 Yeates (Pa.) 387; *Priestman v. Keyser*, 4 Binn. (Pa.) 344. But in 1819, where special bail had been delayed until the plaintiff lost the opportunity of trying his cause as soon as he might have done, if the bail had been entered within six weeks after the return of the original writ, it was held that the bail must stand as security for the debt to be recovered. *McFarland v. Holmes*, 5 S. & R. (Pa.) 50.

In *Delaware*: "Insufficient bail shall be regarded as no bail. A sheriff or officer taking insufficient bail shall be deemed to have voluntarily permitted the defendant to escape, and shall be liable accordingly. One or more citizens of the county, of ability to answer the sum in which bail is required, shall be sufficient bail." *Delaware L.* 1874, p. 636, § 7.

In *Illinois*, against a defendant who fraudulently contracted the debt, or conceals property with intent, etc., the plaintiff may sue out a *capias ad respondendum*, the judge or master granting it to fix the amount of bail. The form of the bail bond is prescribed in *Illinois Rev. Stat.* 1891, p. 158, § 4: "No person shall be permitted to be special bail in any action, unless he be a householder and resident within this state, and of sufficient property; and no counselor or attorney at law, sheriff, under sheriff, bailiff, constable, or other person concerned in the execution of process, shall be permitted to be special bail in any action." P. 159, § 5. There *scire facias* against special bail was abolished in 1845. P. 162, § 25.

Enlargement on bail does not prevent an insolvent debtor from being imprisoned again on the same debt. *People v. Hanchett*, 111 Ill. 90.

In *Indiana*, the creditor's right of action on the recognizance of special bail is limited to two years after the final judgment against the principal. *Indiana Rev. Stat.* 1888, § 880.

In *Michigan*: The form of the recognizance and of the bail-piece for special bail is prescribed in *Michigan Annot. Stat.* 1882, §§ 7319-7320.

In *South Carolina* no attorney or officer of court is acceptable as bail. *South Carolina Gen. Stat.* 1882, § 667.

In some States, a bail bond which does not satisfy the statute may be valid at common law.¹

A bail bond may be nullified by illegality of prior proceedings.²

2. Under the New Codes; New York, etc.—The Codes have provisions not only defining the objects of bail "undertaking" in civil actions, but also minutely prescribing the procedure therein.³

In *Alabama*, such is a rule of court. *Alabama Code*, 1886, p. 807, rule 5.

In *Georgia*, *scire facias* against bail can only issue from the court in which the original judgment was obtained. *Georgia Code*, 1882, § 3417.

1. *Bell v. Pierce*, 146 Mass. 60.

But there must have been an actual or implied acceptance by the obligee of such common-law bond to constitute a delivery, etc. *Hawkes v. Pike*, 105 Mass. 560; 7 Am. Rep. 554. See also *Kent*, 4 Com. (13th ed.) 454.

In *Vermont*, as to the common-law rights and liabilities of special bail, see *Worthen v. Prescott*, 60 Vt. 68.

In *Missouri*, the sureties on a criminal recognizance are liable though the principal has not signed it. *State v. Peyton*, 32 Mo. App. 522.

In *Indiana*, so also. *Minor v. State*, 1 Blackf. (Ind.) 236.

In *Georgia*, as to bail in trover and replevin, see *Georgia Code*, 1882, §§ 3418, *et seq.*

In *Mississippi*, no bond or recognizance is affected by any irregularity therein. *Mississippi Rev. Code*, 1880, § 2305.

2. In *Texas*, failure of an affidavit to state that the attachment was not sued out for the purpose of injuring the defendant was held to be ground for quashing the attachment and relieving the forthcoming sureties. *Burch v. Watts*, 37 Tex. 135.

3. In *New York*: "The defendant may give bail, by delivering to the sheriff a written undertaking, in the sum specified in the order of arrest, executed by two or more sufficient bail, stating their places of residence and occupations to the following effect: (1) If the order of arrest could be granted only by the court, that the defendant will obey the direction of court, or of an appellate court, contained in an order or a judgment, requiring him to perform the act specified in the order; or, in default of his so doing, that he will, at all times, render himself amenable to proceedings to punish him for the omission. (2) If the action is to recover a chattel,

that the defendant will deliver it to the plaintiff, if delivery thereof is adjudged in the action, and will pay any sum recovered against him in the action. (3) In any other case, that the defendant will, at all times, render himself amenable to any mandate which may be issued to enforce a final judgment against him in the action." *Birdseye's New York Rev. Stat.* 1889, p. 97, § 25.

"It is not necessary that the undertaking be approved or accompanied with an affidavit of justification of the bail. But the officer taking the acknowledgment of the undertaking must, if the sheriff so requires, examine under oath, to a reasonable extent, the persons offering to become bail, concerning their property and their circumstances. The examination must be reduced to writing, subscribed by the bail, and annexed to the undertaking." *Ibid*, § 26.

"Within three days after bail is given, the sheriff must deliver to the plaintiff's attorney copies certified by him of the order of arrest, return and undertaking. The plaintiff's attorney, within ten days thereafter, must serve upon the sheriff a notice that he does not accept the bail; otherwise he is deemed to have accepted them, and the sheriff is exonerated from liability." *Ibid*, § 27.

"The qualifications for bail are as follows: (1) Each of them must be worth the sum specified in the order of arrest, exclusive of property exempt from execution; but the judge, on justification, may allow more than two bail to justify, severally, in sums less than that specified in the order, if the whole justification is equivalent to that of two sufficient bail." *Ibid*, § 29.

If required by the plaintiff's attorney, the judge's examination must be reduced to writing, and subscribed by the bail. § 30.

See *California Code Civ. Proc.* 1885, §§ 487, *et seq.*; *Nevada Gen. Stat.* 1885, §§ 3103, *et seq.*; *Dakota Comp. L.* 1887, §§ 4953, *et seq.*; *Montana Comp. Stat.* 1887, p. 92, §§ 129, *et seq.*

3. Under the Louisiana Code.—In *Louisiana*, under the code of practice, which is chiefly derived from the civil law, the function and liability of bail in civil actions are in some respects like those of the *fide-jussores*.¹ Cases often arise thereunder which in any other State would seem quite anomalous.

IV. DISCHARGE.—1. In General; the Roman Law.—At common law, it seems nothing but the act of God could excuse in the case of bail.² The Roman law was more indulgent.³

When bail become fixed, they cannot be discharged from liability, either by the surrender, bankruptcy or arrest of the principal on a *ca. sa*.⁴

1. See *infra*, this title, *Discharge; The Roman Law*.

One who carries all his property in his pocket is not acceptable as a surety within the *Louisiana* act of 1876, whereunder the surety, to be "good and solvent" within *Louisiana* Code, art. 575, must have property susceptible of being legally reached by the sheriff. *State v. Rightor*, Judge, 36 La. Ann. 711.

In some cases—*e. g.*, in a bond for the release of an attachment—what is omitted in the conditions will be supplied by the court, and what is added will be ignored. *McCloskey v. Wingfield*, 32 La. Ann. 38.

Discontinuance of the suit against some of the solidary obligors does not discharge the other defendants. *Vredenburgh v. Behan*, 33 La. Ann. 627.

In a case where no money judgment is enjoined, a surety on an injunction bond—apparently interested in maintaining the judgment—may become, for the opposite party, a surety on an appeal bond—apparently interested in having a reversal; he is not a "party" within the *Louisiana* Code. *Verret v. Bonvillain*, 32 La. Ann. 29.

2. In *England*, in 1745, one under sentence of transportation was brought up and surrendered in discharge of his bail, and then remanded. *Vergen's Bail*, 2 Stra. 1217. But Lord Mansfield refused this where the principal was actually on board ship therefor. *Fowler v. Dunn*, 4 Burr. 2034.

In *New York*, a stipulation between the plaintiff and the defendant for extending the time of payment does not exonerate the bail. *Steinbock v. Evans*, 55 N. Y. Super. Ct. 278.

3. It is true that by the laws of the Twelve Tables, tab. 1, cap. 1, the creditor was authorized of his own right, and without the authority of a precept

from a magistrate, to seize his debtor anywhere in public, and forthwith carry him before the prætor. Brief was the formula of citation. "*Te in jus voco*." If he hesitated, or attempted to escape, *struitur in pedes*, the creditor, calling the bystanders to witness, might seize and drag him, *oborto collo*, to the judgment-seat. If the debtor was aged or sick, a cart could be resorted to.

The debtor's only escape was to give a caution or bail, usually with sureties or *fide-jussores*, for his appearance at a future time. This was called the *stipulatio in judicio sistendi*. Its object was satisfied when the debtor was personally subject to the process of the court. If between the service of process and the day for appearance, he had contracted new obligations, become embarrassed and less able to pay, it was not a forfeiture.

But the tribunals admitted a variety of excuses for his non-appearance; *e. g.*, stress of duties of a municipal office; detention elsewhere as a witness; condemnation to death or exile; civil imprisonment, or restraint of military custody; captivity under the public enemy; death in his family; detention by sickness, tempest or flood. On such excuse, the prætor discharged the *fide-jussores*.

As to the distinction between the liability of such *fide-jussores* and that of the special bail in the common-law practice, see 3 Bl. (Sharswood ed.) 292.

4. The difference between bail to the action and bail in error is, that in the former, the sureties not being fixed, a *ca. sa.* is sued out and returned, but in the latter, no *ca. sa.* is necessary at all for that purpose, and they become fixed from the judgment of the territorial superior court. *Dowlin v. Standifer*, Hempst. (U. S.) 290.

Where special bail are entitled to be discharged *ex debito justitiae*, they may not apply for an *exoneretur* by way of summary proceeding, but they may plead the matter in bar.¹

An amendment conforming the declaration to the cause of action in which the bail was given, will not authorize a discharge.²

In general, special bail will not be allowed to plead that the judgment recovered against the principal was unjust.³

2. Surrender of the Principal; Frustration.—A surrender of the principal discharges the undertaking,⁴ and, ordinarily, no justification of bail is necessary, when special bail is entered for the purpose of making a surrender.⁵

1. See opinions in *Beers v. Haughton*, 9 Pet. (U. S.) 329; *Davidson v. Taylor*, 12 Wheat. (U. S.) 604, quoted in note at BAIL, vol. 2, p. 39.

Bail may surrender their principal even after a conditional judgment has been rendered against them. *Stare v. Lingerfelt*, 109 N. Car. 775.

2. *Carrington v. Ford*, 4 Cranch (C. C.) 231. But otherwise, as to matter added at variance with the affidavit to hold to bail. *Hyer v. Smith*, 3 Cranch (C. C.) 437.

3. In an action of covenant brought in a Federal court in Ohio, on a bond signed by D, for release of Mahon from imprisonment, conditioned to pay what should be recovered in a suit of G. v. M., pending in Kentucky, it was held that D could not show that the judgment recovered was unjust. *Great-house v. Dunlap*, 3 McLean (U. S.) 303.

In *Sibbald v. U. S.*, 12 Pet. (U. S.) 492, the court by Baldwin, J., said: "No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes, or to reinstate a cause dismissed by mistake." This rule has been applied to a judgment of forfeiture of a recognizance. *U. S. v. Wallace*, 46 Fed. Rep. 569. As to relief in equity see *Hendrickson v. Hinckley*, 17 How. (U. S.) 444; *Embry v. Palmer*, 107 U. S. 3; *Phillips v. Negley*, 117 U. S. 665. See a case complicated by death of defendant. *U. S. v. Insley*, 49 Fed. Rep. 776.

As to when there could be no relief on *habeas corpus*, see *Ex parte Bowen*, 25 Fla. 214.

4. In general, as to the effect of surrender of the principal by special bail, see BAIL, vol. 2, p. 38.

In *Massachusetts*, in 1811, on *scire facias* it was held not to be sufficient excuse for bail not surrendering their principal, that he was confined in prison for counterfeiting. *Parker v. Chandler*, 8 Mass. 264. But in 1819 it was held that bail who had surrendered their principal were discharged by his subsequent sentence to State prison. *Bigelow v. Johnson*, 16 Mass. 218.

In *Connecticut*, such seasonable surrender is good for discharge. *Ruggles v. Corey*, 3 Conn. 419. But compare *Lockwood v. Jones*, 7 Conn. 431; *Beebe v. Gardner*, 11 Conn. 104.

In *New York*, in 1820, bail were held entitled to an *exoneretur*, where their principal had been sentenced to the Vermont State prison for thirteen years for counterfeiting. *Loflin v. Fowler*, 18 Johns. (N. Y.) 335. Otherwise, in 1827, in case of a two years' sentence. *Phoenix F. Ins. Co. v. Mowatt*, 6 Cow. (N. Y.) 599. In 1839 bail was held entitled to an *exoneretur*, where before return of the *capias* against him, his attempt to surrender the principal was frustrated by the latter's imprisonment for life. *Cathcart v. Cannon*, 1 Johns. Cas. (N. Y.) 28.

5. The New York code expressly provides for relief of the bail of one imprisoned on a criminal charge, B.'s N. Y. Rev. Stat. 1889, p. 101, § 50.

In a cause in a Federal court in *Pennsylvania*, in 1830, one who had become bail to the marshal entered special bail, and on exception and refusal to justify, he was sued on the bail bond, and surrendered the principal before the return of the writ. It was held, that the surrender was good, and that the bail was entitled to relief on the usual terms. *Stockton v. Throgmorton, Baldw.* (U. S.) 148.

Bail in *Pennsylvania* may follow their principal into the District of Co-

Where the principal would be entitled to an immediate and unconditional discharge if he had been surrendered, the bail are entitled to relief by entering an *exoneretur* without any surrender.¹

The codes generally provide very explicitly for the surrender of the principal, frustration, the effect, etc.²

3. Insolvency of the Principal.—The statutes of some states make the principal's discharge in insolvency or bankruptcy an exoneration of the bail, if occurring before liability fixed.³

lumbia, and there take him out of the custody of the person who has become bail for him in that District. If the principal be brought into the circuit court of that District to be surrendered to the marshal, he will be ordered by the court to be delivered up to the Pennsylvania bail; in case of conflict of State laws, that of the commonwealth, in which the parties are, must prevail. *Sharpless v. Knowles*, 2 Cranch (C. C.) 129.

In *Illinois*: "If any defendant, having given special bail in any action, shall afterward be legally arrested and delivered over to the executive authority of the United States, or of any State or Territory thereof, upon a charge of having committed a crime out of the jurisdiction of this State, and shall be thereupon carried beyond the limits thereof, such bail shall be discharged from all liability incurred as bail, if the defendant has not returned to this State discharged from such arrest, before he shall be liable to be charged as bail for such defendant." *Illinois Rev. Stat.* 1891, p. 162, § 23.

1. *Olcutt v. Lilly*, 4 Johns. (N. Y.) 407. And this, *a fortiori*, where the law prohibits the party from being imprisoned at all; or where, by the positive operation of law, a surrender is prevented. *Beers v. Haughton*, 9 Pet. (U. S.) 329—quoted in note at BAIL, vol. 2, p. 39.

The act of Congress of 1839 gives immediate effect to the State laws in regard to imprisonment of debtors, as well in cases pending as in those begun subsequently. It relates to the remedy and does not impair the contract obligation. Where appearance bail had been given theretofore, the defendants are not bound to give special bail, but may be discharged on motion on common bail. *Gray v. Munroe*, 1 McLean (U. S.) 528.

2. *E. g.*, Birdseye's *New York Rev. Stat.* 1889, p. 100, §§ 42, *et seq.*

In *Ohio*, the bail may, for the pur-

pose of surrendering the defendant, arrest him at any time or place, before he is finally charged, or, by a written authority indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so. *Ohio Rev. Stat.* 1890, § 5513.

In *Kansas* so also. *Kansas Gen. Stat.* 1889, § 4252.

In *Virginia*, against a defendant about to abscond, the plaintiff may, after giving bond, etc., sue out a *capias ad respondendum*, the form of which writ shall, in a suit in equity, as well as in an action at law, be, as nearly as may be, assimilated to the form of such writ as it was used at law before the first day of July, 1850; the defendant to give bond to appear and answer interrogatories. *Virginia Code*, 1887, §§ 2991-2, 2997. It seems, that the function and liability of the sureties therein would be that of ordinary special bail. See *Forbes v. Hagman*, 75 Va. 168; *Branch v. Webb*, 7 Leigh (Va.) 371; *Allen v. Hamilton*, 9 Gratt (Va.) 255.

A plea by special bail that the principal was imprisoned in Pennsylvania was, by the Virginia court of appeals, held to be unavailing—the incarceration preceding the date of the undertaking. *Ross v. Randolph*, 5 Call (Va.) 297.

3. In *Illinois*, discharge of the defendant in insolvency or bankruptcy entitles the bail to have an *exoneretur*, provided that judgment shall not have been recovered against him as the bail of such defendant. *Illinois Rev. Stat.* 1891, p. 162, § 24.

A discharge of the principal under insolvent laws—*e. g.*, of *Louisiana*—does not affect the liability of bail theretofore fixed. *Lyon v. Auchincloss*, 12 Pet. (U. S.) 234. Or, *e. g.*, under those of *Pennsylvania*. *Bobyshall v. Oppenheimer*, 4 Wash. (U. S.) 317. But compare *Richardson v. McIntyre*, 4 Wash. (U. S.) 412.

Such discharge before the return of

4. **Death of the Principal.**—A like rule and restriction apply in case of the death of the principal.¹

V. EXCESSIVE BAIL.—In criminal cases, what is, or what is not "excessive bail" within the constitutional inhibition, is rather a matter of sound discretion, aided somewhat by precedent.² But in civil cases, the *ad damnum* clause in the writ, together with a statutory restriction to double of the amount thereof, ordinarily render infrequent the instances of grievance therefor.³ Still, the criterion, of course, is, as in criminal cases, the probability of the defendant's appearing; and this is generally determinable by his known character and means. It seems that no civil action would lie against a justice for demanding an excess.⁴

the *ca. sa.* may be pleaded in bar to a *scire facias* against the bail. *Byrne v. Carpenter*, 1 Cranch (C. C.) 481. So also as to a discharge in bankruptcy. *Bennet v. Alexander*, 1 Cranch (C. C.) 90.

In *Massachusetts*, a plea that the principal is discharged in bankruptcy and that the debt ought to have been proved therein is good. *Champion v. Noyes*, 2 Mass. 481.

1. In *Maryland*, where the English practice prevails, if the principal dies after the return of the *ca. sa.*, and before the return of the *scire facias*, the liability of the bail is considered fixed by the return of the *ca. sa.* *Davidson v. Taylor*, 12 Wheat. (U. S.) 604.

In *Illinois*, death of the principal before the return day exonerates the bail; but they may be liable for costs. *Illinois Rev. Stat.* 1891, p. 162, § 22.

In *Rhode Island*, death of the principal before the return day of the execution discharges the bail. *Rhode Island Pub. Stat.* 1883, p. 619, § 6.

In *California*, "The bail are exonerated by the death of the defendant, or his imprisonment in a State prison, or by his legal discharge from the obligation to render himself amenable to the process." *California Code Civ. Proc.* 1885, § 491. Compare *B's New York Rev. Stat.* 1889, p. 101, § 51.

In *Ohio*, so also. *Ohio Rev. Stat.* 1890, § 5514.

In *Kansas*, so also. *Kansas Gen. Stat.* 1889, § 4253.

In *Nebraska*, arrest and imprisonment for debt were abolished in 1887. *Nebraska L.* 1887, p. 654.

In *New Hampshire*, if the principal dies after a return of *non est inventus*, the bail is holden for the amount of the judgment. *Hamilton v. Dunklee*, 1 N. H. 172.

2. See *BAIL*, vol. 2, p. 12.

3. See *Bacon, Abr.*, art. *BAIL*.

4. In *Evans v. Foster*, 1 N. H. 374—trespass on the case against a justice of the peace, purporting to be founded on a violation of the constitutional inhibition of excessive bail—the court, by Woodbury, J., said: "It is not certain that, as a general principle, civil remedies can be prosecuted for all violations of the constitution. [*Citing Nantucket v. Cotton*, 14 Mass. 243—that no appeal lies from a judge's assessment of a pauper's relatives.] Indictments and impeachments seem the only redress for some of them; though it can hardly be questioned that a civil remedy, also, may be sustained for all those violations which at common law or by statute have been pronounced actionable.

"The offense of denying, delaying, or obstructing bail where it ought to be granted, was not only known at the common law, but was punishable by action . . . as well as by indictment. [*Citing 4 Bl. Com.* 296.] Yet to constitute this offense it must have been manifest that either the number or the sum required was unreasonable; for the officer who demanded them was at the same time liable if he accepted insufficient bail. . . . It was once the practice to require of the bail *corpus pro corpore*. [*Citing Castell's Widow v. Bambridge*, Strange 854—case against Bambridge, warden of the Fleet, for compelling Castell while therein imprisoned to catch the smallpox.]

"Judicial officers are, for obvious reasons, exempt from civil prosecutions for their acts. [*Citing Kent, C. J.*, in *Yates v. Lansing*, 8 Johns. (N. Y.) 289.] This does not give to magistrates any dangerous immunity. The

Definition. *SPECIAL BAILIFF—SPECIAL CASE.* **Definition.**

In dealing with arrests and bail bonds, the courts will not go into nice questions of law, on complicated affidavits.¹

In some states, arrest in civil cases is not permitted unless the plaintiff make affidavit that the defendant is indebted to him in a certain sum.²

If another suit is pending elsewhere for the same cause of action, the bail will be reduced to a nominal sum, or only common bail allowed.³

SPECIAL BAILIFF.—See BAILIFF, vol. 2, p. 39.

SPECIAL CASE.—(See also REPORT AND CASE MADE; VERDICT).—1. A statement in writing of the facts proved on the trial of a cause, drawn up and settled by the attorneys and counsel for the respective parties under the supervision of the judge, for the purpose of having certain points of law, which arose at the trial and could not then be satisfactorily decided, determined upon full argument before the court *in banc*. This is otherwise called a case reserved, or made; and it is usual for the parties, where the law of the case is doubtful, to agree that the jury shall find a general verdict for the plaintiff, subject to the opinion of the court upon such a case to be made, instead of obtaining from the jury a special verdict.⁴

2. The constitutions of *California* and *New York* provide that the legislature may confer jurisdiction upon the county courts in "special cases." As thus used, the term "special cases" has been held to embrace "those cases that are the creation of statute, and the proceedings under which are unknown to the general framework of the courts of common law and equity."⁵

constitution forbids all courts of law, as well as single 'magistrates' to require 'excessive' bail. If the members of a higher court, therefore, violate this prohibition, they are equally liable with a justice of the peace; and an indictment or an impeachment would seem to be sufficient remedies. Any suffering to individuals, that might be apprehended from the great numbers and limited knowledge of single magistrates, can always be soon obviated; as the person committed for a failure to procure bail, which appears excessive, possesses the right to be brought before a judge of this court by *habeas corpus*, and to have the sum reduced, if, under all the circumstances, it is thought too large."

1. In *Burton v. Haworth*, 4 B. & Ad. 467, 24 E. C. L. 103, the court by Taunton, J., said: "The arrest may have proceeded on improper motives, but we cannot try the merits of the cause on affidavits. This is not one of those clear cases, of which Chambers

v. Bernasconi, 6 Bing. 498, 19 E. C. L. 149, is an instance, where the court, unless they shut their eyes, cannot but see that the process has been improperly used, and where, therefore, they are justified in interfering summarily. In *Nizetich v. Bonacich*, 5 B. & Ald. 904, 7 E. C. L. 296, there was a letter of the plaintiff, acknowledging in one line that the defendant was his creditor; the case lay in a nutshell. Here it is very different."

2. *E. g.*, in *New Hampshire*, §13-33-*New Hampshire* Pub. Stat. 1891, p. 614, § 8. This was the amount for jurisdiction of a justice of the peace. See *Blanchard v. Goss*, 2 N. H. 492.

3. So held, in a Federal court in *Massachusetts*, in certain infringement litigation; suits also pending in *New York* and *New Jersey*. *Parkhurst v. Kinsman*, 3 Woodb. & M. (U. S.) 168.

4. Burr. L. Dict., tit. "Case."

5. *Parsons v. Tuolumne Co. Water Co.*, 5 Cal. 43; 63 Am. Dec. 76. See also CASE, vol. 3, p. 23.

Definition. **SPECIAL COUNTS—SPECIAL ISSUE.** Definition.

SPECIAL COUNTS.—See SPECIAL ASSUMPSIT.

SPECIAL DAMAGES—(See also DAMAGES, vol. 5, p. 50; LIBEL AND SLANDER, vol. 13, p. 434; NUISANCES, vol. 16, p. 922; TRESPASS; TROVER).—Special damage is that which the law does not necessarily imply that the plaintiff has sustained from the act complained of. It is often very difficult to distinguish general from special damage. The necessary result of an injury is often and easily confounded with the natural and proximate result, and all legal damage, whether general or special, must naturally and proximately result from the act or default complained of. It is difficult to lay down any general rule by which to determine when the law implies the damage and when it does not. It would seem, however, that when the consequences of an injury are peculiar to the circumstances and condition of the injured party, the law could not imply the damage simply from the act causing the injury.¹

SPECIAL DEMURRER.—See DEMURRER, vol. 5, p. 549; PLEADING, vol. 18, p. 511.

SPECIAL DEPOSITS.—See BAILMENT, vol. 2, p. 43; BANKS AND BANKING, vol. 2, p. 93; DEPOSIT, vol. 5, p. 570; NATIONAL BANKS, vol. 16, p. 206.

SPECIAL FINDING—(Compare FINDING, vol. 7, p. 991; VERDICT).—A "special finding" is not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes and not the evidence on which those ultimate facts are supposed to rest.²

SPECIAL IMPARLANCE.—See PLEADING, vol. 18, p. 506.

SPECIAL INDORSEMENT—(See also BILLS AND NOTES, vol. 2, p. 382).—An indorsement in full, which, besides the indorser's signature, designates the person in whose favor the indorsement is made; thus, "Pay C. D. or order, A. B." is a special indorsement.

SPECIAL ISSUE.—The issues produced upon special pleas as being usually more specific and particular than those of not

In the following cases the scope of the term as used in these constitutional provisions was considered: *Griswold v. Sheldon*, 4 N. Y. 581; *Kundolf v. Thalheimer*, 12 N. Y. 593; *Doubleday v. Heath*, 16 N. Y. 80; *Arnold v. Rees*, 18 N. Y. 57; *People v. Main*, 20 N. Y. 434; *Beecher v. Allen*, 5 Barb. (N. Y.) 169; *Hall v. Nelson*, 23 Barb. (N. Y.) 88; *Benson v. Cromwell*, 6 Abb. Pr. (N. Y.) 83; *People v. Kern Co.*, 45 Cal. 679; *Spencer Creek Water Co. v. Vallejo*, 48 Cal. 70; *Bixler's Appeal*, 59 Cal. 550.

The definition as given in the text has been much shaken in *New York* by the decision in *Arnold v. Rees*, 18 N. Y. 57; but is still sustained by the *California* cases.

1. *Tomlinson v. Derby*, 43 Conn. 567.

2. *Norris v. Jackson*, 9 Wall. (U. S.) 125.

Bouvier's definition is: "Where a jury find specially a particular fact presumably material to the general question before them, but which does not involve the whole of that question." Bouv. L. Dict.

Definition. **SPECIAL JUDGE—SPECIAL PLEA.** Definition.

guilty, *nil debet*, etc., are sometimes described in the books as special issues, by way of distinction from the others, which are called general issues.¹

SPECIAL JUDGE.—See JUDGE, vol. 12, p. 24.

SPECIAL JURY.—See JURY AND JURY TRIAL, vol. 12, p. 321.

SPECIAL LAW.—(See also CONSTITUTIONAL LAW, vol. 3, p. 696; LOCAL, vol. 13, p. 980; JUDICIAL NOTICE, vol. 12, p. 167; MUNICIPAL CORPORATIONS, vol. 15, p. 979; STATUTES; USAGES AND CUSTOMS).—A special law is one, such as at common law the courts would not notice unless it were pleaded and proved like any other fact; *e. g.*, a special statute; a local custom.²

SPECIAL LEGACY.—(See also LEGACIES AND DEVISES, vol. 13, p. 10).—A specific legacy.

SPECIAL LIEN.—(See also LIENS, vol. 13, p. 576).—Another term for a particular lien.

SPECIAL MOTION.—See MOTIONS, vol. 15, p. 893.

SPECIAL PARTNER OR PARTNERSHIP.—(See also LIMITED PARTNERSHIP, vol. 13, p. 802; PARTNERSHIP, vol. 17, p. 889).—There is, perhaps, some distinction in these phrases; special partner usually means the partner, who under laws authorizing the formation of limited partnerships, puts in a definite capital, assumes no part (or only such as the statute permits) in the business management, and is liable only to loss of the capital contributed. But the partnership thus formed is commonly called a limited partnership; and special partnership may well mean one formed for a single branch of business or subject.³

SPECIAL PLEA.—A plea other than the general issue.⁴

1. Steph. Pl. (3d Am. ed.) 179. This definition is approved by the dictionaries of Black, Burrill and Brown. But Bouvier and Anderson define "special issue" as being a plea to the action which denies some particular material allegation, which is in effect a denial of the entire right of action. The term is probably used in both senses. Abb. L. Dict.

2. Hingle v. State, 24 Ind. 28; Toledo, etc., R. Co. v. Nordyke, 27 Ind. 95.

A law which applies only to an individual, or to a number of individuals selected out of the class to which they belong, is a special and not a general law. State v. California Min. Co., 15 Nev. 249.

3. Abb. L. Dict.

4. See PLEADING, vol. 18, p. 478.

"On the subject of general issues, it remains only to remark that other

pleas are ordinarily distinguished from them by the appellation of special pleas; and when resort is had to the latter kind, the party is said to plead specially, in opposition to pleading the general issue." Steph. Pl. (3d Am. ed.) 179.

"When the allegations (or pleadings, as they are called) of the contending parties in an action, are not of the general or ordinary form, but are of a more complex or special character, they are denominated special pleadings; and when a defendant pleads a plea of this description (*i. e.*, a special plea) he is said to plead specially, in opposition to pleading the general issue. These terms have given rise to the popular denomination of that science which, though properly called pleading, is generally known by the name of special pleading. Hence, also, the denomination of 'special pleader'

Definition. *SPECIAL PRIVILEGES—SPECIALTY.* **Definition.**

SPECIAL PRIVILEGES—(See also **PRIVILEGE**, vol. 19, p. 122).
—See note 1.

SPECIAL PROCEEDINGS, under the codes of civil procedure of *New York* and other states, embrace all civil remedies which are not ordinary actions.²

SPECIAL PROPERTY.—See **PROPERTY**, vol. 19, p. 288.

SPECIAL TAIL.—See **ESTATES**, vol. 6, p. 879.

SPECIAL TRAVERSE.—See **PLEADING**, vol. 18, p. 548.

SPECIAL TRUST.—See **SIMPLE TRUSTS**; **TRUSTS**.

SPECIALTY—(See also **DEBT**, vol. 5, p. 165, and references there given).—An obligation or contract under seal; an instrument sealed and delivered.³

as applied to those learned persons who are employed in drawing and framing special pleadings. These, it may be as well to observe, are mostly gentlemen who have studied for more than three years at one of the Inns of Court, and who may or may not intend, at some future period, to engage in the more complicated and important avocations of a barrister." *Brown's L. Dict.*

Bouvier defines a special plea in bar as "one which advances new matter. It differs from the general in this, that the latter denies some material allegation and never advances new matter." *Bouv. L. Dict. Citing Gould Pl.*, ch. 2, § 38.

1. **Special Privilege**.—An act of Congress forbidding any territorial legislature to grant a private charter or special privilege, does not preclude authority to pass ordinances to restrict gaming houses. The act does not forbid conferring upon a particular city the common and usual powers conferred on municipal corporations, of passing by-laws in the nature of police regulations. *Ex parte Douglass*, 1 Utah 108.

2. *New York Code Civ. Pro.*, § 3.

3. Debts by specialty are such whereby a sum of money becomes or is acknowledged to be due by an instrument under seal. 2 Bl. Com. 465, followed in *January v. Goodman*, 1 Dall. (Pa.) 208.

A specialty is a writing sealed and delivered, containing some agreement. *Lane v. Morris*, 10 Ga. 167.

A specialty is a contract executed with the solemnities of sealing and delivery, and is emphatically styled a

deed. *Helm v. Eastland*, 2 Bibb (Ky.) 194.

Statute of Limitations.—"Specialties" were not within the statute of 21 James I, ch. 16, the English statute upon which the Statutes of Limitation of most of the States are founded. The term, as used in that statute and in its American counterparts, has in some jurisdictions received a more extended meaning than would be warranted by the definitions given above, and has been held to include judgments, liabilities created by statute, etc.

Judgments, Liabilities Created by Statute.—In *Stockwell v. Coleman*, 10 Ohio St. 40, an action of debt was brought upon a transcript of a judgment of a justice of the peace of the State of Indiana. A plea of the Statute of Limitations of four years was entered. The court by *Sutliff, J.*, said: "It is certain that while the term specialty, in the strict and early use of the word, was regarded as only applicable to bonds, deeds or other instruments under seal, it afterwards came to be used in a much more comprehensive sense. The term specialty has long been used both in *England* and *America* in this more comprehensive sense, as embracing debts upon recognizances, judgments and decrees, and (in *England* certainly) debts upon statutes. And we have no doubt that the word specialty, as used in our Statute of Limitations was intended and does in fact comprehend as well judgments as sealed instruments. . . . This court, however, rests its opinion in the case before us upon the conclusion arrived at, that a judgment of a court of another State is, in the legal and reasonably

Definition.

SPECIAL VERDICT—SPECIE.

Definition.

SPECIAL VERDICT.—See VERDICT.

SPECIE.—The meaning of this word is well understood to be metallic money, issued by public authority, and it is generally used in contradistinction to paper money.¹

comprehensive sense of the term, to be regarded in this State as a debt upon a 'specialty;' and such a judgment when sued upon in this State is not subject to a plea of the Statute of Limitations of four years, whether the judgment be that of a court of record or of a court not of record." See also *Bobo v. Norton*, 10 Ohio St. 514; *Bissell v. Jaudon*, 16 Ohio St. 498; *Randolph v. King*, 2 Bond (U. S.) 104. But in *Tyler v. Winslow*, 15 Ohio St. 366 (followed in *Hawkins v. Lasley*, 40 Ohio St. 40), it was held that a domestic judgment was not a "specialty" within the statute. These decisions are absolutely irreconcilable upon principle.

In *Pease v. Howard*, 14 Johns. (N. Y.) 480, it was held that a judgment in a justice's court is not within the Statute of Limitations, like a foreign judgment; "for it is, in an action founded upon it, conclusive evidence of a debt, and is, therefore, not a debt by simple contract but by specialty."

In *Seymour v. Street*, 5 Neb. 85, it was said that "specialty" originally imported a writing actually under seal, though it has been extended to include judgments.

In *Indiana*, however, in the case of *Kimball v. Whitney*, 15 Ind. 282, it was said: "The term 'specialty' employed in the statute, does not embrace a judgment. Says Blackstone: 'A debt of record is a sum of money which appears to be due by the evidence of a court of record.' 'Debts by specialty, or special contract, are such whereby a sum of money becomes, or is acknowledged to be due, by deed or instrument under seal.'" 2 Bl. Com. 465. And though the judgment sued upon in that case was a foreign one, it does not appear that the court intended to limit the doctrine enunciated to foreign judgments. See also *Niblack v. Goodman*, 67 Ind. 181. To the same effect see *Todd v. Crumb*, 5 McLean (U. S.) 172. See also *David v. Porter*, 51 Iowa 254.

These authorities well illustrate the confusion in which the subject is involved. Upon principle and authority it would seem that a judgment is not a specialty; but as it is not an agree-

ment, contract, or promise in writing, it is not within the Statute of Limitations of 21 James I, nor the similar Statutes of Limitation in this country. 7 Wait's Actions and Defenses, p. 253; *Dudley v. Lindsey*, 9 B. Mon. (Ky.) 486; 50 Am. Dec. 522; *Todd v. Crumb*, 5 McLean (U. S.) 172; *Mitchell v. Mitchell*, 8 Humph. (Tenn.) 359; *Reddington v. Julian*, 2 Ind. 224; *Stewart v. Peterson*, 63 Pa. St. 230; *Mahurin v. Bickford*, 8 N. H. 54.

The same may be said of statute liabilities. They, too, have been frequently termed specialties by the courts. *Jones v. Pope*, 1 Wm. Saund. 38; *Cork, etc., R. Co. v. Good*, 13 C. B. 826; 76 E. C. L. 824; *Shepherd v. Hills*, 11 Exch. 55; *Ward v. Reeder*, 2 Har. & M. (Md.) 145; *Lane v. Morris*, 10 Ga. 162; *Bullard v. Bell*, 1 Mason (U. S.) 243; *Van Hook v. Whitlock*, 3 Paige (N. Y.) 409; *Atwood v. Rhode Island, etc., Bank*, 1 R. I. 376.

Except in *Ohio* (*Stockwell v. Coleman*, 10 Ohio St. 33, cited *supra*, this note), it has been generally held that a foreign judgment is not a specialty, even in those jurisdictions in which domestic judgments are so held. *Hubbell v. Cowdrey*, 5 Johns. (N. Y.) 132; *Pease v. Howard*, 14 Johns. (N. Y.) 479; *Jordan v. Robinson*, 15 Me. 167; *Keith v. Estill*, 9 Port. (Ala.) 669; *Cameron v. Wurtz*, 4 McCord (S. Car.) 278; *Harness v. Green*, 20 Mo. 316.

1. *Walkup v. Houston*, 65 N. Car. 503. See also *Webb v. Moore*, 4 T. B. Mon. (Ky.) 483.

Hard money or specie is a coin of the precious metals, of a certain weight and fineness, with the government stamp thereon, denoting its value as a medium of exchange, or currency. *Henry v. Bank of Salina*, 5 Hill (N. Y.) 536.

In *Trebilcock v. Wilson*, 12 Wall. (U. S.) 687, suit was brought upon a note which was payable "in specie." It was held that when a contract for money is, by its terms, made payable in specie or in coin, judgment may be entered thereon for coined dollars. The court by Field, J., said: "Here the terms 'in specie' are merely descriptive of the kind of dollars in which the

Definition.

SPECIFIC—SPECIFIC LEGACY.

Definition.

SPECIFIC, SPECIFICALLY.—See note 1.

SPECIFICATION.—A statement of particulars; an account or narrative in detail.²

SPECIFIC LEGACY.—See LEGACIES AND DEVICES, vol. 13, p. 10.

note is payable, there being different kinds of circulation, recognized by law. They mean that the designated number of dollars in the note shall be paid in so many gold or silver dollars of the coinage of the United States. They have acquired this meaning by general usage among traders, merchants and bankers, and are the opposite of the terms, in currency, which are used when it is desired to make a note payable in paper money. These latter terms, in currency, mean that the designated number of dollars is payable in an equal number of notes which are current in the community as notes. *Paup v. Drew*, 10 How. (U. S.) 218." See also *MONEY*, vol. 15, p. 705; *Polard v. Pleasant Hill*, 3 Dill. (U. S.) 195.

Contra.—In *Glover v. Robbins*, 49 Ala. 219; 20 Am. Rep. 272, a promissory note for six thousand five hundred dollars was made in October, 1864, and was by its terms payable "*in specie*." It was held that a judgment for the said sum and interest in gold or silver coin, "being the said plaintiff's damages as assessed by the jury aforesaid, or its equivalent in United States currency," was erroneous, and that the judgment could be recovered only for the amount of the note in United States currency. The court by Peters, J., said: "The note on which this suit is brought bears date on the 10th day of October, 1864, and it is made payable '*in specie*.' There was no evidence offered to show what was meant by the word *specie*. But as there was no objection made to the verdict, which assessed the damages '*in gold or silver coin*,' it is supposed that this interpretation was put upon this word by both the plaintiff and the defendant. Yet, as the debt was contracted long after the passage of the legal tender acts of Congress, regulating the payment of such contracts, the judgment should have been for so many dollars only, leaving it to be discharged in any legal tender currency or money of the United States. It is presumed that this is the result of the latest construction of the legal tender acts of Congress by the Supreme Court of the United States; and the decisions of

that high tribunal, until modified or overruled, constitute the governing rule, and are a part of the paramount law of the land. *Legal Tender Cases* (*Knox v. Lee*, and *Parker v. Davis*), 12 Wall. (U. S.) 457; *Banks v. Supervisors*, 7 Wall. (U. S.) 26; 12 U. S. Stat. at L. 345, 532, 709.

1. The statute of 43 Eliz. ch. 2, establishing poor rates in England, imposed no liability on any mines, except coal mines. The *English Rating Act* of 1874 (37 & 38 Vict., ch. 54, § 3) made all mines assessable to the poor rate; but, by § 8, a lessee till then exempt from being rated, became during the continuance of his lease, entitled to deduct from his rent one-half of the rate, unless he had "specifically contracted to pay such rate in the event of the abolition of the said exemption." A lessee of an iron mine, who became liable to the poor rate under the latter act, and who before its passing had contracted to pay his rent "free from all deductions whatsoever," and also to pay "all manner of taxes, rates, assessments, charges, and impositions whatsoever, parliamentary or parochial, which now are or which shall at any time hereafter," be payable in respect of the mine, was held not to have "specifically" contracted himself out of the benefit of § 8. Lord Hatherley said: "The meaning of the word '*specific*' is the reverse of '*general*.' We cannot give to a general covenant the force of a specific agreement with regard to a particular tax; and a covenant in a lease to pay all taxes, rents, assessments, charges, and impositions whatsoever, cannot be regarded as a '*specific covenant*.'" *Chaloner v. Bolckow*, L. R., 3 App. Cas. 933. See also *Devonshire v. Barrow Hæmatite Steel Co.*, 2 Q. B. Div. 286.

2. "In architecture, not only the dimensions and mode of construction, but a description of every piece of material—its kind, length, breadth, thickness, and the manner of joining the separate parts." And. L. Dict., citing *Gilbert v. U. S.*, 1 Ct. of Cl. 34. See also *WORKING CONTRACTS*.

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Definition.

SPECIFIC PERFORMANCE.

Definition.

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I. DEFINITION.—Specific performance is an equitable remedy which compels the performance of a contract in the precise terms agreed upon, or such a substantial performance as will do justice between the parties, under the circumstances of the case.¹

1. There are two aspects under which this subject may be viewed, one taking it as a branch of equitable jurisprudence, and the other, contemplating the act itself, rather than its judicial quality. Thus, adopting the latter view, Bouvier defines it as "the actual accomplishment of a contract by the party bound to fulfill it," and Burrill, "the performance of a contract in the precise terms agreed upon—strict performance." Waterman qualifies Burrill's definition by including "substantial performance, or such as will do justice between the parties under the circumstances, with compensation to the other party when that is required." Waterman on Sp. Perf., § 1. See Woodbury v. Luddy, 14 Allen (Mass.) 1; 92 Am. Dec. 731; Taggart v. Tevanny, 1 Ind. App. 339; Willard v. Tayloe, 8 Wall. (U. S.) 557; Portland, etc., R. Co. v. Grand Trunk R. Co., 63 Me. 90; Comer v. Bankhead, 70 Ala. 493; Conaway v. Wright, 5 Del. Ch. 472; while Anderson defines it as "That branch of equity jurisprudence which compels a party to perform his contract in specie." And. L. Dict.; Riddle v. Cameron, 50 Ala. 263; Morgan v. Morgan, 3 Stew. (Ala.) 383; 21 Am. Dec. 638; Dehart v. Dehart, 15 Ind. 167; Johnson v. Johnson, 40 Md. 189.

Courts of law do not enforce specific performance unless authorized by statute. Their sole remedy is in damages. McLane v. Elmer, 4 Ind. 239; Harnett v. Yielding, 2 S. & L. 586; Tasker v. Small, 3 M. & C. 63.

Under the early statute in *Massachusetts*, courts of law were given limited equitable jurisdiction, which included the power to decree specific performance, but the powers thus granted were strictly construed. See Kidder v. Hunt, 1 Pick. (Mass.) 328; 11 Am. Dec. 183; Adams v. Townsend, 1 Met. (Mass.) 483; Jacobs v. Peterborough, etc., R. Co., 8 Cush. (Mass.) 223; Buck v. Dowley, 16 Gray (Mass.) 555.

The chancellor may award damages, either in lieu of performance which may be impossible of strict enforcement, or in addition thereto. See *infra*, this title, *Decree—Compensation in Lieu of Performance*.

This money judgment of the chancellor is not damages, however, but is termed "compensation." But compensation is not awarded where damages is the sole relief sought, and the suit which should have been brought at law was brought in chancery by pretense: thus, where a grantor of land filed a bill in equity for the specific

II. ORIGIN AND NATURE OF REMEDY.—As a remedy it is exclusively equitable, although the rights it enforces may be legal as well as equitable,¹ and is as old as equity jurisprudence itself. The earliest cases in the reports are found in the time of Edw. III, where specific performance of a marriage settlement was decreed;² and of Edward IV, where the chancellor enforced the performance of an agreement to build a house.³ In the reign of Elizabeth we find a number of cases where a decree of specific performance was ordered. At that time, and for some years after, much hostility existed between the chancellors and the common-law judges over their respective authority and jurisdiction, the latter denying the right to specific performance while the former maintained it.⁴

The authorities, indeed, trace the remedy back to the *Roman* law, where, according to Pothier, even contracts in relation to chattels were enforceable, although the *English* rule has not yet been carried thus far, until recently.⁵ In 1800 the right had become so well recognized that Sir William Grant declared that where the parties were competent and the contract unobjectionable, it was as much of course in chancery to decree specific performance as to give damages at law.⁶ The granting or denial of the relief sought rests in the sound judicial discretion of the court, in view of all the circumstances of the case.⁷ It is not to be exer-

performance of a contract to reconvey upon the performance of certain conditions, and prayed for damages for non-performance, knowing that his grantees had conveyed the land to third parties, who had no knowledge of his alleged equities, and thereby had disabled themselves from performing the contract, it was held that a court of equity had no jurisdiction to award damages. In such case an allegation in the bill of notice to the subsequent purchasers, the complainant knowing better, was regarded as intended merely to give color of jurisdiction to a court of chancery, and the bill was dismissed. *Doan v. Mauzey*, 33 Ill. 227.

Under the *New York* Code, the court may award damages in lieu of a performance, where performance is impossible and the alternative relief is prayed for. *Barlow v. Scott*, 24 N. Y. 40; *Margraf v. Muir*, 57 N. Y. 159.

1. *Pomeroy's Eq. Jur.*, §§ 138, 1400. In the latter section it is said: "Although contracts may also give rise to a legal right, yet when equity compels their specific performance, it enforces the equitable obligation arising from them and not the legal duty."

2. *Pomeroy's Eq. Jur.*, § 35; *Pal-*

grave's *History of the Council*, pp. 64, 67.

3. *Year Book*, 8 Edw. IV, 4 (b); *Fitzherbert's Abr.*, tit. Subpœna; *Waterman on Sp. Perf.*, § 34; *Story's Eq. Jur.*, § 716; 1 *Madd. Ch. Pr.* 287.

4. See article on this subject by Prof. J. B. Ames, in *Green Bag*, vol. 1, p. 26.

5. See *Law Mag.*, vol. 12, p. 334; *Butler's Dissertation on Feudal Law*; Austin's "Outline" appended to his "Province of Jurisprudence."

6. *Hall v. Warren*, 9 *Ves.* 608.

See *Chance v. Beall*, 20 *Ga.* 143; *Rogers v. Saunders*, 16 *Me.* 92; 33 *Am. Dec.* 635; *Hopper v. Hopper*, 16 *N. J. Eq.* 147; *Seymour v. Delancy*, 3 *Cow. (N. Y.)* 505; 15 *Am. Dec.* 270.

Particularly where the contract relates to real estate. *King v. Hamilton*, 4 *Pet. (U. S.)* 311.

7. *Blackwilder v. Loveless*, 21 *Ala.* 371; *Carlisle v. Carlisle*, 77 *Ala.* 339; *Wynn v. Garland*, 19 *Ark.* 23; 68 *Am. Dec.* 190; *Kelly v. Central Pac. R. Co.*, 74 *Cal.* 557; *Godwin v. Collins*, 3 *Del. Ch.* 189; *Patterson v. Bloomer*, 35 *Conn.* 57; 95 *Am. Dec.* 218; *Ralls v. Ralls*, 82 *Ill.* 243; *Beach v. Dyer*, 93 *Ill.* 295; *Hetfield v. Willey*, 105 *Ill.* 286; *Dougherty v. Humpston*, 2 *Blackf. (Ind.)* 273; *Kirk-*

cised arbitrarily or capriciously, but its administration is governed by settled principles.¹ It is never to be demanded as

man *v.* Kenyon, 17 Ind. 607; Rudolph *v.* Covell, 5 Iowa 525; Sweeney *v.* O'Hara, 43 Iowa 34; Thurston *v.* Arnold, 43 Iowa 43; Minneapolis, etc., *R. Co. v.* Cox, 76 Iowa 306; Fowler *v.* Marshall, 29 Kan. 665; Grundy *v.* Edwards, 7 J. J. Marsh. (Ky.) 368; 23 Am. Dec. 409; Simon *v.* Wildt, 84 Ky. 157; Mansfield *v.* Sherman, 81 Me. 365; Wardsworth *v.* Manning, 4 Md. 59; Brewer *v.* Herbert, 30 Md. 310; 96 Am. Dec. 582; Boston, etc., *R. Co. v.* Bartlett, 10 Gray (Mass.) 385; Graves *v.* Goldthwait, 153 Mass. 268; Smith *v.* Lawrence, 15 Mich. 499; 99 Am. Dec. 344; Buck *v.* Smith, 29 Mich. 166; 18 Am. Rep. 84; Fish *v.* Lightner, 44 Mo. 268; Thornburgh *v.* Fish (Mont. 1891), 27 Pac. Rep. 381; King *v.* Gsantner, 23 Neb. 795; Johnson *v.* Hubbell, 10 N. J. Eq. 332; 66 Am. Dec. 773; Hill *v.* Resseguieu, 17 Barb. (N. Y.) 166; Clarke *v.* Rochester, etc., *R. Co.*, 18 Barb. (N. Y.) 350; Gillespie *v.* Moon, 2 Johns. Ch. (N. Y.) 598; 7 Am. Dec. 559; St. John *v.* Benedict, 6 Johns. Ch. (N. Y.) 111; Bruce *v.* Tilson, 25 N. Y. 202; Jones *v.* Seligman, 81 N. Y. 191; Trustees of Columbia College *v.* Thacher, 87 N. Y. 311; 41 Am. Rep. 365; Murtfeldt *v.* New York, etc., *R. Co.*, 102 N. Y. 703; 25 Am. & Eng. R. Cas. 144; Day *v.* Hunt, 112 N. Y. 191; Conger *v.* New York, etc., *R. Co.*, 120 N. Y. 29; Miles *v.* Dover Furnace Iron Co., 125 N. Y. 294; Lloyd *v.* Wheatley, 2 Jones Eq. (N. Car.) 267; Love *v.* Welch, 97 N. Car. 200; Ramsey *v.* Gheen, 99 N. Car. 215; Garrard *v.* Grinling, 2 Swanst. 257; Hudson *v.* King, 2 Heisk. (Tenn.) 560; Shenandoah Valley *R. Co. v.* Lewis, 76 Va. 833; 12 Am. & Eng. R. Cas. 305; Knott *v.* Shepardston Mfg. Co., 30 W. Va. 790; Roundtree *v.* McLain, 1 Hempst. (U. S.) 245; Mississippi *R. Co. v.* Cromwell, 91 U. S. 643; Nickerson *v.* Nickerson, 127 U. S. 668; Hennessey *v.* Woolworth, 128 U. S. 438; Cheney *v.* Libby, 134 U. S. 68; Joyner *v.* Statham, 3 Atk. 388; Pitcairn *v.* Ogbourne, 2 Ves. 375; White *v.* Damon, 7 Ves. 35; Legal *v.* Miller, 2 Ves. 299; Townsend *v.* Strangroom, 6 Ves. 328; Clark *v.* Grant, 14 Ves. 519; Mason *v.* Armistage, 13 Ves. 25; Winch *v.* Winchester, 1 Ves. & B. 375; Clowes *v.* Higginson, 1 Ves. & B. 527; Ramsbottom *v.* Golden, 1 Ves. & B. 165; Flood *v.* Finlay, 2 B. & B. 15; Price *v.* Dyer, 17 Ves. 357.

1. King *v.* Hamilton, 4 Pet. (U. S.) 328; Willard *v.* Tayloe, 8 Wall. (U. S.) 557; Rutland Marble Co. *v.* Ripley, 10 Wall. (U. S.) 339; Nickerson *v.* Nickerson, 127 U. S. 668; Hennessey *v.* Woolworth, 128 U. S. 438; Gould *v.* Womack, 2 Ala. 83; Pulliam *v.* Owen, 25 Ala. 492; Bogan *v.* Daughdrill, 51 Ala. 312; McGarvey *v.* Hall, 23 Cal. 140; Meeker *v.* Meeker, 16 Conn. 403; Quinn *v.* Roath, 37 Conn. 16; Hudson *v.* Layton, 5 Harr. (Del.) 74; 48 Am. Dec. 167; Frisby *v.* Ballance, 5 Ill. 287; 39 Am. Dec. 409; Broadwell *v.* Broadwell, 6 Ill. 599; Scott *v.* Whitlow, 20 Ill. 310; Hough *v.* Coughlan, 41 Ill. 134; Fish *v.* Leser, 69 Ill. 395; Alexander *v.* Hoffman, 70 Ill. 119; Iglehart *v.* Vail, 73 Ill. 63; Bowman *v.* Cunningham, 78 Ill. 51; Race *v.* Weston, 86 Ill. 94; Cohn *v.* Mitchell, 115 Ill. 124; Ash *v.* Daggy, 6 Ind. 259; Atkinson *v.* Jackson, 8 Ind. 31; Richmond *v.* Dubuque, etc., *R. Co.*, 33 Iowa 422; Turner *v.* Clay, 3 Bibb (Ky.) 52; Rogers *v.* Saunders, 16 Me. 92; 33 Am. Dec. 635; Waters *v.* Howard, 1 Md. Ch. 112; Duvall *v.* Myers, 2 Md. Ch. 401; Perkins *v.* Wright, 3 Har. & M. (Md.) 324; Somersby *v.* Buntin, 118 Mass. 279; 19 Am. Rep. 459; McMurtrie *v.* Bennett, Harr. (Mich.) 124; Blanchard *v.* Detroit, etc., *R. Co.*, 31 Mich. 43; 18 Am. Rep. 142; Aston *v.* Robinson, 49 Miss. 348; King *v.* Morford, 1 N. J. Eq. 274; Bowen *v.* Irish, etc., Congregation, 6 Bosw. (N. Y.) 245; St. John *v.* Benedict, 6 Johns. Ch. (N. Y.) 111; Seymour *v.* Delancy, 6 Johns. Ch. (N. Y.) 222; McWhorter *v.* McMahan, 1 Clarke Ch. (N. Y.) 400; Prater *v.* Miller, 3 Hawks (N. Car.) 629; Leigh *v.* Crump, 1 Ired. Eq. (N. Car.) 299; Henderson *v.* Hays, 2 Watts (Pa.) 148; Howard *v.* Moore, 4 Sneed (Tenn.) 317; Pigg *v.* Corder, 12 Leigh (Va.) 69; Byran *v.* Lofftus, 1 Rob. (Va.) 12; 39 Am. Dec. 242; Anthony *v.* Leftwich, 3 Rand. (Va.) 238; Lowry *v.* Buffington, 6 W. Va. 249.

And mere proof of a valid legal contract is not enough to maintain the right to a decree. Chicago, etc., *R. Co. v.* Reno, 113 Ill. 39; Menasha *v.* Wisconsin Cent. *R. Co.*, 65 Wis. 502.

The contract must be such a one as in all its features appeals to the judicial discretion as being fit to be specifically enforced. Bruck *v.* Tucker, 42 Cal. 347.

a matter of absolute right in either party,¹ and a much stronger case is required to maintain the suit than to defeat it.² But the use of the term "discretionary" is misleading and inaccurate, for, in a proper case—that is, where all the necessary elements, conditions, and incidents are present—relief by way of specific performance should be granted as a matter of course, and not merely as a matter of favor within the arbitrary discretion of the trial court.³ Inflexible rules cannot be laid down for the exercise of this power.⁴ It is so largely discretionary that seemingly similar facts cannot always claim the same remedies. The relations of the parties and the circumstances of the case are potent factors in its application. It may be stated broadly, however, that courts are held to much stricter adherence to the doctrines governing judicial discretion in the enforcement of contracts relating to chattels and to personal conduct than in the enforcement of agreements concerning land. From their very nature, real-estate contracts which it is proper to enforce at all

Lord Hardwicke, in *Joynes v. Statham*, 2 Atk. 388, said: "The constant doctrine of this court is that it is in their discretion whether in such a bill they would decree a specific performance or leave the plaintiff to his remedy at law."

In *McCarty v. Kyle*, 4 Coldw. (Tenn.) 348, the court by Milligan, J., said: "The specific execution of a contract is decreed at the sound discretion of a court of chancery, but it is a jurisdiction so important and so long and frequently exercised that the principles by which it is governed are nearly as well settled as if regulated by positive enactment." *Citing Cock v. Evans*, 9 Yerg. (Tenn.) 287; *Humbard v. Humbard*, 3 Head (Tenn.) 100.

The remedy is discretionary, the question being not what must the court do but what, under all the circumstances of the case, should it do in the interest of justice. *Plummer v. Keepler*, 25 N. J. Eq. 481; *Mississippi, etc., R. Co. v. Cromwell*, 91 U. S. 643; *Fish v. Leser*, 69 Ill. 394.

1. 5 *Lawson's Rts. Rem. & Pr.*, § 2600; *Ramshire v. Bolton*, L. R., 8 Eq. 294; *Hill v. Lane*, L. R., 11 Eq. 215; *Barry v. Croskey*, 2 J. & H. 1; *Nickerson v. Nickerson*, 127 U. S. 668; *Blackwelder v. Loveless*, 21 Ala. 371; *Young v. Daniels*, 2 Iowa 126; 63 Am. Dec. 477; *Johnson v. Hubbell*, 10 N. J. Eq. 332; 66 Am. Dec. 773; *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 339; *Hennessey v. Woolworth*, 128 U. S. 438; *Sherman v. Wright*, 49 N. Y. 227; *Peters v. Delaplaine*, 49 N. Y.

362; *Day v. Hunt*, 112 N. Y. 191; *Hayes v. Nourse*, 114 N. Y. 595; 11 Am. St. Rep. 700; *Vincent v. Larson*, 1 Idaho N. S. 241; *Auter v. Miller*, 18 Iowa 405; *Minneapolis, etc., Co. v. Cox*, 76 Iowa 306; *McComas v. Easley*, 21 Gratt. (Va.) 23; *Hale v. Wilkinson*, 21 Gratt. (Va.) 75; *Hudson v. Layton*, 5 Harr. (Del.) 74; 48 Am. Dec. 167; *Godwin v. Collins*, 3 Del. Ch. 189; *Knox v. Spratt*, 23 Fla. 64; *Love v. Welch*, 97 N. Car. 200; *Ramsey v. Gheen*, 99 N. Car. 215; *Datz v. Phillips*, 137 Pa. St. 203; 21 Am. St. Rep. 864; *Jones v. Newhall*, 115 Mass. 244; 15 Am. Rep. 97; *Western R. Corp. v. Babcock*, 6 Met. (Mass.) 346; *Waters v. Howard*, 8 Gill (Md.) 262; *Philpot v. Elliott*, 4 Md. Ch. 273; *Smoot v. Rea*, 19 Md. 398; *Chambers v. Livermore*, 15 Mich. 381; *Hester v. Hooker*, 7 Smed. & M. (Miss.) 768; *Tobey v. Bristol Co.*, 3 Story (U. S.) 500; *Pickering v. Pickering*, 38 N. H. 400; *Eckstein v. Downing*, 64 N. H. 248; 10 Am. St. Rep. 404; *Rudolph v. Covell*, 5 Iowa 126; *Humbard v. Humbard*, 3 Head (Tenn.) 100; *Barrett v. Farney*, 82 Va. 269; *Knott v. Shepardstown Mfg. Co.*, 30 W. Va. 790.

2. 1 *Willard's Eq. Jur.* 263; *Trigg v. Read*, 5 Humph. (Tenn.) 529; 42 Am. Dec. 447; *Vawter v. Bacon*, 89 Ind. 565; *Tyson v. Watts*, 1 Md. Ch. 13; *Crane v. Gough*, 4 Md. 316; *Casey v. Holmes*, 10 Ala. 776.

3. *Pomeroy's Eq. Jur.*, § 1404.

4. *Shaw v. Livermore*, 2 Greene (Iowa) 343; *Young v. Daniels*, 2 Iowa 126; 63 Am. Dec. 477.

are enforced specifically as a matter of course,¹ while other contracts are not.²

The discretion to refuse is not to be exercised where the contract which the plaintiff seeks to enforce is evidently fair in all its parts, free from fraud or error, and founded on a proper consideration. In such cases it would be the exercise of arbitrary power to refuse relief.³ Specific performance is akin to certain other branches of equity jurisprudence, such as injunction and rescission. Under certain circumstances it differs but slightly from injunction; where the circumstances are alike, affirmative relief will take the form of a decree for specific performance, or negative relief may be afforded by injunction. In the one instance, the court decrees that the offending party shall perform an agreement which he has broken, and in the other, the court forbids and prevents the breach which he is about to make.⁴

It is the exact reverse of rescission, the defendant who resists the application for specific performance standing in much the

1. Pomeroy's Eq. Jur., § 221; Fowler v. Marshall, 29 Kan. 665; St. Paul Division v. Brown, 9 Minn. 157; Aston v. Robinson, 49 Miss. 348.

Specific performance of a contract to convey land will not be refused on the ground of an adequate remedy at law, as there could be recovered at law only the excess of the sum agreed to be paid above the market value when the contract was to be performed, and this is an inadequate remedy. Hodges v. Knowing, 58 Conn. 12.

2. Young v. Daniels, 2 Iowa 126; 63 Am. Dec. 477. See *infra*, this title, *Contracts Enforceable*, etc.

Equity will not relieve where money is a sufficient compensation for the breach. Carter v. United Ins. Co., 1 Johns. Ch. (N. Y.) 463; Taylor v. Reese, 44 Miss. 93; Bailey v. Strong, 8 Conn. 278; Pitkin v. Pitkin, 7 Conn. 307; 18 Am. Dec. 111; Rees v. Parish, 1 McCord Ch. (S. Car.) 561; Jones v. Boston Mill Corp., 4 Pick. (Mass.) 511; 16 Am. Dec. 358; Story v. Norwich, etc., R. Co., 24 Conn. 94; Howe v. Nickerson, 14 Allen (Mass.) 400; nor where the contract is merely one for the payment of money. Pierce v. Plumb, 74 Ill. 326; Richmond v. Dubuque, etc., R. Co., 33 Iowa 422; Bradford, etc., R. Co. v. New York, etc., R. Co., 123 N. Y. 316; as to enforce a vendor's lien. Hawkins v. Thurman, 1 Idaho N. S. 598; nor where, by reason of the contract's not being enforceable, the decree could only be for the payment of money. Summerlin v. Fronteriza Silver Min., etc., Co., 41 Fed.

Rep. 249; Murdock v. Anderson, 4 Jones Eq. (N. Car.) 77. But see *infra*, this title, *Decree — Compensation in Lieu of Performance*.

Thus, where defendant had contracted to construct a secure building foundation for plaintiff and failed to do so, and the plaintiff then did the necessary work and sued defendant, praying for a specific performance by requiring defendant to reimburse to plaintiff his money expended, the court of chancery very properly held this to be a mere claim for damages, and refused to entertain jurisdiction. Church of the Holy Communion v. Paterson, etc., R. Co., 46 N. J. Eq. 372. See also Hicks v. Turck, 72 Mich. 311.

3. Cabeen v. Gordon, 1 Hill Eq. (S. Car.) 51; Hale v. Wilkinson, 21 Gratt. (Va.) 80. See Abbott v. L'Hommiedieu, 10 W. Va. 677.

4. See INJUNCTION, vol. 10, p. 779; Pomeroy Eq. Jur., § 1341. See Parker v. Garrison, 61 Ill. 250.

To enjoin from refusing performance is, in effect, to decree specific performance; and this the chancellor cannot do in vacation. Lowell Machine Shop v. Atlanta Cotton Factory Co., 60 Ga. 233.

Upon a bill for a specific execution of an agreement and an injunction, it is clear, that if, upon the plaintiff's case, as made out by his bill, he is not entitled to a specific execution of the agreement set up by him, he cannot be entitled to an injunction, which is only ancillary to the principal object of the suit. Allen v. Burke, 2 Md. Ch. 534.

same attitude as that of the plaintiff who seeks a rescission.¹ But the relative positions of the parties are not precisely the same, for the heavier burden in each case is on the plaintiff.²

III. JURISDICTION AND POWER OF THE COURT.—The jurisdiction of courts of equity is not confined within the narrow limits that once bound it. The constant tendency has been to broaden their powers. Especially is this true in the exercise of jurisdiction in suits for specific performance.³ The former doctrine was the general principle of equity that the suitor could only invoke this remedy when relief in damages was wholly inadequate. And this is still the rule,⁴ stated broadly and subject to many excep-

1. See *Johnston v. Mitchell*, 1 A. K. Marsh. (Ky.) 225; 10 Am. Dec. 727. See *RESCISSIION*, vol. 21, p. 24.

2. In *Osgood v. Franklin*, 2 Johns. Ch. (N.Y.) 23; 7 Am. Dec. 513, the court by Kent, Ch., says: "There is a very important distinction between ordering a contract to be rescinded and decreeing a specific performance. Though inadequacy of price is not a ground for decreeing an agreement to be delivered up or a sale rescinded unless its grossness amount to fraud, yet it may be sufficient for the court to refuse to enforce performance. It is not uncommon for the court to refuse to enforce for inadequacy and at the same time to refuse to rescind." See *Clitherall v. Ogilvie*, 1 Desaus. Eq. (S. Car.) 257; *Seymour v. Delancy*, 3 Cow. (N. Y.) 445; 6 Johns. Ch. (N. Y.) 222; 15 Am. Dec. 270.

Chancery may refuse to decree specific performance of a contract, although it is such a contract as it would not set aside if executed. *Barksdale v. Payne*, Riley Eq. (S. Car.) 174. See also *Willard Eq. Jur.* 264; *Jackson v. Ashton*, 11 Pet. (U. S.) 229; *Cathcart v. Robinson*, 5 Pet. (U. S.) 264; *Clark v. Maurer*, 77 Iowa 717.

3. *Tyson v. Watts*, 1 Md. Ch. 13.

4. *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 339; *Memphis v. Brown*, 20 Wall. (U. S.) 289; *Brewster v. Tuthill Spring Co.*, 34 Fed. Rep. 769; *Sainter v. Ferguson*, 1 M. & G. 286.

Courts of equity will not entertain jurisdiction to compel the specific performance of a contract, when the plaintiff can obtain adequate redress by his action at law for damages. *Pennsylvania Coal Co. v. Delaware, etc., Canal Co.*, 31 N. Y. 91; *Flint v. Brandon*, 8 Ves. Jr. 163; *Harnett v. Yielding*, 2 S. & L. 553; *Comer v. Bankhead*, 70 Ala. 496; *Bailey v. Strong*, 8 Conn. 278; *Corbin v. Tracy*, 34 Conn. 325; *Samp-*

son v. Hunt, 1 Root (Conn.) 521; *Satterthwait v. Marshall*, 4 Del. Ch. 337; *Doggett v. Hart*, 5 Fla. 215; 58 Am. Dec. 464; *Thompson v. Manley*, 16 Ga. 440; *Orr v. Brown*, 5 Ga. 400; *Smith v. Carney*, 1 Litt. (Ky.) 295; *Chamberlain v. Blue*, 6 Blackf. (Ind.) 491; *Mather v. Simonton*, 73 Ind. 595; *Richmond v. Dubuque, etc.*, R. Co. 33 Iowa 422; *Bonebright v. Pease*, 3 Mich. 318; *Adair v. Winchester*, 7 Gill & J. (Md.) 114; *Noyes v. Marsh*, 123 Mass. 286; *McClane v. White*, 5 Minn. 178; *Peeler v. Levy*, 26 N. J. Eq. 330; *Carter v. United Ins. Co.*, 1 Johns. Ch. (N. Y.) 463; *Cutting v. Dana*, 25 N. J. Eq. 265; *Johnson v. Brooks*, 93 N. Y. 337; *Dech's Appeal*, 57 Pa. St. 467; *Nestel v. Knickerbocker L. Ins. Co.*, 13 Phila. (Pa.) 477; *Smaltz's Appeal*, 99 Pa. St. 310; *Barnes v. Barnes*, 65 N. Car. 261; *Mechanics', etc., Bank v. Debolt*, 1 Ohio St. 591; *Rees v. Parish*, 1 McCord Eq. (S. Car.) 56; *Moseley v. Boush*, 4 Rand. (Va.) 392.

Compare *Cutting v. Dana*, 25 N. J. Eq. 265.

As a general rule equity will not interfere to compel specific performance of a contract, except where the legal remedy is inadequate, and something remains to be done besides the mere payment of money. *Phyfe v. Wardell*, 2 Edw. Ch. (N. Y.) 47. See *Summerlin v. Fronteriza Silver Min., etc., Co.*, 41 Fed. Rep. 249.

A contract in the form of a bond, which binds the defendant in a penal sum for the performance of certain work, and binds the plaintiff to pay for such work when completed, does not entitle plaintiff to a decree for specific performance, as a breach of the contract may be compensated in damages. *McCarter v. Armstrong* (S. Car. 1890), 10 S. E. Rep. 953.

Where a complaining party will not be deprived of any legal right by

tions. But of recent years, with the expansion of the equity powers, the practice has become prevalent to allow the suitor his choice of remedies,¹ where the nature of the case is such as to permit the chancellor to intervene at all.² He may not seek

withholding specific redress in chancery, relief should not be granted, unless he can show clearly that he is entitled to it. *Parish v. Oldham*, 3 J. J. Marsh. (Ky.) 544.

An action in damages is not an adequate remedy, if the defendant be actually insolvent. *Clark v. Flint*, 22 Pick. (Mass.) 231; 33 Am. Dec. 733.

1. *Crary v. Smith*, 2 N. Y. 60; *Pincke v. Curteis*, 4 Bro. C. C. 329; *Smyth v. Sturges*, 108 N. Y. 495; *Taggart v. Tevanny*, 1 Ind. App. 339; *Snodgrass v. Snodgrass*, 32 Ind. 406; *Hill v. Hobart*, 16 Me. 164; *Godfrey v. Dwinell*, 40 Me. 94; *Bryson v. Peak*, 8 Ired. Eq. (N. Car.) 310.

2. It has been held that the vendor of land has the right to come into a court of equity to compel the specific performance of a contract of sale against the vendee, although he may have another and adequate remedy at law for the purchase money, and the vendee has the same liberty. *Crary v. Smith*, 2 N. Y. 60; *Brown v. Haff*, 6 Paige (N. Y.) 235; 28 Am. Dec. 425; *Phyfe v. Wardell*, 5 Paige (N. Y.) 283; 28 Am. Dec. 430; *Schroeppel v. Hopper*, 40 Barb. (N. Y.) 425; *Cathcart v. Robinson*, 5 Pet. (U. S.) 269; *Rindge v. Baker*, 57 N. Y. 219; 15 Am. Rep. 475; *Stone v. Lord*, 80 N. Y. 60; *Baumann v. Pinckney*, 118 N. Y. 604; *Andrews v. Sullivan*, 7 Ill. 327; 43 Am. Dec. 53; *Heatherwick v. Heatherwick*, 32 Ill. 73; *Springs v. Sanders*, Phill. Eq. (N. Car.) 67; *Finley v. Aiken*, 1 Grant Cas. (Pa.) 83; *Larison v. Burt*, 4 W. & S. (Pa.) 27. See *infra*, this title, *Contracts Relating to Land*.

In *Andrews v. Sullivan*, 7 Ill. 327; 43 Am. Dec. 53, the court by Scates, J., states the general rule that equity will not interfere where the party has his remedy at law, and adds: "It is also true that an action at law may be maintained upon this note (a purchase-money note) if plaintiff has performed his part of the agreement. But it is equally true that one particular branch of the jurisdiction of courts of equity is the enforcement of a specific execution of contracts. While the rule, therefore, is general, it is not universal," and quotes from Sugden on

Vendors 216: "If either the vendor or the vendee refuse to perform the contract, the other may bring an action for breach of contract, or file a bill for a specific performance, although it appears to have been formerly thought that as a vendor only wants the purchase money, his remedy was at law."

The distinction is made by the New York court in *Rindge v. Baker*, 57 N. Y. 219; 15 Am. Rep. 475, by Dwight, Com., thus: "If the action be brought for damages for breach of contract, it is a case at law. If it be brought for money by way of performance of the contract, it is a case in equity. Thus, where a vendor, in a contract for sale of land, sues for the price, his action is equitable. The mutuality of the contract gives each of the parties the same remedy, and yet the recovery by the vendor is simply in money.

"If this theory did not prevail in respect to contracts partly performed, the vendor would be utterly without remedy, since it is well settled that there is no action at law on a parol contract in part performed." And see *Memphis, etc., R. Co. v. Scruggs*, 50 Miss. 284.

Where, on a bill by a vendor, it appeared that by the contract the vendee had the right to relieve himself from the purchase by paying a stipulated sum, it was held that the right to come into equity for specific performance being clear, the court, in refusing that decree, might, under the rule that if jurisdiction in equity once attaches, the court may go on to do complete justice, decree the payment by the vendee of the stipulated sum to the vendor, although the vendor might have recovered the same at law. *Cathcart v. Robinson*, 5 Pet. (U. S.) 264. Compare *Stevenson v. Buxton*, 8 Abb. Pr. (N. Y.) 414.

Of course, where the complainant would have a remedy more adequate and full at law than a decree for specific performance could give him, equity will not interfere. *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 339.

Chancery will not enforce specific performance of a contract to convey land of small value where there are no

both damages and performance, but will be required to elect his remedy; and the refusal to grant this relief in equity will not preclude a recovery at law.¹

On the other hand, it has been held that one who possesses the right of enforcement in equity may lose that right by first prosecuting his claim to judgment at law,² although such is not the

equitable grounds, and an adequate remedy at law may be had for much less cost. *Blake v. Flatley*, 44 N. J. Eq. 228.

Where decreeing the specific performance of a contract will impose upon one of the parties a large burden of expense, without any practical benefit to the other, the court will refuse to grant a decree, and leave the plaintiff to his action at law. *Chicago, etc., R. Co. v. Schoeneman*, 90 Ill. 258; *Royle v. Wynne*, C. & P. 252; *Heywood v. Covington*, 4 Leigh (Va.) 373; *Long v. Colston*, 1 Hen. & M. (Va.) 111; *Herrington v. Hubbard*, 2 Ill. 569; 33 Am. Dec. 426; *Harsha v. Reid*, 45 N. Y. 415.

1. 1 Story Eq. Jur. 769; *Vawter v. Bacon*, 89 Ind. 565; *Beck v. Allison*, 56 N. Y. 336; 15 Am. Rep. 430; *Bal-lou v. Billings*, 136 Mass. 307.

2. *Marston v. Humphrey*, 24 Me. 513; *Buckmaster v. Grundy*, 8 Ill. 626; *Sainter v. Ferguson*, 1 M. & G. 286; *Moore v. Fitz Randolph*, 6 Leigh (Va.) 175; 29 Am. Dec. 208; *Long v. Colston*, 1 Hen. & M. (Va.) 111; *Funk v. M'Keoun*, 4 J. J. Marsh. (Ky.) 162.

A recovery of damages in an action for the breach of a covenant by the grantee of land for the purpose of a public square, to grade, inclose, and improve the premises, is a bar to a bill for the specific performance of such covenant. But a recovery for the breach of a covenant to forever keep the premises open as a public square, is not a bar to a subsequent bill for specific performance of the covenant, it being a continuing covenant. *Stuyvesant v. Mayor, etc., of N. Y.*, 11 Paige (N. Y.) 414.

In *Moore v. Fitz Randolph*, 6 Leigh (Va.) 175; 29 Am. Dec. 208, the court, by Carr, J., said: "The ground on which equity first assumed the power of giving specific performance of contracts, was to aid the defective remedy of the common law. A man bought a tract of land; it pleased his taste, and he wanted it for a residence. After he had paid his money, the vendor changed his mind, refused a

title, and the vendee could only sue at law for the money he had paid. Equity said: This is not justice, if the vendee wants the land, he shall have it in specie. Having gone thus far the courts, on the ground of reciprocity, went a step further, and said that the vendor also should have their aid if the vendee refused to execute the contract. But they did not say, and could not say, that the vendor might break his covenant, suffer a suit on it at law, take his chance of defense there, and when judgment was recovered against him, begin a new race in equity for a specific execution."

It seems to be regarded as an insuperable barrier to a decree for specific performance that the plaintiff, before the filing of his bill had failed in an attempt to enforce the agreement at law. *Story Eq. Jur.*, § 737; *Swinfen v. Swinfen*, 2 De G. & J. 381.

Vendors of land sued the purchaser for their damages by reason of his failure to perform. Upon trial before a judge, a jury being waived, they failed to prove any damages. *Held*, that the court could not grant a judgment for specific performance, although the evidence warranted such a suit. *Towle v. Jones*, 19 Abb. Pr. (N. Y.) 449; *Cowenhoven v. Brooklyn*, 38 Barb. (N. Y.) 9.

The commencement of a suit at law for breach of a contract, is not of itself a bar to a suit in the court of chancery, by the other party, for a specific performance. *Brush v. Vandenberg*, 1 Edw. Ch. (N. Y.) 21.

In *Long v. Colston*, 1 Hen. & M. (Va.) 110, *Long*, considering that *Colston* had broken his covenant, sued on it at law. Instead of defending himself there, *Colston* filed a bill, offering a specific execution, and praying that the whole matter might be transferred into equity. On the broad ground that in cases proper for specific execution, though the party aggrieved may have elected to proceed at law for damages, yet as he might have resorted to equity for a specific performance, and as in equity rem-

universal rule.¹ The fact that one party to a contract might have recovered damages at law of the other for his non-performance is no reason why the former should not have a decree for a specific performance.² The aim of the courts is to grant equitable relief whenever such a decree would best accomplish the ends of justice.³ The jurisdiction may be said to reach all contracts the specific performance of which would be indispensable to justice, all contracts for the breach of which there could be no proper measure of damages, all cases, indeed, where the judgment of a court of law could not put the plaintiff in as beneficial and satisfactory a situation as enforcement might, or as he would have been in, had the contract been originally fulfilled. And where equity once obtains jurisdiction it proceeds to adjust all questions material to complete justice between the parties.⁴ The decree of chancery in such cases operates *in rem* as well as *in personam*, although its primary aim is rather to reach the person and control the conscience of the defendant than to affect his property.⁵

edies ought to be reciprocal, the aggrieved party might compel him to abandon his common-law remedy, and hold him to a remedy for specific performance.

The remedy of specific performance is based upon the existence of a contract between the parties to the suit or between those through whom they claim; and when it was settled by a prior action at law that no such contract or promise was ever made, and that the acts done and claimed as in performance were under a mere parol license, no specific performance can be decreed. *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384; 54 Am. Rep. 243.

1. In *Connihan v. Thompson*, 111 Mass. 270, the court, by Wells, J., said: "The remedy in equity by compelling specific performance and that at law in damages for the breach are both in affirmance of the contract. They are alternative remedies, but not inconsistent; and remedy in both forms might be sought in one and the same action. If the plaintiff institutes separate actions, he cannot carry both to judgment and satisfaction. He may be compelled, by order of the court, at any stage of the proceedings, to elect which he will further prosecute. But the mere commencement or pendency of one will not bar the other, or defeat the action." *Citing Livingston v. Kane*, 3 Johns. Ch. (N. Y.) 224; *Rogers v. Vosburgh*, 4 Johns. Ch. (N. Y.) 84.

Where a purchaser had the uninter-

rupted possession, but through his own fault prevented the title from being conveyed, it was held that he should be compelled to execute the contract, although he had commenced an action before the bill was filed, and obtained judgment for breach of covenant. *Hughes v. McKinsey*, 5 T. B. Mon. (Ky.) 38.

2. *Washburn v. Dewey*, 17 Vt. 92.

3. *Shimer v. Morris Canal, etc.*, Co., 27 N. J. Eq. 364; *Carpenter v. Atherton*, 28 How. Pr. (N. Y.) 307; *Duff v. Fisher*, 15 Cal. 381; *McGarvey v. Hall*, 23 Cal. 140; *Sullivan v. Tuck*, 1 Md. Ch. 59; *Waters v. Howard*, 1 Md. Ch. 112; *Barr v. Lapsley*, 1 Wheat. (U. S.) 152; *Very v. Levy*, 13 How. (U. S.) 345; *Willard v. Tayloe*, 8 Wall. (U. S.) 557; *Kirksey v. Fike*, 27 Ala. 383; 62 Am. Dec. 768; *Bogan v. Daughdrill*, 51 Ala. 312; *McKnight v. Robbins*, 5 N. J. Eq. 229; *Shimer v. Morris Canal, etc.*, Co., 27 N. J. Eq. 364; *Ashe v. Johnson*, 2 Jones Eq. (N. Car.) 149; *Barnes v. Barnes*, 65 N. Car. 261; *Furman v. Clark*, 11 N. J. Eq. 306; *Steward v. Winters*, 4 Sandf. Ch. (N. Y.) 587; *Hall v. Hiles*, 2 Bush (Ky.) 532; *McMullen v. Vanzant*, 73 Ill. 190; *Watson v. Smith*, 7 Oregon 448; *Somerville v. Buntin*, 118 Mass. 279; 19 Am. Rep. 459; *May v. LeClaire*, 11 Wall. (U. S.) 217; *Stuyvesant v. Mayor, etc.*, of N. Y., 11 Paige (N. Y.) 414.

4. See *infra*, this title, *Doctrines*.

5. *Pomeroy's Eq. Jur.*, § 135; 1 Ves. 454; *Massie v. Watts*, 6 Cranch (U. S.) 158; *Worthington v. Lee*, 61 Md. 530;

The decree may regulate the conduct and enforce the contracts of aliens and non-residents temporarily within the territorial jurisdiction and served with notice there,¹ and direct the management and the conveyance of real estate abroad,² the jurisdiction being complete if the defendant be personally before the

Davis *v.* Parker, 14 Allen (Mass.) 94; Burrall *v.* Eames, 5 Wis. 260.

1. Dooley *v.* Watson, 1 Gray (Mass.) 414; Cleveland *v.* Burrill, 25 Barb. (N. Y.) 532; MacGregor *v.* MacGregor, 9 Iowa 65; Penn *v.* Hayward, 14 Ohio St. 302; Pingree *v.* Coffin, 12 Gray (Mass.) 288.

But see Porter *v.* Worthington, 14 Ala. 584; Carter *v.* Jordan, 15 Ga. 76; Smith *v.* Iverson, 22 Ga. 190; Akin *v.* Lloyd, 28 Ill. 331; Birchard *v.* Cheever, 40 Vt. 94.

2. Archer *v.* Preston, 1 Eq. Cas. Abr. 133 ch. 3; Foster *v.* Vassall, 3 Atk. 589; Pike *v.* Hoare, 2 Eden 185; Jackson *v.* Petrie, 10 Ves. 164; Lord Portarlington *v.* Soulby, 3 Mylne & K. 108; White *v.* Hall, 12 Ves. 323; Farley *v.* Shippen, Wythe (Va.) 135; Toller *v.* Carteret, 3 Vern. 494; Hughes *v.* Hall, 5 Munf. (Va.) 431; Cranstown *v.* Johnston, 3 Ves. 170; 5 Ves. 277; Kildare *v.* Eustace, 1 Vern. 419; Guerrant *v.* Fowler, 1 Hen. & M. (Va.) 5; Bailey *v.* Ryder, 10 N. Y. 363; Ward *v.* Arredondo, Hopk. (N. Y.) 213; 14 Am. Dec. 543; Sutphen *v.* Fowler, 9 Paige (N. Y.) 280; Mead *v.* Merritt, 2 Paige (N. Y.) 402; Newton *v.* Bronson, 13 N. Y. 587; 67 Am. Dec. 89; Gardner *v.* Ogden, 22 N. Y. 327; 78 Am. Dec. 192; Shattuck *v.* Cassidy, 3 Edw. Ch. (N. Y.) 152; DeKlyn *v.* Watkins, 3 Sandf. Ch. (N. Y.) 185; Stansbury *v.* Fringer, 11 Gill & J. (Md.) 149; Davis *v.* Parker, 14 Allen (Mass.) 94; Pingree *v.* Coffin, 12 Gray (Mass.) 304; Brown *v.* Desmond, 100 Mass. 267; Olney *v.* Eaton, 66 Mo. 563; Keyser *v.* Rice, 47 Md. 203; 28 Am. Rep. 448; Penn *v.* Hayward, 14 Ohio St. 302; Burnley *v.* Stevenson, 24 Ohio St. 474; 15 Am. Rep. 625; Snook *v.* Smetzer, 25 Ohio St. 516; Watkins *v.* Holman, 16 Pet. (U. S.) 25; McDowell *v.* Read, 3 La. Ann. 391; Caldwell *v.* Carrington, 9 Pet. (U. S.) 86; Watts *v.* Waddle, 6 Pet. (U. S.) 400. *Contra*, see Rourke *v.* McLaughlin, 38 Cal. 196; Cloud *v.* Greasley, 125 Ill. 313; White *v.* White, 7 Gill & J. (Md.) 208; Wood *v.* Warner, 15 N. J. Eq. 81; Davis *v.* Headley, 22 N. J. Eq. 120; Potter *v.* Hollister, 45 N. J. Eq. 508; Topp *v.*

White, 12 Heisk. (Tenn.) 165; Hughes *v.* Hall, 5 Munf. (Va.) 431.

A will directed a devisee to convey certain land in another State to M. On a suit to compel the conveyance it was held that the devisee could base no defense on the argument that as M could not have maintained an action in such State to recover the land, the will not being recorded there, his heirs could not maintain an action to compel a conveyance. McQuerry *v.* Gilleland (Ky. 1890), 12 S. W. Rep. 1037.

If a defendant is personally within the jurisdiction of the court, the court has jurisdiction as to his property situated beyond the reach of the process of the court; and he may be compelled either to bring the property in dispute within the jurisdiction of the court, or to execute such a transfer of conveyance thereof as will vest the legal title, as well as the possession of the property, according to the *lex loci rei sita*. Mitchell *v.* Bunch, 2 Paige (N. Y.) 615; 22 Am. Dec. 674.

Thus in Penn *v.* Baltimore, 1 Ves. Sr. 444, Lord Hardwicke decreed the specific performance of a contract relative to the boundary between the colonies of Pennsylvania and Maryland. And in Archer *v.* Preston (*cited in* 1 Vern. 135), the court decreed the specific performance of a contract concerning land in Ireland. See Arglasse *v.* Muschamp, 1 Vern. 237; Massie *v.* Watts, 6 Cranch (U. S.) 159. And in Derby *v.* Athol, 1 Ves. 202, the court maintained its right to consider the title to the Isle of Man, where equitable interests were involved.

A court of equity may compel the specific performance of a contract to purchase land, though such contract was both made and to be performed, and the land lies within a foreign jurisdiction; provided the defendant has been duly served with process, and subjected to the jurisdiction of the court. Cleveland *v.* Burrill, 25 Barb. (N. Y.) 532.

But where part only of the persons from whom such conveyance is required are residents of the State, and the court has not acquired jurisdiction over the

court, no matter where the property in suit be situated.¹ While this is true, the courts have no power to pass the title to land situated abroad. They may compass practically the same end by binding the conscience of its owner and compelling him to carry out his agreements concerning it; but there is no authority to directly affect the land itself or the title of it, and the deed of a master appointed to convey for the contractor will have no efficacy.²

It is not always essential to the jurisdiction that the defendant

persons of the non-residents, so that complete relief cannot be had in that suit, the cause will be dismissed; especially where no real necessity exists for trenching upon the rule discountenancing multiplicity of suits. *Penn v. Hayward*, 14 Ohio St. 302.

Ward v. Arredondo, Hopk. (N. Y.) 213; 14 Am. Dec. 543, was a suit in the New York courts by a resident of the West Indies against other residents of those islands to enforce a contract made in Cuba for the conveyance of Alabama lands. The court, on appeal, sustained the jurisdiction, and, by Sandford, Ch., said: "This is in effect a bill to enforce a specific performance of the contract by laying hold of the deed which is within the jurisdiction of the court. If the land and all parties were within the jurisdiction it would be the ordinary case. The peculiarity is, that the land and the only party defendant who has an interest, is out of the jurisdiction. An objection has been made that there may be different suits under different jurisdictions, and thence that there may be conflicting decisions. It is very true that none but the Alabama courts can determine the title to the land in the last resort. . . .

The elementary principle seems to be that the jurisdiction may be upheld wherever the parties or the subjects are within the jurisdiction, that an effectual decree can be made and enforced so as to do justice between the parties. . . . The dispute, then, is about a personal contract which is transitory and may be enforced in any country. To enforce it here encroaches not upon any jurisdiction of Spain or Alabama. The deed is subject to our jurisdiction; that deed is such a portion of the subject in question, that by acting upon it, the court may decide the controversy, and do complete justice between the parties." See *Myres v. De Mier*, 4 Daly (N. Y.) 343.

The courts will enforce a contract to execute a mortgage upon land situated abroad. *Hicks v. Turck*, 86 Mich. 214.

In Kansas, etc., *R. Const. Co. v. Topeka R. Co.*, 135 Mass. 34; 16 Am. & Eng. R. Cas. 495; 46 Am. Rep. 439, suit was brought in a Massachusetts court by a Kansas construction company against a Kansas railroad corporation and a citizen of Massachusetts to enforce specific performance of a covenant contained in a contract for the delivery of bonds and certificates of stock in payment of work to be performed in Kansas by the plaintiff and to enjoin the Massachusetts defendant from disposing of shares of stock and railroad bonds alleged to have been delivered to him in violation of the rights of plaintiff. The defendant railroad company had an office in Massachusetts for the transfer of shares of its capital stock and appeared to the suit by its attorney. Upon the ground that the delivery of the certificates was but a small part of the contract and that the performance of the work contemplated not having been executed it was of such a nature that a Massachusetts court at least would be powerless to compel its execution, specific performance of the contract against the defendants was refused.

1. *Gardner v. Ogden*, 22 N. Y. 327; 78 Am. Dec. 192; *Stephenson v. Davis*, 56 Me. 75; *Worthington v. Lee*, 61 Md. 530; *Davis v. Headley*, 22 N. J. Eq. 120; *Shattuck v. Cassidy*, 3 Edw. Ch. (N. Y.) 152; *Sutphen v. Fowler*, 9 Paige (N. Y.) 280; *Penn v. Hayward*, 14 Ohio St. 302; *Great Falls Mfg. Co. v. Worster*, 23 N. H. 462; *March v. Eastern R. Co.*, 40 N. H. 548; 77 Am. Dec. 744; *Orr v. Irwin*, 2 Law Repos. (N. Car.) 465.

Thus the court of *Illinois*, where the parties reside, may decree specific performance of a contract requiring defendant to convey to plaintiff land in Arkansas, in consideration that plaintiff build a house on defendant's lot in Illinois. *Cloud v. Greasley*, 125 Ill. 313.

2. In *Burnley v. Stevenson*, 24 Ohio St. 474; 15 Am. Rep. 625, the court by

be personally before the court, for in many instances the presence within the jurisdiction of the property involved gives the court the opportunity to enforce its decree, and enables it to control possession and title to chattels, even where the party sought to be bound is not subject to judicial process. Nor is the *locus* of the chattel or of the contract material, if jurisdiction of the person can be acquired.¹ The transfer of corporate stock may be decreed² whether the corporation be domestic or foreign, and the contracts of corporations may be enforced, the courts exercising the same jurisdiction over acts and contracts of private and municipal corporations that they do over the acts of individuals.³ The courts may compel the

McIlvaine, J., says: "It does not follow, however, that a court having power to compel the parties before it to convey lands situated in another State may make its own decree to operate in such conveyance. Indeed, it is well settled that the decree of such court cannot operate to transfer title of land situate in a foreign jurisdiction. And this, for the reason that a judgment or decree *in rem* cannot operate beyond the limits of the jurisdiction or State wherein it is rendered. And, if a decree in such case cannot effect the transfer of the title to such lands, it is clear that a deed executed by a master under the direction of the court can have no greater effect." See *Watts v. Waddle*, 6 Pet. (U. S.) 389; *Page v. McKee*, 3 Bush (Ky.) 135; 96 Am. Dec. 201; *Howard v. Huffman*, 3 Head (Tenn.) 462; 75 Am. Dec. 783. See also *infra*, this title, *Decree*. 1 Willard Eq. Jur. 270; *Story's Eq.*, § 744a; *Ward v. Arredondo*, Hopk. Ch. (N. Y.) 213; 14 Am. Dec. 543; *Telfair v. Telfair*, 2 Desaus. Eq. (S. Car.) 271.

By the laws of *Ohio*, a decree for the conveyance of land operates as a conveyance, but it cannot so operate if the land is *de facto* under a foreign jurisdiction when the proceedings are commenced, although within the jurisdiction of the court rendering the decree at its rendition. Where a bill was filed to compel a conveyance of land within the territory claimed both by Michigan and Ohio over which jurisdiction was at the time exercised by Michigan, although the general assembly of Ohio had by law extended the jurisdiction of that State over the territory, and a subpoena was served within that territory upon the defendant by leaving a copy at his residence in his absence—held, that the decree for a conveyance was inoperative as to

the land; also, that there was no such service as to give the court jurisdiction of the defendant's person. *Daniels v. Stevens*, 19 Ohio 222.

Mortgaged land in Massachusetts was there sold on foreclosure. Held, that a court of equity in Vermont could compel the purchaser of the equity of redemption to pay the deficiency, his deed subjecting him to the obligation to do so. *Davis v. Hulett*, 58 Vt. 90.

1. *March v. Eastern R. Co.*, 40 N. H. 548; 77 Am. Dec. 732.

But in *Kansas*, etc., *R. Const. Co. v. Topeka*, etc., *R. Co.*, 135 Mass. 34; 16 Am. & Eng. R. Cas. 495; 46 Am. Rep. 439, the court refused to entertain a bill by one foreign corporation against another and a citizen, where the transactions done, or to be done were beyond the State and of such character that the court could not control them.

2. See *infra*, this title, *Contracts Which Concern Personal Property*.

3. *Hooper v. Savannah*, etc., *R. Co.*, 69 Ala. 529; 14 Am. & Eng. R. Cas. 256; *Jones v. Boston Mill Corp.*, 4 Pick. (Mass.) 507; 16 Am. Dec. 358; *Desper v. Continental Water Meter Co.*, 137 Mass. 252; *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 373; 32 Am. Rep. 315.

In *Massachusetts*, a bill will not lie against a foreign corporation unless such corporation be properly before the court by voluntary appearance or by attachment. *Desper v. Continental Water Meter Co.*, 137 Mass. 252.

Of course where a suit is brought against an alien, or a non-resident, whether an individual or a corporation, such defendant must be properly before the court by appearance or by summons or attachment, it being impossible for the court to extend the

enforcement of almost every class of contract, whether entered into or to be executed within the State or outside of it, their extraordinary powers extending to the enforcement of all proper contracts which by their nature can find no satisfactory or legal enforcement at law.¹ This is subject to the limitation that a foreign contract, to be specifically enforced, must be legally enforceable in the country where it was entered into, as well as consistent with the law and policy of this country.² As the decree strictly and primarily operates against the person rather than *in rem*, the general rule is that suit may be brought and jurisdiction entertained in the county where the defendant resides; or, if he be a non-resident, in any forum where process may be had upon him.³ Some courts have held that in the absence of statute, such suits, if they relate to real estate contracts, are to be commenced only in the county or district where the land is,⁴ but such is not the true rule, the authorities generally allowing the county of the defendant's residence to determine the jurisdiction.⁵

IV. EQUITABLE MAXIMS, APPLIED AND ILLUSTRATED.—Most of the maxims of equity have full application to the equitable remedy under consideration, notably those which follow.

1. Equity Follows the Law.⁶

arm of its process into a foreign State. *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498; 3 Am. St. Rep. 758; *Sayre v. Elyton Land Co.*, 73 Ala. 85; *Galpin v. Page*, 18 Wall. (U. S.) 350; *Camden, etc., Co. v. Swede Iron Co.*, 32 N. J. L. 15. See *Shafer v. O'Brien*, 31 W. Va. 601.

1. *Foubert v. Turst*, 1 Bro. P. C. 129; *March v. Eastern R. Co.*, 40 N. H. 548; 77 Am. Dec. 732.

The court of chancery has jurisdiction to enforce the performance of contracts made between foreigners, and in a foreign country, although the defendant is only temporarily within the jurisdiction of the court at the time of the service of the process upon him. *Mitchell v. Bunch*, 2 Paige (N. Y.) 616; 22 Am. Dec. 669; *Waterman on Sp. Perf.*, § 48.

2. *Waterman on Sp. Perf.*, § 48; *Hope v. Hope*, 26 L. J. Ch. 417.

The contrary rule applied to the ordinary action at law on contracts seems to be announced in *Smith v. Spinolla*, 2 Johns. (N. Y.) 198, where the court says: "If a foreign creditor pursues his debtor here, he is entitled to the more efficacious remedy provided by our laws." *Sicard v. Whale*, 11 Johns. (N. Y.) 194; *Peck v. Hozier*, 14 Johns. (N. Y.) 346.

3. *Davis v. Parker*, 14 Allen (Mass.) 94.

4. *Burrall v. Eames*, 5 Wis. 260; *Gartrell v. Stafford*, 12 Neb. 545, 41 Am. Rep. 767.

5. *Miller v. Rusk*, 17 Tex. 170. Or that of one of the defendants. *Hearst v. Kuykendall*, 16 Tex. 327.

Such would seem to be the Indiana rule (see *Coon v. Cook*, 6 Ind. 268; *Dehart v. Dehart*, 15 Ind. 167, and *Vail v. Jones*, 31 Ind. 467), although in *Parker v. McAllister*, 14 Ind. 12, upon the strength of a statute requiring actions for the recovery of real estate or an interest therein to be commenced in the county where the land is situated, the action was held to be local.

6. The courts, in applying this maxim to suits for specific performance, expand it into the familiar doctrine that equity will not decree the specific performance of a contract upon which an action at law will not lie. And sometimes the same idea is expressed by declaring that relief is granted whenever a contract is broken which was binding at law and the legal remedy is clearly inadequate. See 3 *Parsons on Contracts* 353; *Flint v. Brandon*, 8 Ves. 163; *Cannel v. Buckle*, 2 P. Wms. 243; *Aston v. Robinson*, 49 Miss. 348; *Hickman v. Grimes*, 1 A. K. Marsh. (Ky.) 86; 10 Am. Dec. 714.

See note to *Hepburn v. Dunlop*, 1 Wheat. (U. S.) 206, in *Lawyers' Co-op. ed.*

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In *Lemmon v. Tapper*, 2 S. & L. 682, the court, by Lord Redesdale, said: "Courts of equity have therefore enforced contracts specifically where no action for damages could be maintained; for at law the party plaintiff must have strictly performed his part, and the inconvenience of insisting upon that in all cases was sufficient to require the interference of courts of equity. They dispense with that which would make compliance with what the law requires oppressive."

And in *Getchell v. Jewett*, 4 Me. 350, it was held that in order to found a decree for specific performance, it is not necessary that the breach shall be such as would support a claim for damages at law.

The maxim that equity will not decree the specific performance of a contract, upon which an action at law for damages, will not lie, only means that the contract must be such as the law would have recognized if sued on in proper time and under proper circumstances. *White v. Butcher*, 6 Jones Eq. (N. Car.) 231.

In order to obtain a specific performance in equity, the note in writing must be sufficient to maintain an action at law. *Barry v. Coombe*, 1 Pet. (U. S.) 650.

In other words, equity will supply a remedy where the law affords none, but it will not create a right of action, where none exists at law. *Waterman on Sp. Perf.*, § 13; *Hoy v. Hansbrough*, 1 Freem. Ch. (Miss.) 533; *Day v. Hunt*, 112 N. Y. 191.

Where a party has no right of action at law, equity will not interfere to enforce a contract, unless there have been some circumstances excusing the failure at law, or a waiver of the forfeiture on the part of the obligee. *Tevis v. Richardson*, 7 T. B. Mon. (Ky.) 654; *Allen v. Beal*, 3 A. K. Marsh. (Ky.) 554; 13 Am. Dec. 203.

But it does not follow as a matter of course because the legal obligation is perfect, that specific performance will be decreed. *Semmes v. Worthington*, 38 Md. 325.

Statutes of Limitation.—Courts of equity follow the law in applying the Statute of Limitations. *Hovenden v. Annesley*, 2 S. & L. 617; *Johnson v. Hopkins*, 19 Iowa 49; *Bruce v. Tilson*, 25 N. Y. 202; *Beaubien v. Beaubien*, 23 How. (U. S.) 190; *Prater v. Sears*, 77 Ga. 28.

That is to say, a right of action

barred at law by the statute will not be enforced in equity. But even where the claim is not legally barred equity will in its discretion refuse to recognize it if the plaintiff has delayed its prosecution inexcusably. *Peters v. Delaplaine*, 49 N. Y. 362.

Contra, in *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 168.

Although, under certain circumstances, equity may grant relief even though the Statute of Limitations may have barred the legal remedy. See *Norman v. Bennett*, 32 W. Va. 614.

It was held in *Wright v. Leclair*, 3 Iowa 221, that the Statute of Limitation does not necessarily bar a suit for specific performance brought after an action at law would be barred, the legal bar applying save where there are peculiar equitable circumstances affecting the case. See *infra*, this title, *Laches*.

Under this rule in *Smith v. Carney*, 1 Litt. (Ky.) 295, relief was denied on a verbal contract for the sale of land, made before the Statute of Frauds went into operation, as assumpsit alone could be maintained at law for a breach of the contract, and was barred by five years' delay, and more than that time had elapsed between the accruing of the cause of action and the commencement of the suit.

Equity will not give to an executed agreement of the parties contemplating no further act by either, any different effect than that which the law attributes. *Stoddard v. Hart*, 23 N. Y. 556.

A decedent had executed a deed to be delivered after his death. This in the absence of a delivery during his lifetime would be void at law. But in *Jones v. Jones*, 6 Conn. 111; 16 Am. Dec. 35, equitable relief was granted and specific performance decreed. See *Bunn v. Winthrop*, 1 Johns. Ch. (N. Y.) 329.

Contra, *Comer v. Baldwin*, 16 Minn. 172.

In *Martin v. Dwelly*, 6 Wend. (N. Y.) 18; 21 Am. Dec. 245, the court by Sutherland, J., said: "If an absolute sale, consummated by a deed is void unless such deed is acknowledged in the mode prescribed by the statute, it is impossible that a contract to sell and convey at some future time should be valid."

Married Woman's Contract.—So if a married woman cannot legally make a conveyance of her real estate she can make no contract therefor that equity

2. Equity Looks to the Intent Rather Than to the Form.¹

will recognize. *Butler v. Buckingham*, 5 Day (Conn.) 492; 5 Am. Dec. 174; *Townsley v. Chapin*, 12 Allen (Mass.) 476; *Martin v. Dwelly*, 6 Wend. (N. Y.) 19; 21 Am. Dec. 245. See *Martin v. Mitchell*, 2 J. & W. 424.

A mere agreement of a *feme covert* to convey, though made with the concurrence of her husband, will not be specifically enforced. *Blythe v. Dargin*, 68 Ala. 370; *Bowden v. Bland*, 53 Ark. 53; *Milwee v. Milwee*, 44 Ark. 112.

And a deed by a *feme covert* which the statute says shall be acknowledged in a particular manner, to be valid, is void in equity if unacknowledged as well as at law. *Gebb v. Rose*, 40 Md. 387; *Johns v. Reardon*, 11 Md. 465; *Byer v. Etnyre*, 2 Gill (Md.) 151; 41 Am. Dec. 410; *Steffey v. Steffey*, 19 Md. 5; *Roseburgh v. Sterling*, 27 Pa. St. 292. So with her contract to sell. *Jackson v. Torrence*, 83 Cal. 521; *Butler v. Buckingham*, 5 Day (Conn.) 492; 5 Am. Dec. 174.

Where the statute required the husband's assent to his wife's conveyance, her deed, made without that assent, is void and cannot be the foundation of an equity. A court of equity has no more jurisdiction than a court of law to recognize and give effect to instruments inoperative for want of compliance with a condition made by statute a prerequisite to their validity. *Barrett v. Tewksbury*, 9 Cal. 13; *Leonis v. Lazzarovich*, 55 Cal. 52; *Butler v. Buckingham*, 5 Day (Conn.) 492; 5 Am. Dec. 174; *Dickinson v. Glenney*, 27 Conn. 104; *Lane v. McKeen*, 15 Me. 304; *Gebb v. Rose*, 40 Md. 387; *Jewett v. Davis*, 10 Allen (Mass.) 68; *Townsley v. Chapin*, 12 Allen (Mass.) 478; *White v. Holly*, 91 N. Car. 67; *Carr v. Williams*, 10 Ohio 305; 36 Am. Dec. 87; *Purcell v. Goshorn*, 17 Ohio 105; 49 Am. Dec. 448. See *Dreutzer v. Lawrence*, 58 Wis. 594.

Statute of Frauds.—Equity follows the law in that the Statute of Frauds is equally binding upon both. This is subject to the limitation that part performance of a parol contract barred by the statute takes the contract out of the statute in courts of equity although it has no efficacy in a court of law. See FRAUDS, STATUTE OF, vol. 8, p. 737. See also *infra*, this title, *Statute of Frauds*.

Exceptions.—A contract may be void under the Statute of Frauds; yet, if the conduct of the party setting up the invalidity has been such as to raise an equity outside of, and independent of, the contract, and nothing else will be adequate satisfaction of such equity, a court of equity will sustain the sale, though not valid under the statute. *Hunt v. Turner*, 9 Tex. 385; 60 Am. Dec. 167.

1. 3 Parsons on Contracts 355; *James v. State Bank*, 17 Ala. 69. See *Bull v. Bell*, 4 Wis. 54; *Thornburg v. Fish* (Mont. 1891), 27 Pac. Rep. 383; *Buys v. Eberhart*, 3 Mich. 524; *St. Paul Division v. Brown*, 9 Minn. 157.

Where a father agreed with his son, upon a valid consideration, to make a certain devise, and, upon his death, the will proved to be invalid for want of witnesses, the agreement was specifically enforced as against testator's heirs at law. *Maddox v. Rowe*, 23 Ga. 431; 68 Am. Dec. 535. See *Jones v. Baird*, 4 Jones Eq. (N. Car.) 167.

Where, under the Statute of Frauds, the agreement must be in writing, equity says: "The form is not regarded, nor the place of signature, provided it be in the handwriting of the party or his agent and furnish evidence of a complete and practicable agreement." *Barry v. Coombe*, 1 Pet. (U. S.) 650.

An imperfect deed is in equity regarded as an agreement to convey, and where it is acted on by the parties, conveys an equitable title which the courts may enforce. *Hill v. Cooper*, 6 Oregon 181; *Goodlett v. Hansell*, 66 Ala. 151; *Roney v. Moss*, 74 Ala. 390.

The delivery of a deed with an indorsement on the back by the grantee, that he transfers the deed with all its contents, upon certain conditions, gives no legal title to the person holding it; but his rights may be recognized and enforced in a court of equity. *Porter v. Read*, 19 Me. 363.

When any written instrument is designed to operate as a transfer of property, and proper and apt terms are used, whereby the meaning of the parties can be clearly ascertained, if some circumstances necessary to give it legal validity are omitted, whereby it is deprived of its intended specific operation, a court of equity will set it up as a contract or as evidence of a contract; and where the rights of innocent third parties would not be thereby affected, will carry it

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into specific execution as between the parties, provided it is founded upon a valuable consideration. *Tiernan v. Poor*, 1 Gill & J. (Md.) 216; 19 Am. Dec. 225.

Where a parent, in consideration of natural affection, executed deeds of part of his estate to two of his children, to secure a provision for them, but retained such deeds in his custody, giving directions to his wife to lodge them, after his death, with the town clerk for record, which was accordingly done—held, that this was an agreement which a court of chancery would enforce. *Jones v. Jones*, 6 Conn. 111; 16 Am. Dec. 35.

A deed defective under the law in having no seal has been held effectual in equity, nevertheless, as a contract to sell. *Munds v. Cassidey*, 98 N. Car. 558; *Mastin v. Halley*, 61 Mo. 196.

See *Hanson v. Michelson*, 19 Wis. 498.

And a deed having, by mistake, but one witness and not sealed is assignable and enforceable by the assignee. *Dreutzer v. Lawrence*, 58 Wis. 594.

An unrecorded deed which confers an equitable title has been held to be a valid contract of conveyance as against all but a grantee without notice. *Moncrieff v. Goldsborough*, 4 Har. & M. (Md.) 281; 1 Am. Dec. 407.

See *Williams v. Mayor*, etc., of Annapolis, 6 Har. & J. (Md.) 539; *Somerville v. Trueman*, 4 Har. & M. (Md.) 43; 1 Am. Dec. 389.

It has been held in two Maryland decisions that an unacknowledged and unrecorded deed by a married woman may be enforced in equity. *Tiernan v. Poor*, 1 Gill & J. (Md.) 216; 19 Am. Dec. 225; *Brundige v. Poor*, 2 Gill & J. (Md.) 1.

But the contrary doctrine is better supported. See *Gebb v. Rose*, 40 Md. 387; *Drury v. Foster*, 2 Wall. (U. S.) 24; *Martin v. Dwelly*, 6 Wend. (N. Y.) 9; 21 Am. Dec. 245.

When the law of primogeniture prevailed in Maryland, an agreement was made between a father and his eldest son that the father should permit his estate to descend to his son, without devising the same, upon the express trust that, in case the son should succeed as devisee to the property of a third party, he would convey the estate which should thus descend to him from the father to his younger brothers. Pursuant to this agreement, the son executed a deed to his brothers which was defective, not being duly in-

dented, acknowledged, or recorded and a conveyance was decreed in their favor. *Browne v. Browne*, 1 Har. & J. (Md.) 430.

Any memorandum in writing, indicative of the intent of the parties, and so precise as to enable the inquirer to ascertain the terms of the contract, the land to be conveyed, and the price to be paid for it, is a sufficient contract in writing to be enforced specifically; and it need not be under seal, nor acknowledged before a magistrate; nor need it contain words of inheritance, where circumstances evince the intention to pass the fee. *McFarson's Appeal*, 11 Pa. St. 503.

A contract for the sale of real estate made to a copartnership in the firm name will be decreed to be executed to the members individually as tenants in common. *Townshend v. Goodfellow*, 40 Minn. 312.

Exceptions.—See notes *supra*, this title, under the maxim, *Equity Follows the Law*.

Where the informality of an instrument is such that it would be absolutely void, at law, equity will not reform or enforce it.

Thus, when statutes require a *feme covert* excluding a deed to be examined separate and apart from her husband and to acknowledge the execution, the courts have said that her deed executed in contravention of such requirements is void and has no standing either in a court of equity or at law. *Butler v. Buckingham*, 5 Day (Conn.) 492; 5 Am. Dec. 174.

But she may be compelled to acknowledge a deed which she has executed and refused to acknowledge. *Dundas v. Bidle*, 2 Pa. St. 160.

B and wife left a region infested with yellow fever; went to the house of S. his brother-in-law; offered to pay well if allowed to remain; were both taken sick, and she died. B, on convalescence, expressed gratitude to S and wife for saving his life, and in return therefor executed an instrument bequeathing his property to them, and delivered it to them, but it was not a valid will. This was held not to be such a contract as would authorize a decree for specific performance against B's administrator, requiring delivery of the estate to S and wife. *Studer v. Seyer*, 69 Ga. 125.

In *Dickinson v. Glenney*, 27 Conn. 104, the court, by Storrs, C. J., said: "But at the threshold of this inquiry

3. Equity Regards That as Done Which Ought to Have Been Done.¹

we are met with the established doctrine that equity will not contravene the positive enactments or requirements of law and defeat its policy by supplying under the guise of amending defective instruments, those deficient elements of form without which the agreement is absolutely void, even as between the parties to it; that it will not fabricate for contracting parties those essential ingredients of a contract without which, in the eye of the law, there subsists no valid contract whatever.

In such cases the intent of parties to conform to the enactments or rules of law will not avail them; and having fallen short of its requirements, they have consummated no agreement at all." So, also, *Drury v. Foster*, 2 Wall. (U. S.) 24.

In *Carr v. Williams*, 10 Ohio 305; 36 Am. Dec. 87, the court, by Grimke, J., says: "A deed which is intended to convey the legal estate, but which is so imperfectly executed as to fail of effecting that object, is deprived of the character of a conveyance, but may be treated as an agreement to convey and a resort may be had to chancery for the purpose of enforcing it and compelling a specific performance. . . . But a deed so informal as not to be legal under the statute, as where the husband fails to join and the statute requires that he join in order to render the conveyance valid, does not come within this rule, and in the case last cited specific performance was refused under the principle in the maxim 'Equity follows the law.'"

And so with an unrecorded conveyance where, as in *North Carolina*, a statute requires registration. *White v. Holly*, 91 N. Car. 67.

1. Or, better, equity regards that as already done which was agreed to be done. *Burgess v. Wheate*, 1 W. Bl. 121. See *Ensign v. Kellogg*, 4 Pick. (Mass.) 5.

This means no more than that the plaintiff may insist on being placed in a situation equally as advantageous as if the contract had been fulfilled. *Gardiner v. Gerrish*, 23 Me. 46.

An executory contract of sale is regarded in equity, under this doctrine, as already executed, and equitably the vendee becomes the owner and the vendor is seized in trust for him, holding merely a lien on the land for the

purchase money, while the purchaser becomes trustee for the purchase money and is chargeable with interest thereon. *Green v. Smith*, 1 Atk. 572; *Pollexfen v. Moore*, 3 Atk. 272; *Davie v. Beardsham*, 1 Ch. Cas. 39; *Chicago, etc., R. Co. v. Hay*, 119 Ill. 507; *Hunter v. Bales*, 24 Ind. 299; *Cutsinger v. Ballard*, 115 Ind. 93; *Cross v. Bean*, 83 Me. 61; *Michigan State Bank v. Hastings*, 1 Dougl. (Mich.) 225; 41 Am. Dec. 549; *St. Paul Division v. Brown*, 9 Minn. 157; *Paris v. Haley*, 61 Mo. 453; *Huffman v. Hummer*, 17 N. J. Eq. 263; *Champion v. Brown*, 6 Johns. Ch. (N. Y.) 398; 10 Am. Dec. 343; *Traphagen v. Traphagen*, 40 Barb. (N. Y.) 537; *Worrall v. Munn*, 38 N. Y. 137; *Bostwick v. Beach*, 105 N. Y. 661.

And where the vendor has sold to an innocent purchaser at an advance he is chargeable with the price and the profit with interest. *Sugg v. Stowe*, 5 Jones Eq. (N. Car.) 126.

Effect of Destruction or Deterioration Before Consummation of the Sale of Realty.—This doctrine finds its most frequent application to agreements for the sale of real estate. In such agreements, equity declares that from the hour the contract is made the vendee becomes the owner of the land and the vendor holds it in trust for him.

Where, after the contract to sell has been made and before the conveyance agreed upon has passed, a change in the circumstances occurs by an increase or diminution in the value of the property or a destruction of a part of it by fire or accident, it becomes pertinent to inquire what effect is thereby had upon the rights and interests of the parties.

In such cases, the general rule appears to be, that where the property has deteriorated through the vendor's fault he is chargeable with the injury caused. *Worrall v. Munn*, 38 N. Y. 137; *Bostwick v. Beach*, 105 N. Y. 661.

In *Brewer v. Herbert*, 30 Md. 301; 96 Am. Dec. 582, after the execution of a written contract for the sale of a house and lot, and before the day fixed for delivery of possession and payment of the first installment of purchase money, the house was accidentally destroyed by fire, without fault of either party or of the tenant then in possession. The vendor had a fee-simple title to the property, and at the proper time, under the contract, offered to deliver

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possession of the premises in the condition in which they then were. This the purchaser refused to receive because of the destruction of the house by fire. It was held on the theory that the vendee under the contract of sale became the immediate owner of the land, that the loss must be his, and the contract could be specifically enforced against him.

And the court, by Miller, J., says: "In contracts of this kind between private parties, the vendee is in equity the owner of the estate from the time of the contract of sale, and must sustain the loss if the estate be destroyed between the agreement and the conveyance, and will be entitled to any benefit which may accrue to it in the interim. This doctrine, notwithstanding the *dictum* in *Stent v. Baillie*, 2 P. Wms. 220, to the contrary, was plainly announced and settled by the decision of Lord Eldon in *Paine v. Meller*, 6 Ves. 349, a case very similar in its circumstances to the present, where it was held that if there was no objection to the title of the vendor, or if it had been accepted in fact by the vendee before the houses were burned, no solid objection to the bill for specific performance could be founded on the mere effect of the accident before conveyance; 'for if the party,' says the lord chancellor, 'by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being incumbered as his; they may be devised as his; they may be assets, and they would descend to his heirs.'

"This decision has always been regarded as fixing the true equitable rule in such cases."

And citing *Harford v. Purrier*, 1 Madd. 532; *Rawlins v. Burgis*, 2 Ves. & B. 287, and *Revell v. Hussey*, 2 B. & B. 287, the court adds:

"From these, and other authorities of equal weight, announcing the maxim that equity regards as done that which was agreed to be done, is deduced the established doctrine in equity, that from the time the owner of an estate enters into a binding agreement for its sale, he holds the same in trust for the purchaser, and the latter becomes a trustee of the purchase money for the vendor, and being thus in equity the owner, the vendee must bear any loss which may happen and is entitled to any benefit which may accrue to the

estate in the interim between the agreement and the conveyance."

Rents and Profits.—So where the vendor, after having promised to convey, continues wrongfully in possession, the rule which makes him the trustee for the vendee requires him to account to the vendee for the rents and profits of the land. *Lombard v. Chicago Sinai Congregation*, 75 Ill. 271; *Hampton v. Snipes*, 1 Desaus. Eq. (S. Car.) 125.

Or the value of its use where it possesses no rental value. *Worrall v. Munn*, 38 N. Y. 137.

On decree for specific performance of a contract for the sale of land, of which possession had been given, the price being payable in annual installments bearing interest, the vendor must account to the vendee for rent received on a lease executed after the agreement of sale. *Craig v. Greenwood*, 24 Neb. 557. See *Swain v. Burnett*, 76 Cal. 299.

But if he offers to surrender possession in accordance with his contract, and the vendee wrongfully refuses his proffer, the vendor is released from the accountability for the income from the land, and has his option to prosecute his suit for enforcement in specie, or to treat the contract to sell as rescinded.

The vendor is only chargeable with the rents and profits from the date of tender. *Eastman v. Simpson*, 139 Mass. 348.

Where the purchaser is ready and willing to perform, and the delay is on the part of the vendor, the purchaser is entitled to the rents and profits from the time when, according to the terms of the contract, possession should have been delivered; or, if the vendor has remained in possession, he is chargeable with the value of the use and occupation from the same period, and the purchaser is chargeable with interest on the purchase money if it has remained in his hand unappropriated; but where it has been appropriated, and notice thereof given to the vendor, and the purchaser has received no notice thereon, he is not liable to pay interest to the vendor. *Bostwick v. Beach*, 103 N. Y. 414; *Dias v. Glover*, Hoffm. Ch. (N. Y.) 71.

Interest Chargeable to Vendee.—*Sanders v. Bryer*, 152 Mass. 141, was a case where suit was brought by the tenant to enforce a covenant to sell under a lease containing such a covenant. The court held that the tenant was bound to make tender of the purchase

4. Who Seeks Equity Must do Equity.¹

price and keep his tender good with interest so long as he remained in possession without paying rent, and that he could not keep the benefit both of the rents and of the interest on the purchase money. The court, by Devens, J., said: "Even if he holds himself ready to obtain and pay the money when a conveyance is tendered, if he desires a decree which shall treat the land as his after the date of the day when he made his offer of payment, the money should be treated as belonging to the vendor as of the same date. The vendee cannot be entitled to the use both of the land and of the money which is the consideration to be paid for it." *Powell v. Martyr*, 8 Ves. 146. See also *Fludyer v. Cocker*, 12 Ves. 25; *Dyson v. Hornby*, 4 De G. & S. 481; *Covell v. Cole*, 16 Mich. 223.

Even if the vendor is at fault, the vendee, if he would escape liability to pay interest, must actually set aside the money and appropriate it for the vendor; must not in any way derive a benefit from it, and must notify the vendor of these facts, and that the money is thus lying idle; but after a sufficient tender, interest does not run. *Calcraft v. Roebuck*, 1 Ves. 221; *Roberts v. Massey*, 13 Ves. 561; *Kershaw v. Kershaw*, L. R. 9 Eq. 56; *Regents Canal Co. v. Ware*, 23 Beav. 575; *Walker v. Ogden*, 1 Dana (Ky.) 247; *Baxter v. Brand*, 6 Dana (Ky.) 296; *Rutledge v. Smith*, 1 McCord Eq. (S. Car.) 399; *Stevenson v. Maxwell*, 2 N. Y. 403; *Viele v. Troy*, etc., R. Co., 21 Barb. (N. Y.) 381; *Riley v. McNamara* (Tex. 1892), 18 S. W. Rep. 141; *Hundley v. Lyons*, 5 Munf. (Va.) 342; 7 Am. Dec. 685; *Brockenbrough v. Blythe*, 3 Leigh (Va.) 619; *Selden v. James*, 6 Rand. (Va.) 465.

Where the purchaser of land has obtained a decree for specific performance of the contract of sale, with costs against the vendor, an order dismissing the bill for non-performance of the decree by the plaintiff, and still retaining the suit for the purpose of an account of the rents and profits of the premises, is erroneous. *Clark v. Hall*, 7 Paige (N. Y.) 382.

It devolves on the vendor to show that the plaintiff has received some use of the money tendered, or the vendee cannot be chargeable with the interest, the presumption being that the money is unproductive in the vendee's hands.

Bass v. Gilliland, 5 Ala. 761; *Hunter v. Bales*, 24 Ind. 299.

A and B being jointly in possession of several lots of land under a lease and contract of sale, A agreed to convey to B his share in one of the lots on a day certain, and to execute further assurances when their title should be perfected, and B was to pay the price of the conveyance at the same time. The contract was not performed at the day fixed, and A subsequently repudiated the contract, but B proceeded to erect buildings upon the lot, for which a large rent was received. On a bill filed by A to compel B, amongst other things, to complete the contract, it was held that B was not liable for interest on the purchase money until a tender of a deed by A, but that A was entitled to his share of what the rents and profits of the lot would have been, had it remained in the same state in which it was at the time of the agreement to convey. *Stevenson v. Maxwell*, 2 Sandf. Ch. (N. Y.) 273.

One holding a land warrant sold a tract of land representing that the whole of it was covered by the warrant, and articles were drawn up between the vendor and vendee for sale of the land to be acquired under the warrant. In fact, only a part of the tract pointed out by the vendor was acquired under that warrant, which he offered to convey. Afterwards, he procured a title to the residue of the tract. Held, that as to the title to such residue, equity would consider him the trustee of the vendee, and compel him to convey to the vendee. *Tyson v. Passmore*, 2 Pa. St. 122; 44 Am. Dec. 181.

But this general rule is not to be too rigidly enforced. It is subject to modifications according to the peculiar circumstances of the case. *Worrall v. Munn*, 38 N. Y. 137.

1. *King v. Hamilton*, 4 Pet. (U.S.) 328; *Moon v. Crowder*, 72 Ala. 79; *Derrice v. Monette*, 73 Ala. 75; *Kitchen v. Coffyn*, 4 Ind. 504; *Smith v. St. Phillips' Church*, 107 N. Y. 610; *Datz v. Phillip*, 137 Pa. St. 203; 21 Am. St. Rep. 864.

In *Rushton v. Thompson*, 35 Fed. Rep. 635, the court by Brewer, J., said: "Courts not merely observe the words of the contract, but also have respect to the obligations of the golden rule, and that unless plaintiff has done as he would be done by it is useless for him to come into that forum where equity

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and good conscience reign supreme over the letter of the law."

This requires of plaintiff that he do all that is in his power to fulfill his part of the contract which he is seeking to enforce, according to its terms. He must do his full duty or the court will not regard his prayer. *New York Paper-Bag Mach. Co. v. Union Paper-Bag Mach. Co.*, 32 Fed. Rep. 783; *Davis v. Read*, 37 Fed. Rep. 418; *Morgan v. Morgan*, 2 Wheat. (U. S.) 290; *Colson v. Thompson*, 2 Wheat. (U. S.) 336; *Pratt v. Carroll*, 8 Cranch (U. S.) 471; *Watts v. Waddle*, 6 Pet. (U. S.) 389; *Boone v. Missouri Iron Co.*, 17 How. (U. S.) 340; *Ohio Steel Barb Fence Co. v. Washburn, etc., Mfg. Co.*, 26 Fed. Rep. 702; *Strange v. Watson*, 11 Ala. 324; *Hoen v. Simmons*, 1 Cal. 119; 52 Am. Dec. 291; *Green v. Covillaud*, 10 Cal. 317; 70 Am. Dec. 725; *Nunez v. Morgan*, 77 Cal. 427; *McFarland v. Reeve*, 5 Del. Ch. 118; *Askew v. Carr*, 81 Ga. 685; *Bates v. Wheeler*, 2 Ill. 54; *Livingston Co. v. Henneberry*, 41 Ill. 180; *McCave v. Crosier*, 69 Ill. 501; *Cassell v. Cassel*, 104 Ill. 361; *Thayer v. Wilmington Star Min. Co.*, 105 Ill. 540; *Cohn v. Mitchell*, 115 Ill. 124; *Harrison v. Polar Star Lodge*, 116 Ill. 279; *Weingaertner v. Pabst*, 115 Ill. 412; *Slaughter v. Harris*, 1 Ind. 238; *Vawter v. Bacon*, 89 Ind. 565; *Jones v. Alley*, 4 Greene (Iowa) 181; *Garretson v. Vanloon*, 3 Greene (Iowa) 128; 54 Am. Dec. 492; *Vennum v. Babcock*, 13 Iowa 194; *Butler v. Archer*, 76 Iowa 551; *Wisconsin, etc., R. Co. v. Braham*, 71 Iowa 484; *Moore v. Skidmore*, Litt. Sel. Cas. (Ky.) 453; 12 Am. Dec. 333; *Greenup v. Strong*, 1 Bibb (Ky.) 590; *Bearden v. Wood*, 1 A. K. Marsh. (Ky.) 450; *Satterfield v. Keller*, 14 La. Ann. 615; *Rogers v. Saunders*, 16 Me. 92; 33 Am. Dec. 635; *Simmons v. Hill*, 4 Har. & M. (Md.) 252; 1 Am. Dec. 398; *Furbish v. White*, 25 Me. 219; *Carswell v. Walsh*, 70 Md. 504; *Williams v. Hart*, 116 Mass. 513; *Love v. Sortwell*, 124 Mass. 446; *Wass v. Murgridge*, 128 Mass. 394; *Stone v. Buckner*, 12 Smed. & M. (Miss.) 73; *Stewart v. Raymond R. Co.*, 7 Smed. & M. (Miss.) 568; *Tyler v. McCardle*, 9 Smed. & M. (Miss.) 230; *Mhoon v. Wilkerson*, 47 Miss. 633; *Mayger v. Cruse*, 5 Mont. 485; *Delassus v. Poston*, 19 Mo. 425; *Hughes v. Reese*, 22 Neb. 78; *English v. Millgan*, 27 Neb. 326; *Gibson v. Milne*, 1 Nev. 526; *Earl v. Halsey*, 14 N. J. Eq. 332; *Thorp v. Pettit*, 16 N. J. Eq. 488;

Dowden v. Junker (N. J. 1891), 22 Atl. Rep. 727; *Jones v. Lynds*, 7 Paige (N. Y.) 301; *Babcock v. Emrich*, 64 How. Pr. (N. Y.) 435; *Burling v. King*, 66 Barb. (N. Y.) 633; *McIntosh v. St. Philip's Church*, 54 N. Y. Super. Ct. 291; *Wheeler v. Wheeler* (Supreme Ct.), 2 N. Y. Supp. 496; *Hutcheson v. McNutt*, 1 Ohio 14; *Sanford v. Wheelan*, 12 Oregon 301; *Lake v. Shurnate*, 20 S. Car. 33; *White v. Yaw*, 7 Vt. 357; *Cleveland v. Burton*, 11 Vt. 138; *Goodell v. Field*, 15 Vt. 448; *Frame v. Frame*, 32 W. Va. 463; *Whiting v. Gould*, 2 Wis. 552. But see *Ramsay v. Brailsford*, 2 Desaus. Eq. (S. Car.) 552; 2 Am. Dec. 698.

Instances of this application of the rule embodied in this maxim to cases of specific performance may be seen in *Thayer v. Wilmington Star Min. Co.*, 105 Ill. 540; *Enterprise Imp., etc. Co. v. Wilson* (Ky. 1889), 11 S. W. Rep. 437; *Sharp's Rifle Mfg. Co. v. Rowan*, 35 Conn. 127; 91 Am. Dec. 728; *Jones v. Roberts*, 6 Call (Va.) 187; 3 Am. Dec. 576; *Harvie v. Banks*, 1 Rand. (Va.) 408; *Weingaertner v. Pabst*, 115 Ill. 412; *Minneapolis Industrial Exposition v. Brown*, 43 Minn. 77; *Huldemann v. Chambers*, 19 Tex. 1; *Taft v. Leavitt*, *Wright* (Ohio) 389; *McClure v. King*, 15 La. Ann. 220; *Moore v. Skidmore*, Litt. Sel. Cas. (Ky.) 453; 12 Am. Dec. 333; *Clay v. Turner*, 3 Bibb (Ky.) 52; *Wright v. Delafield*, 23 Barb. (N. Y.) 498.

Performance Entitles to Decree.—This rule carries with it the reciprocal doctrine that one who has performed his contract in good faith is entitled to enforce his obligation against the other contracting party. *Ellis v. Burden*, 1 Ala. 458; *Laning v. Cole*, 4 N. J. Eq. 229; *Traphagen v. Traphagen*, 40 Barb. (N. Y.) 537; *Hulmes v. Thorp*, 5 N. J. Eq. 415; *Dewey v. Life*, 60 Iowa 361.

While a vendee of land is not bound to accept a defective title, he cannot object to the vendor's title until he restores possession of the land to the vendor. *Gans v. Renshaw*, 2 Pa. St. 34; 44 Am. Dec. 152.

A plaintiff who has refused the deed tendered cannot maintain an action to compel a specific performance. *Emrich v. White*, 102 N. Y. 657. See *Gale v. Archer*, 42 Barb. (N. Y.) 320.

Where the consideration is denied, plaintiff must show payment before he can have specific performance. *Logan v. McChord*, 2 A. K. Marsh. (Ky.) 224.

It is not always necessary that plain-

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tiff shall have performed his part of the contract. This he may escape by showing that he is ready and willing to perform. *Jenkins v. Harrison*, 66 Ala. 345; *Forsyth v. McCauley*, 48 Ga. 402; *Belle Greene Min. Co. v. Tuggle*, 65 Ga. 652; *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 416; *Baldwin v. Salter*, 8 Paige (N. Y.) 473; *Thompson v. Scott*, 1 McCord Eq. (S. Car.) 39; *Colson v. Thompson*, 2 Wheat. (U. S.) 336; *Goman v. Salisbury*, 1 Vern. 240.

Or that defendant by his conduct has rendered compliance with the contract on plaintiff's part impossible or vain. As where the obligor has performed the most of his contract and the remainder is voluntarily done by the obligee although the obligor has been ready and willing to do all himself. *Church v. State*, 1 A. K. Marsh. (Ky.) 328.

Or some other sufficient excuse for his default. *Cox v. Boyd*, 38 Ala. 42; *Jordan v. Deaton*, 23 Ark. 704; *Campbell v. Harrison*, 3 Litt. (Ky.) 292; *Moore v. Skidmore*, Litt. Sel. Cas. (Ky.) 453; 12 Am. Dec. 333; *Stevenson v. Dunlap*, 7 T. B. Mon. (Ky.) 134; *Babcock v. Emrich*, 64 How. Pr. (N. Y.) 435; *Ludlow v. Cooper*, 13 Ohio 552.

Of course if the undertaking on plaintiff's part is not a condition precedent, his failure to perform it will not prevent a specific performance in his favor. *Minneapolis, etc., R. Co. v. Cox*, 76 Iowa 306; *Mitchell v. Long*, 5 Litt. (Ky.) 71.

Or if the act required of him be a merely nugatory one, his failure to do it will not impair his rights to a specific performance. *Coale v. Barney*, 1 Gill & J. (Md.) 324.

An executor or administrator need not tender performance in order to claim it. *Mhoon v. Wilkerson*, 47 Miss. 633.

Where the obligation upon plaintiff is not a condition precedent, equity will see to it that defendant is protected by requiring the plaintiff to show that he is able to do his part, and in the absence of such a showing, as where it appears that insolvency or some other cause will render it doubtful if he can fulfill his part, the court will not relieve him. *Sims v. McEwen*, 27 Ala. 184.

Where, by agreement under seal, A covenanted to sell to B a tract of land, and make a warranty deed therefor, and B covenanted to pay a certain sum therefor by installments—held, that B was not entitled to a decree for a specific performance on the payment of the

first installment, without giving security, by mortgage or otherwise, for the remaining installments. *Van Scoten v. Albright*, 5 N. J. Eq. 467.

In a bill by a vendee for the specific performance of the contract of sale, his insolvency is no objection to a decree for performance, as a conveyance will be decreed only on payment of the purchase-money. *Sarter v. Gordon*, 2 Hill Eq. (S. Car.) 121.

It has been held that a vendor who was unable to convey when the contract was made, cannot maintain a suit for specific performance, though he afterwards obtains and tenders a conveyance. *Luse v. Deitze*, 46 Iowa 205. But this cannot be the true doctrine. See *infra*, this title, *Contracts Relating to Land—Title*.

He is not bound to a literal compliance with his obligation, but may establish his position in a court of equity by a substantial performance of it. *Shaw v. Livermore*, 2 Greene (Iowa) 338; *Clark v. Sears*, 3 Iowa 104; *Johnston v. Mitchell*, 1 A. K. Marsh. (Ky.) 227; 10 Am. Dec. 727; *Church v. State*, 1 A. K. Marsh. (Ky.) 330.

Instances.—Thus, where one agreed, in writing, to convey to a railroad company five acres of land, on condition that it would locate its depot upon a certain forty-acre tract, or upon any five acres adjoining, and the depot was located upon a tract which touched a corner of the forty-acres, but did not lie alongside of it, it was held that there had been a substantial compliance, entitling the company to specific performance. *Fitzgerald v. Britt*, 43 Iowa 408.

If the vendor stands by and suffers the vendee to make valuable improvements, and does not demand a strict compliance with the terms of the contract by the vendee, equity will deem him to have waived a strict compliance, and upon a substantial compliance, equally favorable to him, will decree a conveyance. *Farley v. Vaughn*, 11 Cal. 227.

If a vendee shows a readiness, without injury, to perform substantially his agreement, he is entitled to the aid of a court of equity. *Hart v. Brand*, 1 A. K. Marsh. (Ky.) 159; 10 Am. Dec. 715.

On a bill by a vendee for the specific performance of an agreement for the sale of lands, a slight variation or default on the part of the vendee, in the performance of work to be done by him before the deed was delivered, will not prevent a decree for specific performance, if the difference is a proper sub-

5. He Who Comes Into Equity Must Come With Clean Hands.¹

ject for compensation in money. And if the vendee has performed a valuable part of the contract and is in no default as to the performance of the residue, he will be entitled to his decree. *Hulmes v. Thorpe*, 5 N. J. Eq. 415.

It is in equity a sufficient performance, by a purchaser of land, of a stipulation to pay the taxes, to allow it to go to sale for taxes, and bid it off himself, if he seeks no inequitable advantage from the tax sale; it is an indirect mode of payment. *Oliver v. Croswell*, 42 Ill. 41.

Enforcement will be denied him if the contract be one that he has repeatedly broken, even if the other party has been guilty of the first breach, and he will be left to his legal remedies. *Ohio Steel Barb Fence Co. v. Washburn, etc., Mfg. Co.*, 26 Fed. Rep. 702.

A tenant under a lease containing a covenant to renew cannot enforce such covenant if he has violated other covenants in his lease as by a prohibited use of the premises. *Gannett v. Albree*, 103 Mass. 372.

Specific performance of a contract for the sale of land will not be decreed where, at the time of filing the bill and at the time of trial, the plaintiffs are indebted to defendant for the balance of purchase money, which they have not offered to pay. *Askew v. Carr*, 81 Ga. 685.

Specific execution of an agreement will not be decreed at the instance of a party who has been in default, and where the specific execution would be injurious to the other party. *Vail v. Nelson*, 4 Rand. (Va.) 478.

Offer to Perform Sometimes Insufficient.—Plaintiff sued to compel conveyance to him by defendant of certain land, basing his suit on the defendant's bond to convey to him the land, given in 1850, in consideration that the plaintiff should represent him in effecting a partition of this and other land, between the defendant and a joint owner. The partition was partially effected in 1850; but the difficulties arising induced the parties to postpone completion until the boundaries of the grant could be settled by proper authorities. This, it appeared, was not done until 1857, when the plaintiff offered to go on and complete the partition, but the defendant refused. *Held*, that the plaintiff could not be compelled to perform; that his offer to perform was not equivalent

to performance; that, therefore, he could not have a decree for specific performance, as against the defendant, but must be left to his remedy for damages. *Cooper v. Pena*, 21 Cal. 403.

The utmost good faith is expected of all parties before the court and any lapse therefrom will be fatal.

One party to a contract, after accepting the other's understanding of it, which was mutually acted upon, is, on a bill for specific performance filed against him, precluded from making the defense that the complainant is unwilling to perform the contract. *Price v. Morgan* (N. J. 1887), 10 Atl. Rep. 663.

Where a party to a contract of purchase displayed bad faith in repudiating an obligation to pay a certain rate of interest, he was denied any right to specific performance. *McClellan v. Darrah*, 50 Ill. 249.

A vendor who refuses the purchaser's tender of the purchase-money on the ground that he is not bound to convey, cannot afterwards base his refusal on an objection to a misdescription of the deed which he was requested to execute. *Carskaddon v. Kennedy*, 40 N. J. Eq. 259.

Instances.—Plaintiff sought to purchase of defendant a certain land owned by him, and was informed that it had been withdrawn from sale. Next day or the day after, he purchased the property through defendant's agents, who had not been notified of its withdrawal; but he made no inquiry as to whether their authority antedated the information received by him from defendant. An enforcement of his contract was refused. *Wickham v. Winchester*, 75 Iowa 327.

If a vendor of land, after entering into an agreement to convey on payment of the purchase money, mortgages the premises, he cannot claim a specific performance of the contract by the vendee. *Huber v. Burke*, 11 S. & R. (Pa.) 238.

Performance must have been done without any unreasonable delay or plaintiff cannot claim that he has fulfilled his duty. *Lewis v. Woods*, 4 How. (Miss.) 86; 34 Am. Dec. 110.

He must be prompt and eager to perform. *Brown v. Haines*, 12 Ohio 1. See *infra*, this title, *Tender*; *Laches*.

1. *Mississippi, etc., R. Co. v. Cromwell*, 91 U. S. 643; *Conrad v. Lindley*, 2 Cal. 173; *Howe Mfg. Co. v. Gough*,

6. Between Equal Equities the Law Prevails.¹

7. Equity Acts In Personam, Not in Rem.²

8. Equity Acts Specifically.³

V. DOCTRINES ILLUSTRATED.—Other doctrines governing the equitable enforcement of contracts are as general in their application as those expressed in the familiar maxims of equity above quoted. These are—

1. **Equity Will Not Decree Specific Performance Unless Strictly Equitable.**—The decree must be equitable to all parties.⁴ In the spirit of this principle the courts refuse to declare or

2 Ill. App. 477; Bohanan v. Bohanan, 96 Ill. 591; Kelly v. Kendall, 118 Ill. 650; Kitchen v. Coffyn, 4 Ind. 504; Welfley v. Shenandoah Iron, etc., Co., 83 Va. 768.

One who has fraudulently concealed a material fact in connection with a contract cannot specifically enforce it. King v. Knapp, 59 N. Y. 462; Byars v. Stubbs, 85 Ala. 256; Hetfield v. Willey, 105 Ill. 286.

If the plaintiff's case appears unconscionable, specific performance will be denied him. Weise's Appeal, 72 Pa. St. 351; Tucke v. Buchholz, 43 Iowa 415; Vaughan v. Thomas, 1 Bro. C. C. 556.

1. The widow of A and his children, who were of age, sold to B a tract of land belonging to their father's estate. One of the infants, after coming of age, received his share of the purchase money, and acquiesced in the sale, but afterwards gave his bond for a conveyance of his interest in the tract to C, and, a few weeks after, made a conveyance to B. C sold the bond to D, who brought his bill for a conveyance. *Held*, that as the bond was notice of B's possession, it should have put a purchaser upon inquiry into the nature of B's title, and that the equities being equal, the legal title of B must prevail. Gallaher v. Hunter, 5 Mo. 507.

A court of equity will not enforce a gratuitous undertaking on the part of a wife to subject her separate estate to the payment of her husband's debts. In such cases the legal title will not be allowed to prevail in a court of equity over the equitable right; it is only where the equities are equal that the law prevails. White's Appeal, 36 Pa. St. 134.

2. See *supra*, this title, *Jurisdiction*.

3. In other words, equity will not compel specific performance when the benefits of a contract cannot be real-

ized according to its terms. Marietta, etc., R. Co. v. Western Union Tel. Co., 38 Ohio St. 24; 10 Am. & Eng. R. Cas. 387.

4. Cheney v. Libby, 134 U. S. 68; Casey v. Holmes, 10 Ala. 776; Ellett v. Wade, 47 Ala. 456; Schuessler v. Hachett, 58 Ala. 18; Hurst v. Thompson, 73 Ala. 158; Kelly v. Central Pac. R. Co., 74 Cal. 557; 5 Am. St. Rep. 470; Canterbury Aqueduct Co. v. Ensworth, 22 Conn. 608; Swint v. Carr, 76 Ga. 322; 2 Am. St. Rep. 44; Chicago & Alton R. Co. v. Schoeneman, 90 Ill. 258; Chicago, etc., R. Co. v. Reno, 113 Ill. 39; Duncan v. Central Pass. R. Co., 85 Ky. 525; Fowler v. Marshall, 29 Kan. 665; Mansfield v. Sherman, 81 Me. 365; Buckley v. Patterson, 39 Minn. 250; Love v. Sortwell, 124 Mass. 446; Wonson v. Fenno, 129 Mass. 405; Munch v. Shabel, 37 Mich. 166; Veth v. Gierth, 92 Mo. 97; Eaton v. Eaton, 64 N. H. 493; Johnson v. Hubbell, 10 N. J. Eq. 332; 66 Am. Dec. 773; Sherman v. Wright, 49 N. Y. 227; Margraf v. Muir, 57 N. Y. 155; Stevens v. Comstock, 109 N. Y. 655; Day v. Hunt, 112 N. Y. 191; Conger v. New York, etc., R. Co., 45 Hun (N. Y.) 296; Ramsey v. Gheen, 99 N. Car. 215; Miles v. Dover Furnace Iron Co., 125 N. Y. 294; Murtfeldt v. New York, etc., R. Co., 102 N. Y. 703; 25 Am. & Eng. R. Cas. 144; Huntington v. Rogers, 9 Ohio St. 511; Backus's Appeal, 58 Pa. St. 186; Henderson v. Hays, 2 Watts (Pa.) 148; Garnett v. Macon, 6 Call (Va.) 308; Bryan v. Lofftus, 1 Rob. (Va.) 12; 39 Am. Dec. 242.

Instances.—A decree will not be rendered where it is evident that the contract was entered into thoughtlessly. Godwin v. Collins, 4 Houst. (Del.) 28.

Where a bill in equity has been brought to enforce the specific performance of an agreement to convey

enforce a forfeiture if it can be avoided. And if the complainant, by the strict terms of his contract, is entitled to a forfeiture, it will be withheld if the defendant is ready to comply at once with his obligation.¹

2. Equity May Enforce But Not Make Agreements.²

lands, the court will be hardly disposed to afford relief to the plaintiff, when the enforcement of the contract will be attended with inequitable loss to defendants in impairing the value of adjoining lands. *Church of the Advent v. Farrow*, 7 Rich. Eq. (S. Car.) 378.

So, in *Richmond v. Dubuque*, etc., R. Co., 33 Iowa 422, specific performance was refused on the ground that it would subject defendant, and the public also, to delays, inconvenience, and loss.

1. *Knott v. Stephens*, 5 Oregon 235; *Hall v. Delaplaine*, 5 Wis. 206; 68 Am. Dec. 57.

In *Knott v. Stephens*, 5 Oregon 235, the court by Bonham, J., said: "Compensation and not forfeiture is a favorite maxim with courts of equity; and where the vendor, by his contract to convey, had not affirmatively expressed his intention to make the time of payment material, courts of equity will infer that it was understood that interest on the deferred payments would be a sufficient compensation for the delay."

A change in the circumstances of the parties or in the value of the property involved might render enforcement inequitable. See *infra*, this title, *Fairness—Change of Circumstances*.

A covenant, restricting the use of certain land, fixed a minimum price for the cost of all buildings to be erected on the land. *Held*, that such covenant will not be specifically enforced where it appears that the term of the covenant has nearly expired; that the character of the locality has so changed as to render it apparent that buildings of the class contemplated by the covenant will not be built upon the affected land; that, in the meantime, if the covenant should be specifically enforced the lands affected by it could not be profitably used; that the complainant himself has built a house upon the affected land which does not comply with the spirit of the covenant; and that the erection objected to will not be detrimental to him. *Page v. Murray*, 46 N. J. Eq. 325.

One railroad company, in consideration of the right to cross, gave the other a right to cross at some future time. *Held*, that the specific performance of the latter agreement would not be decreed where the crossing was to be at a place not contemplated by the parties, and where it would do a very great damage to the former company; namely, by crossing a drill and freight yard. *Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 105.

Specific performance of a contract by a railroad company with a landowner to erect a station at a certain point is properly denied by a court of equity, where it appears that such point is on the side of a steep mountain, in a sparsely settled district, and approached by a steep grade; that the station could only be constructed at a great expense; and that the public travel would be delayed by the stoppage of the trains, and the public convenience would be impaired. *Conger v. New York, etc., R. Co.*, 45 Hun (N. Y.) 296.

Enforcement of specific performance of a contract should be refused if such enforcement would operate injuriously to the interests of other lessors. *Society for Establishing Manufactures v. Low*, 17 N. J. Eq. 19.

An agreement by a railroad company with a city to locate its terminus, offices, and machine-shops therein, and continue them there notwithstanding its own interests and those of the public should subsequently demand their removal, is not enforceable in equity. *Texas, etc., R. Co. v. Marshall*, 136 U. S. 393; 42 Am. & Eng. R. Cas. 637.

Before granting a decree of specific performance the court will determine whether the rights of others not parties be seriously affected, and in such cases if the decree would operate inequitably upon strangers whose rights have vested since the contract was made the court will refuse its decree. *Curran v. Holyoke Water Power Co.*, 116 Mass. 90.

2. *Cheney v. Libby*, 134 U. S. 68; *Lombard v. Chicago Sinai Congrega-*

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tion, 75 Ill. 271; *Maughlin v. Perry*, 35 Md. 352; *O'Brien v. Pentz*, 48 Md. 562; *Stoddard v. Hart*, 23 N. Y. 559; *Domestic Tel. Co. v. Metropolitan Teleph. Co.*, 39 N. J. Eq. 160.

In *Hunt v. Rousmaniere*, 1 Pet. (U. S.) 14, the court, by Washington, J., says: "Equity may compel parties to perform their agreements, when fairly entered into, according to their terms; but it has no power to make agreements for parties and then compel them to execute the same. The former is a legitimate branch of its jurisdiction, and, in its exercise, is highly beneficial to society. The latter is without its authority, and the exercise of it would not only be an usurpation of power but would be highly mischievous in its consequences."

Equity cannot make nor alter a contract for the parties and then execute it. If the contract must be reformed before it can be executed it can only be reformed in a suit for that purpose, or upon a bill particularly praying for that relief. *Grey v. Tubbs*, 43 Cal. 359; *Osborn v. Phelps*, 19 Conn. 63; 48 Am. Dec. 133; *Kemp v. Humphreys*, 13 Ill. 573; *Colt v. Beaumont*, 32 Mo. 118; *Norfleet v. Southall*, 3 Murph. (N. Car.) 189. But see *Philpot v. Elliott*, 4 Md. Ch. 273; *White v. Port Huron*, etc., R. Co., 13 Mich. 356.

Where a vendor accepts part payment on a contract to sell real estate, he cannot afterwards impose new terms or conditions, and equity will decree a specific performance of the contract against him and a purchaser with notice of the contract. *Keegan v. Williams*, 22 Iowa 378.

Nor will equity reform a writing to make an agreement of a different effect from that which the parties intentionally entered into. *Stoddard v. Hart*, 23 N. Y. 556. In this case the court, by Comstock, C. J., says: "Will a court of equity make a new contract for parties in order to effectuate a mere understanding, where no agreement is pretended different from the one which the writing already expresses, and where there are no circumstances of surprise, imposition, fraud, or misplaced confidence? To do so, I think, would be taking a step in advance of the settled rule on the subject."

In *Attorney-Gen'l v. Sitwell*, 1 Y. & C. 559, the court, by Baron Alderson, said: "I cannot help feeling that in the case of an executory agreement, first to reform and then to decree an execu-

tion of it, would be virtually to repeal the Statute of Frauds."

Quoting this remark, the court, by Waite, J., in *Osborn v. Phelps*, 19 Conn. 63; 48 Am. Dec. 136, said: "These cases appear to be founded upon a just and reasonable construction of the statute, and fully establish the rule, that if two parties enter into an agreement respecting the sale of real estate, and fail to reduce that agreement to writing, according to their intention, it is not competent for the purchaser to come into a court of chancery, for the purpose of having the written agreement rectified, by the aid of parol evidence, and then the execution enforced."

"But this rule does not apply where the mistake is set up by way of defense against a claim for the specific execution of a contract. In such case, the object is not to enforce the execution of a parol agreement, but to prevent the execution of a written one, which the parties never intentionally made to resist one which to enforce would be inequitable and unjust. It was not the object of this statute to give any greater efficacy to written contracts for the sale of lands, than they possessed at the common law; but merely to require such contracts to be made in writing, in order to lay the foundation of a suit at law or in equity."

Where a husband has agreed to allow his wife property to a certain value, for her separate maintenance, to be selected by her, and valued by A and B, a court of equity cannot substitute other appraisers without the consent of the husband, and enforce the agreement. *Wallingsford v. Wallingsford*, 6 Har. & J. (Md.) 485.

The parties having contracted for a sale on credit, the purchase money to be secured by a mortgage, payable by installments, a court of equity will not decree a conveyance reserving a ground rent, extinguishable at the times and in the proportions specified for the payment of the installments contracted to be secured by mortgage. Nor will the payment of the whole of the purchase money in cash be decreed. *Philadelphia, etc., R. Co. v. Lehigh Coal, etc., Co.*, 36 Pa. St. 204.

Under what we take to be a misapplication of this doctrine, the Supreme Court of Pennsylvania has held that where a vendor has contracted to convey land, and his wife refuses to join in his deed, the vendee may not compel a

3. Equity Binds Privies as well as Parties.—Equity binds executors, heirs, personal representatives, assignees, and all privies and parties in interest as well as the original principals.¹

conveyance of the vendor's interest with a corresponding abatement of the purchase price, as this would be in effect making a new contract for the parties. *Riesz's Appeal*, 73 Pa. St. 485. See *infra*, this title, *Contracts Relating to Land*.

1. Where the specific execution of an agreement respecting lands will be decreed between the parties, it will be decreed between all the parties claiming under them in privity of estate, or representation or title, unless other controlling equities intervene. *Hays v. Hall*, 4 Port. (Ala.) 374; 30 Am. Dec. 530; *Wilson v. Emig*, 44 Kan. 125; *Chambers v. Alabama Iron Co.*, 67 Ala. 353; *Meyer v. Mitchell*, 75 Ala. 475; *Thompson v. Myrick*, 20 Minn. 205; *Cole v. Cole*, 41 Md. 301; *Ryder v. Robinson*, 109 Mass. 67; *Curran v. Holyoke Water Power Co.*, 116 Mass. 90; *Champion v. Brown*, 6 Johns. Ch. (N. Y.) 398; 10 Am. Dec. 343; *Raynor v. Lyon*, 46 Hun (N. Y.) 227; *Leahey v. Leahey*, 11 Mo. App. 413; *Boyce v. Francis*, 56 Miss. 573; *Robbins v. McKnight*, 5 N. J. Eq. 642; 45 Am. Dec. 406; *Worthington v. Lee*, 61 Md. 530; *Wheeler v. Crosby*, 20 Hun (N. Y.) 140; *Fisher v. Moolick*, 13 Wis. 321; *Smith v. Hibbard*, Dick. 730; *Hackett v. McNamara*, Plunket 233; *Burgess v. Wheate*, 1 W. Bl. 121. But compare *Fowler v. Rice*, 17 Pick. (Mass.) 100.

Specific performance will be decreed against an heir or devisee on his ancestor's contract of sale or purchase, even though such contract did not purport to be obligatory on the heirs. *Moore v. Fitz Randolph*, 6 Leigh (Va.) 175; 29 Am. Dec. 208; *Jenkins v. Harrison*, 66 Ala. 345; *Butler v. Holtzman*, 55 Ind. 125; *Everett v. Dilley*, 39 Kan. 73; *Woodbury v. Gardner*, 77 Me. 68; *Partridge v. Dorsey*, 3 Har. & J. (Md.) 302; *Jackson v. McCoy*, 56 Miss. 781; *Moore v. Burrows*, 34 Barb. (N. Y.) 173; *Wheeler v. Crosby*, 20 Hun (N. Y.) 140; *In re Mousseau's Estate*, 40 Minn. 236; *Hunter v. Mills*, 29 S. Car. 72; *Holt v. Holt*, 2 Vern. 322. See *Strange v. Watson*, 11 Ala. 324; *Dick's Estate*, 74 Cal. 284; *Madrox v. Rowe*, 23 Ga. 431; 68 Am. Dec. 535; *Stewart v. Noble*, 1 Greene (Iowa) 26; *Berryman v. Mullins*, 8 B.

Mon. (Ky.) 152; *Miller v. Goodwin*, 8 Gray (Mass.) 542; *Ryder v. Robinson*, 109 Mass. 67; *Gardner v. Warren*, 52 Mich. 309; *Bohanan v. Giles*, 26 Fed. Rep. 204; *Glaze v. Drayton*, 1 Desaus. (S. Car.) 109; *Morris v. Morris* (N. J. 1888), 13 Atl. Rep. 267; *Robinson v. McDonald*, 11 Tex. 385; 62 Am. Dec. 480; *Hibbert v. Aylott*, 52 Tex. 530; *Goddin v. Vaughn*, 14 Gratt. (Va.) 102.

Instances.—Where a vendor of land dies before conveying the land under the contract, leaving an only child, who is a lunatic, his heir at law, on a bill for specific performance by the vendee, the court will direct the committee of the lunatic to execute the necessary conveyances. *Swartwout v. Burr*, 1 Barb. (N. Y.) 495.

And even where the estate of the decedent is insolvent, where a trust has arisen, specific performance will be decreed. *Root v. Blake*, 14 Pick. (Mass.) 271; *Boyd v. Soule*, 8 Gray (Mass.) 554.

On a bill against the infant heir for specific performance of a contract of the ancestor, the court may direct a conveyance by the infant when of age, and in the meantime may authorize the vendee to take and hold possession, and will restrain the infant from interfering with the possession, or incumbering the title. *Sutphen v. Fowler*, 9 Paige (N. Y.) 280.

Under clear proof of a parol contract, and of a part performance thereof, a specific performance was decreed against the infant heir of one of the parties, allowing him six months after becoming of age to show cause against the decree. *Wilkinson v. Wilkinson*, 1 Desaus. Eq. (S. Car.) 201.

A gave B a deed to land upon B's agreement to pay certain debts, and give A a life lease of the same premises, with the privilege to A to redeem the property. B paid the debts according to agreement, but before executing the life lease he died. C bought B's title from his heirs, with notice of the equitable rights of A. *Held*, on bill by A against C to enforce B's agreement, that C must execute a life lease to A. *Ash v. Hare*, 73 Me. 401.

A made his will, appointing C his executor, and devising certain real

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estate to B for life; and, after the termination of that estate, to C, in trust, to support certain contingent remainders in fee. A afterwards made a contract of sale to D, who entered into possession, and paid a part of the purchase money. A died without receiving the balance or making a conveyance, and C duly qualified as his executor. *Held*, that a bill by B against C and D to compel the specific performance of the contract, would lie. *Bissell v. Heyward*, 96 U. S. 580.

A contract whereby a mother agrees, in consideration of her son's returning to her farm, working it and maintaining her from it, to give it to him, may be specifically enforced after her death against her heirs. *Thrall v. Thrall*, 60 Wis. 503.

An oral agreement, made as consideration for a deed by a grantee at the time of its execution, to furnish the grantor with a home for life, and which has been performed during the grantee's lifetime, is taken out of the Statute of Frauds, so that specific performance may be enforced against the grantee's devisees. *Herrick v. Starkweather* (Supreme Ct.), 8 N. Y. Supp. 145*.

Where the purchaser has fully performed his contract under a parol agreement to sell real estate, but the grantor is suddenly killed before a deed is executed, the purchaser can have specific performance from the widow and children of the grantor, though nothing was averred about interest on the deferred payments, payment of taxes, or the exact time of payment of the balance due. *Everett v. Dilley*, 39 Kan. 73.

But compare *Givens v. Calder*, 2 Desaus. Eq. (S. Car.) 172; 2 Am. Dec. 686, where, under the provisions of a *South Carolina* statute, enforcement against one contractor's heirs was refused to the heirs of the other contractor.

Liability of Assignee with Notice.—So a purchaser of real estate, whether by deed or by title bond, who has notice of his grantor's prior contract to convey to another is bound by that contract, and by all of its terms, and acquires no greater rights than his vendor had. *Atcherley v. Vernon*, 10 Mod. 518; *Taylor v. Stibbert*, 2 Ves. 437; *Daniels v. Davison*, 16 Ves. 249; *Ross v. Purse* (Colo. 1891), 28 Pac. Rep. 473; *Chicago, etc., R. Co. v. Hay*, 119 Ill. 507; *Hunter v. Bales*, 24 Ind. 299;

Walker v. Cox, 25 Ind. 271; *Keegan v. Williams*, 22 Iowa 378; *Gregg v. Hamilton*, 12 Kan. 333; *Wilson v. Emig*, 44 Kan. 125; *Lovering v. Fogg*, 18 Pick. (Mass.) 540; *Murphy v. Marland*, 8 Cush. (Mass.) 575; *Hayward v. Cain*, 110 Mass. 273; *Connihan v. Thompson*, 111 Mass. 270; *Foss v. Haynes*, 31 Me. 81; *Ash v. Hare*, 73 Me. 401; *Farwell v. Johnston*, 34 Mich. 342; *Grummett v. Gingrass*, 77 Mich. 369; *Hines v. Baine*, 1 Smed. & M. Ch. (Miss.) 530; *Thompson v. Henry*, 85 Mo. 451; *Carson v. Percy*, 57 Miss. 97; *Abbott v. Baldwin*, 61 N. H. 583; *Young v. Young*, 45 N. J. Eq. 27; *Wadsworth v. Wendell*, 5 Johns. Ch. (N. Y.) 224; *Champion v. Brown*, 6 Johns. Ch. (N. Y.) 402; 10 Am. Dec. 343; *Laverty v. Moore*, 33 N. Y. 658; *Post v. West Shore, etc., R. Co.*, 50 Hun (N. Y.) 301; *Cordes v. Kenney* (Supreme Ct.), 7 N. Y. Supp. 849; *Merithew v. Andrews*, 44 Barb. (N. Y.) 200; *Blake v. McMurtry*, 25 Neb. 290; *Hughes v. Reese*, 22 Neb. 78; *Page v. Martin*, 46 N. J. Eq. 585; *Otis v. Payne*, 86 Tenn. 663; *Kennedy v. Embury*, 72 Tex. 387; *Smallwood v. Mercer*, 1 Wash. (Va.) 290.

Instances.—One who buys land and takes a conveyance, knowing that the vendor has already made a contract to sell it to another, stands in the place of his vendor, and a court of equity, if it would decree a specific performance of the contract against one, will render a like decree against the other. The notice need not be actual nor amount to full knowledge. Information, from whatever source derived, which would excite apprehension in an ordinary mind, and prompt a person of average prudence to make inquiry, is sufficient. Notice to an agent, received while clothed with authority to promote, and while engaged in promoting, the intended purchase, will be notice to the principal, even where the principal comes forward before the agent has concluded the negotiations, and completes the purchase in person, the agent not participating in the final stages of the transaction. *Bryant v. Booze*, 55 Ga. 438.

A purchaser who had contracted for the conveyance of lands to himself afterwards contracted to sell the same to a third person, and put him into possession. His vendor, disregarding his rights, conveyed the lands to such third person, although a balance was still due from the latter, he being irre-

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sponsible. Such original purchaser has an equitable right to require of his vendee a conveyance to himself in specific performance of the contract of the original vendor, inasmuch as such a conveyance would simply place the parties where by their contracts they have agreed to place themselves. *Bird v. Hall*, 30 Mich. 374.

An old man arranged with his son that, in consideration of his paying a debt secured on land, he should take the land as his own on condition he would maintain the father and his wife for life. The son paid, took possession and maintained his father and his wife for seven years, and was willing to continue to do so. The father then conveyed to one who had notice. *Held*, that the son could enforce a conveyance to himself. *Neel v. Neel*, 80 Va. 584.

After the execution of a contract to purchase land the vendor conveyed the land, and assigned the contract to a third person who accepted payments from the vendee on the contract. *Held*, that these payments constituted such privity as entitled the vendee to maintain a suit for specific performance. *Lovejoy v. Potter*, 60 Mich. 95.

The plaintiff, prior to his contract for the sale of land to the defendant, had agreed to sell a portion of the land to A, which was known to the defendant, and, subsequently to the contract with the defendant, had conveyed to A, pursuant to the agreement. *Held*, that the defendant was bound to complete his contract, deducting from the purchase money the proceeds of the sale to A, with interest. *Vedder v. Evertson*, 3 Paige (N. Y.) 281.

A agreed with B to sell to him his right to land in possession of B, if three persons, named, should find that he had a title to it, and fix the price which B should pay; no award was made. *Held*, that a purchaser of B, with notice of the agreement, could not compel A to make a conveyance, nor to submit the title and price to any other mode of adjustment. *Smallwood v. Mercer*, 1 Wash. (Va.) 290.

Defendant gave plaintiff an option on his land good for thirty days. Plaintiff elected to purchase, but did not tender the price within the time, the landowner refusing to convey on the ground that his wife would not sign the deed, and plaintiff not making his tender, owing to negotiations with the landowner, to induce the wife to

sign the deed. Subsequently the land was conveyed by deed, in which the wife joined to release dower, to one who took with notice of plaintiff's rights, though in the belief that plaintiff would sue for damages instead of specific performance. *Held*, that plaintiff was entitled to a conveyance of the land clear of dower. *Mausfield v. Hodgdon*, 147 Mass. 304.

Notice.—Though he be a non-resident, and the property be outside the State, the court will hold him to the consequences if he take with notice of outstanding equities. *Pingree v. Coffin*, 12 Gray (Mass.) 288.

But vague reports and rumors are not sufficient to constitute such notice. *Flagg v. Mann*, 2 Sumn. (U. S.) 551; *Hine v. Dodd*, 2 Atk. 275; *Wildgoose v. Wayland*, Gouldsb. 147.

An assignee of chattels, with notice of a prior engagement bestowing superior rights upon another, is chargeable under such engagements as fully as his assignor would be. *Clark v. Flint*, 22 Pick. (Mass.) 231; 33 Am. Dec. 733; *Andrews v. Brown*, 3 Cush. (Mass.) 136; *Maulden v. Armistead*, 18 Ala. 500.

Purchaser Without Notice.—But a specific performance will not be decreed against a *bona fide* grantee who has no actual notice of such outstanding equities. *Shields v. Trammell*, 19 Ark. 51; *Ferrier v. Buzick*, 2 Iowa 136; *Russell v. Moffitt*, 6 How. (Miss.) 303.

Particularly if the one seeking relief has been at all negligent in protecting his equities. *Doar v. Gibbs*, 1 Bailey Eq. (S. Car.) 371.

One who takes a conveyance without having given a valuable consideration therefor is bound by his grantor's contract to convey to another. *Young v. Young*, 45 N. J. Eq. 27.

Rights of Assignee.—So, an assignee of a contract to sell or lease has the same rights of enforcement as his assignor. *Weis v. Meyer* (Ark. 1886), 1 S. W. Rep. 679; *Hunt v. Hayt*, 10 Colo. 278; *Robbins v. McKnight*, 5 N. J. Eq. 642; *Robinson v. Perry*, 21 Ga. 183; 68 Am. Dec. 455; *Wagner v. Cheney*, 16 Neb. 202; *Ensign v. Kellogg*, 4 Pick. (Mass.) 1; *Gannett v. Albree*, 103 Mass. 372; *Love v. Sortwell*, 124 Mass. 446; *Wass v. Mugridge*, 128 Mass. 394.

A, who held certain notes of B, agreed to surrender them in consideration that B would convey to her certain land which he owned. She sur-

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rendered the notes, and, without waiting for the deed for the land, conveyed the land to C. *Held*, that B might be compelled to execute the deed, and both he and his privies were estopped to deny the transaction, or set up any claim to the land. *Johnson v. Hughart*, 85 Ky. 657.

And a personal representative or heir, as his decedent. *Godfrey v. Dwinell*, 40 Me. 94; *Moore v. Crawford*, 130 U. S. 122; *White v. Hooper*, 6 Jones Eq. (N. Car.) 152; *Rutherford v. Green*, 2 Fred. Eq. (N. Car.) 121.

Where, by the reason of the loss of deeds or failure to record them, title to land is not clear, the owner may compel parties through whom he claims to execute the necessary conveyances to confirm the title. *Blight v. Banks*, 6 T. B. Mon. (Ky.) 192; 17 Am. Dec. 136.

Equity will grant specific performance to the assignee of an agreement to convey land, regardless of that privity of contract between the parties which is indispensable to a suit at law; and a subsequent parol extension of the time of payment for the land by the original purchaser applies to the assignee who succeeds to all his assignor's equities under the original agreement. *Ewins v. Gordon*, 49 N. H. 444.

Where a vendor agreed in writing to convey to the vendee on payment of a certain price, it was held that a mortgagee of the vendee was entitled upon a tender of the price, to maintain a bill against the vendor for a conveyance. *Ricker v. Moore*, 77 Me. 292.

Laches of Assignor.—And the laches or the abandonment or forfeiture of contract rights by those under whom he claims, is imputed to him. *Aldrich v. Putney*, 11 Paige (N. Y.) 204; *Havens v. Patterson*, 43 N. Y. 218; *Hayes v. Nourse*, 114 N. Y. 595; 11 Am. St. Rep. 700; *Frazier v. Broadnax*, 2 Litt. (Ky.) 249. See *Kennedy v. Embry*, 72 Tex. 387.

Laches of Infants.—The fact that the heirs of the contractor were all infants, is no excuse for their failure to perform their ancestor's contract; and the laches which would have barred such a suit by him will bar a like suit by them. *Havens v. Patterson*, 43 N. Y. 218; *Hayes v. Nourse*, 114 N. Y. 595; 11 Am. St. Rep. 700.

It is possible for a plaintiff to have an interest capable of supporting a

bill praying for specific performance, although he was not a party to the contract. 3 Parsons on Contracts 354; *Hook v. Kinnear*, 3 Swanst. 417; *Hill v. Gomme*, 5 M. & C. 250; 1 Beav. 540; *Colyear v. Countess of Mulgrave*, 2 Keen 81; *Vernon v. Vernon*, 2 P. Wms. 594.

Thus where a debtor has partly performed his contract to purchase real estate his creditors may come in and complete it and compel the conveyance to them. *Ayer v. Bartlett*, 6 Pick. (Mass.) 76.

Where a vendee of land receives a title bond, and, at the same time, executes his promissory notes for the price, the transaction constitutes an executory contract for the sale of land, which—in favor of indorsees of the notes for value before maturity, who knew of the contract—may be specifically enforced in equity, by a sale of the land and an application of the proceeds to the indebtedness; and they are entitled to an obligation to pay rent given by the vendee after maturity of the notes. *Walker v. Kee*, 16 S. Car. 76.

Instances Where Privies Have Been Bound.—In *McKee v. Barley*, 11 Gratt. (Va.) 340, A and B were coparceners. Without authority from B, A conveyed a portion of the land, using B's name in the deed. Afterwards A and B conveyed the whole land to D, who had notice of the previous conveyance to C. C sued D, setting up his deed as an agreement for the conveyance of the piece of land described in his deed, and prayed for a specific enforcement of that agreement, and it was granted.

The Alabama legislature created a harbor board, with authority to contract for the improvement of Mobile harbor, and requiring the county of Mobile to issue its bonds to said board to a certain amount to pay for said improvement. The board made a contract for work on the harbor, to be paid for in said bonds. Work was performed by contractors, and, on settlement, six bonds of \$1,000 each were found to be due them. The act creating the board had been repealed, and when the board ceased operations it had no means to pay this obligation. *Held*, that a bill in equity by the contractors against the county, to compel a delivery of the bonds, was well brought. *Kimball v. Mobile Co.*, 3 Woods (U. S.) 555.

4. Jurisdiction Once Acquired, Retained.—When equity has once obtained jurisdiction, it will determine all questions material to the accomplishment of complete justice between the parties.¹

Where the Privy Has Committed a Fraud.—Where a vendor of land extends the time of payment for a few days, and afterwards, upon the representations of a third person that the vendee does not intend to take the land, conveys it to such third person at an advanced price, if the original vendee in time tenders the price and demands a deed, he will be entitled to specific performance of the contract. *Dement v. Bonham*, 26 Ill. 158.

Exceptions.—On the death of one of two joint owners of land, between whom a contract existed that neither should sell without giving the other the refusal of the property, equity will not enforce the contract specifically against his devisees. *Weisman v. Smith*, 6 Jones Eq. (N. Car.) 124.

The heirs of a vendee who had a contract for 800 acres of land, and had paid the whole price, sold and conveyed 100 acres of it in fee. *Held*, that their grantee could not maintain a bill against the heirs of the vendor, to compel them to execute to him a conveyance of the 100 acres. *Lord v. Underdunk*, 1 Sandf. Ch. (N. Y.) 46.

A contracted for the purchase of lands, made part payment, and died in default, leaving a posthumous child. For twenty-one years no offer was made to pay the remainder of the purchase money, although the vendor endeavored to have the contract completed. For nineteen years the taxes were not paid as agreed by A, and the land was occupied for a number of years previously to the filing of a bill against the vendor for specific performance by persons claiming under him. *Held*, that A's child was not entitled to specific performance, nor to a return of the money paid. *Scott v. Barber*, 14 Ohio 547.

1. *Central Trust Co. v. Wabash, etc., R. Co.*, 29 Fed. Rep. 557; *Cathcart v. Robinson*, 5 Pet. (U. S.) 264; *Apperson v. Gogin*, 3 Ill. App. 48; *King v. Morford*, 1 N. J. Eq. 274; *Renkin v. Hill*, 49 Iowa 270; *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498; *Anson v. Townsend*, 73 Cal. 415; *Simon v. Wildt*, 84 Ky. 157; *Ross v. Purse* (Colo. 1891), 28 Pac. Rep. 473.

Thus if the chancellor has acquired jurisdiction for the purpose of granting

specific performance and from some cause not known to plaintiff at the time the suit was brought this special relief has proven impracticable or impossible, he may grant the plaintiff compensatory damages as the only possible alternative to the expense and delay of an action at law. *Pratt v. Law*, 9 Cranch (U. S.) 456; *Aday v. Echols*, 18 Ala. 353; 52 Am. Dec. 225; *Kelley v. Allen*, 34 Ala. 663.

This may occur where the defendant, after suit brought, does some act which puts a specific enforcement out of plaintiff's power, as by selling the property to an innocent holder for value. *Andrews v. Brown*, 3 Cush. (Mass.) 130; *Philips v. Thompson*, 1 Johns. Ch. (N. Y.) 131; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. (N. Y.) 273. See *infra*, this title, *Compensation in Lieu of Performance*.

Another instance where equity will exercise complete authority, having once acquired jurisdiction, is where suit is brought to specifically enforce a parol contract to insure. This is done, where the loss has occurred, not by actually requiring that a policy issue, but by a decree for the payment of the loss as if a policy had issued. "This method of enforcement," says the court by *Sherwood, C. J.*, in *Baile v. St. Joseph, etc., Ins. Co.*, 73 Mo. 371, "proceeds on the ground that equity, once possessed of a cause, will, before releasing its grasp on the *res*, avoid a multiplicity of suits by doing full, adequate and complete justice between the parties by entering that judgment to which the party will ultimately be entitled." *Citing Real Estate Sav. Inst. v. Collomous*, 63 Mo. 290, *q. v.*

Where plaintiff asks for specific performance of a parol contract relating to real estate, and the defendant avers that the terms of the contract were other than as alleged in the bill, and the evidence established a contract differing materially from that set forth in bill or answer, the court may, with the consent of the plaintiff, decree specific performance of the contract as proved, or rescind and put the parties *in statu quo*. The defendant cannot object that the order is a surprise. *West Virginia Oil, etc., Co. v. Vinal*, 14 W. Va. 637.

5. Parol Evidence May be Heard to Rebut an Equity but Not to Create One.¹

6. Performance Must be Mutual.—Equity will not enforce specific performance unless its enforcement can be made mutual.²

Where specific performance of an exchange is refused for mistake in regard to the subject-matter, defendant having set up, by cross-bill, payment of the boot money, is entitled to its repayment. *Hess v. Evans* (N. J. 1881), 15 Atl. Rep. 310. See *Adams v. Valentine*, 33 Fed. Rep. 1.

"If the nature of any particular contract be such that a court of equity upon the established rules governing the enforcement of specific performance, ought to listen to one of the parties if he should ask its aid, it will be willing, upon a principle of even-handed dealing, to grant a specific performance of the contract at the instance of the other party also, although his case, *per se*, would not be strictly within the reason of this jurisdiction of equity." 3 Parsons on Contracts 326.

Another application of the doctrine is where the parties having agreed to determine a matter by arbitration, one of them refuses to abide by the agreement. In such case the court will determine the matter which the arbitrators were to have settled. See *Lowe v. Brown*, 22 Ohio St. 463. See *infra*, this title, *Agreements to Arbitrate*.

1. See *infra*, this title, *Procedure—Evidence*. See *Stoutenburgh v. Tompkins*, 9 N. J. Eq. 332; *Herren v. Rich*, 95 N. Car. 500; *Veth v. Gierth*, 92 Mo. 97.

The plaintiff who seeks a decree for specific performance is not entitled to the same indulgence in the introduction of parol proof as the respondent may be, who defends against it and offers to prove the existence of verbal stipulations inconsistent with and varying, and operating as conditions of or limitations to the writing. *Quinn v. Roath*, 37 Conn. 16.

2. See *infra*, this title, *Mutuality*.

Unless a contract can be specifically enforced as to all parties, a court of equity will not interfere. *Adderley v. Dixon*, 1 S. & S. 610; *Duff v. Hopkins*, 33 Fed. Rep. 599; *Pullman Palace Car Co. v. Texas, etc.*, R. Co., 11 Fed. Rep. 625; 6 Am. & Eng. R. Cas. 617; *Jackens v. Nicolson*, 70 Ga. 198; *Blalock v. Waggoner*, 82 Ga. 122; *Ikerd v. Beavers*, 106 Ind. 485; *Old Colony R. Co. v.*

Evans, 6 Gray (Mass.) 25; 66 Am. Dec. 394; *Jones v. Newhall*, 115 Mass. 244; 15 Am. Rep. 97; *Kansas, etc., R. Const. Co. v. Topeka, etc., R. Co.*, 135 Mass. 34; 16 Am. & Eng. R. Cas. 495; 46 Am. Rep. 439; *Buck v. Smith*, 29 Mich. 166; 18 Am. Rep. 84; *Ewins v. Gordon*, 49 N. H. 444; *Hopper v. Hopper*, 16 N. J. Eq. 147; *Smith v. McVeigh*, 11 N. J. Eq. 239; *Rindge v. Baker*, 57 N. Y. 219; 15 Am. Rep. 483; *Snyder v. Neefus*, 53 Barb. (N. Y.) 63; *Pugh v. Good*, 3 W. & S. (Pa.) 56; 37 Am. Dec. 534; *Moore v. Fitz Randolph*, 6 Leigh (Va.) 175; 29 Am. Dec. 208.

This rule means, further, that specific performance will not be enforced unless equity can enforce it on both parties simultaneously.

A written contract for the exchange of lands will not be specifically enforced, where it appears that complainant agreed to pay defendant a certain sum in further consideration, and that such agreement is omitted from the writing, as defendant could not have enforced the payment of such sum. *Hall v. Loomis*, 63 Mich. 709.

But this rule has its exceptions, as where the consideration is entire but the performance separate. *Sterling v. Klepsattle*, 24 Ind. 94; 87 Am. Dec. 309.

Thus, in *Ogden v. Ogden*, 4 Ohio St. 182, an agreement to execute a mortgage to pay money at a future day was enforced.

And in *Sterling v. Klepsattle*, 24 Ind. 94; 87 Am. Dec. 319, the agreement was to give a title bond at a future day, the consideration being already executed.

Nor will equity require a defendant to specifically perform covenants of a personal character where, from any cause, by a like proceeding instituted by defendant, the plaintiff could not be compelled to perform his part of the covenants. *Bozon v. Farlow*, 1 Meriv. 459; *Coslake v. Till*, 1 Russ. 376; *Stocker v. Wedderburn*, 3 Kay & Johns. 393; *Hills v. Croll*, 2 Phill. 60; *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 339; *Port Clinton R. Co. v. Cleveland, etc., R. Co.*, 13 Ohio St. 544.

The case of *Eckstein v. Downing*, 64

7. **Executed Contracts Will Not be Enforced.**—It is a general rule that courts will not decree specific performance of a contract that is executed.¹

VI. CONTRACTS ENFORCEABLE OR NOT, CLASSIFIED AS TO SUBJECT-MATTER.—Although the courts have continually attempted to determine the equitable enforceability of contracts by classifying them according to their subject-matter, and have declared that certain kinds of contracts, notably those which concern real estate, will be specifically enforced, while others, such as those relating to chattels and personal conduct, will not, yet the true test is not to be found in the subject-matter. For if the contract possesses the elements requisite to enable a court of equity to enforce it, specific performance will be decreed, regardless of what manner of interests or rights it concerns. The real test is the one already named, Is there an adequate remedy at law? If there is, the suitor will be left to his action in damages; if not, equity will grant him relief. Applying this test to the various classes of

N. H. 248; 10 Am. St. Rep. 404, was one in which, in consideration of plaintiff's agreement to sell a yacht, defendant had promised to pay therefor a certain number of shares of stock in a designated corporation. The evidence failed to show that plaintiff had any special wish or reason to become the owner of this stock in preference to any other stock of the same value, or that he would not have been willing to take other stock, or even money in payment for the yacht. The court took the position that the fact that one party to the contract is entitled to have a decree for specific performance of such contract does not entitle the other party to specific performance in his favor, for the breach of the contract can be adequately compensated to him by the payment of a sum of money. The court, by Smith, J., said: "The rule of mutuality of remedy is of English origin. In that country there is no limitation upon the jurisdiction of their chancery courts, except so far as it is fixed and defined by usage. For no other reason, apparently, than the arbitrary one, that the remedy should be mutual, the rule became established that either party might maintain a bill for specific performance if the other could, although the party bringing the bill could have no other relief than the recovery of the same amount of money or damages as would be recovered in a suit at law. In *Massachusetts*, the jurisdiction of their court to decree specific performance of the contract is limited to cases where 'the parties have not

a plain, adequate, and complete remedy at common law.' Neither in that State nor in *Pennsylvania* does the English rule of mutuality of remedy seem to be followed in its fullest extent. . . . The mutuality required is that which is necessary for creating a contract enforceable on both sides in some manner, but not necessarily enforceable on both sides by specific performance."

1. In *Tucker v. Clark*, 2 Sandf. Ch. (N. Y.) 96, where parties, supposing that they were seised, sold and conveyed lands, with covenants of seisin and warranty, to which as it subsequently appeared, they had no title; and six years afterwards, on being sued by their grantee on the covenant of seisin, purchased the lands of the true owners and tendered a new conveyance thereof to the grantee, who refused to accept it, it was held that the court had no power to compel the grantee to receive the deed, or to interfere with his action on the covenants of title.

Where, after the execution of a contract to convey to a railroad company a right of way in consideration of which the company stipulated to perform certain acts, a deed of the right of way was executed, containing different stipulations, the contract is merged in the deed, and cannot be specifically enforced. *Shenandoah Val. R. Co. v. Dunlop*, 86 Va. 346.

A collateral covenant which restrains the assignment of a contract, will not be enforced in equity, when it appears in the contract that such restraint is a

contracts, we find that, with the exception of those which relate to land, the great majority of broken agreements find an adequate remedy at law, and therefore are not proper subjects for equitable relief.¹

1. **Contracts Relating to Land.**—By its very nature, real estate has no measurable money equivalent. One who has a contract which entitles him to the conveyance of land cannot be compelled to accept money compensation instead, for money may not be a fit equivalent. As to him equity will always presume that the land possesses a special value that is not, for the purposes of the suit, convertible into any liquidated sum. Hence it follows that a contract relating to land will be enforced as a matter of course, if it is fair and definite in its terms, and stands upon a sufficient consideration.² Equity assumes jurisdiction over all manner of rights and interests connected with real estate, for example, in addition to contracts which relate to fee-simple interests in land, leasehold estates, life estates, easements, expectancies, riparian rights, and, indeed, any interest or estate, legal or equitable, which arises out of real property.³

mere incident to the principal covenants, and these have been substantially performed. *Grigg v. Landis*, 21 N. J. Eq. 494.

1. See Article on Specific Performance of Contracts relating to Personality, *Law Mag.*, vol. 12, p. 334. Note by John H. Stewart, 15 Cent. L. J. 8.

2. *Young v. Daniels*, 2 Iowa 126; 63 Am. Dec. 477; *Throckmorton v. Davidson*, 68 Iowa 643; *Fowler v. Marshall*, 29 Kan. 665; *Popplein v. Foley*, 61 Md. 381; *St. Paul Division v. Brown*, 9 Minn. 157; *Aston v. Robinson*, 49 Miss. 348; *Johnson v. Dodge*, 17 Ill. 433; *Modisett v. Johnson*, 2 Blackf. (Ind.) 431; *Shriver v. Seiss*, 49 Md. 384.

In *Ensign v. Kellog*, 3 Pick. (Mass.) 5, the court by Parker, C. J., said: "We are satisfied that no subject is more proper for the power of a court of chancery in decreeing specific execution than a contract for the sale of real estate; for what is agreed to be done ought, in conscience, to be done. . . . Nor is the remedy at law for damages complete or adequate; for the thing contracted for is wanted, and the value in money may often be an unsatisfactory compensation."

Specific performance will be decreed, though it appears that the land contracted for is chiefly valuable on account of its timber. Equity adopts this principle, not because the land is fertile, or rich in minerals, but because

it is land. *Kitchen v. Herring*, 7 Ired. Eq. (N. Car.) 190.

Of a contract in writing respecting lands which is certain in its terms, fair, reasonable, and founded on an adequate consideration, specific performance is as much a matter of right as compensation in damages. *Bogan v. Daughdrill*, 51 Ala. 312; *Chambers v. Alabama Iron Co.*, 67 Ala. 353; *McClure v. Otrich*, 118 Ill. 320.

3. **Instances.**—Leases. See *infra*, this title, *Leases*.

Easements.—*Puttman v. Haltey*, 24 Iowa 425; *Purinton v. Northern Ill. R. Co.*, 46 Ill. 297.

Expectancies.—*Mastin v. Marlow*, 65 N. Car. 695; *Bayler v. Com.*, 40 Pa. St. 37; 80 Am. Dec. 551; *Powers' Appeal*, 63 Pa. St. 443. Compare *Mercier v. Mercier*, 50 Ga. 546; 15 Am. Rep. 694. But this is denied in *Lowry v. Spear*, 7 Bush (Ky.) 451. Compare *infra*, this title, *Essentials to an Enforceable Contract—Fairness*.

Riparian Rights.—*Rerick v. Kern*, 14 S. & R. (Pa.) 267; 16 Am. Dec. 497. See, also, *Coffman v. Robbins*, 8 Oregon 278; *Carson v. Percy*, 57 Miss. 97.

A mere possibility, clothed with an interest in real estate may be made the subject of a contract which a court of equity will enforce. *Anderson v. Lewis*, 1 Freem. Ch. (Miss.) 178.

But in *Paddock v. Davenport*, 107 N. Car. 710; a sale of trees standing upon defendant's land was held, in the

a. SUITS BY THE VENDEE.—Contracts for the sale of real estate are enforceable at the suit of the vendee, upon a payment of the purchase price or consideration, or, where that is not accepted, upon a sufficient tender thereof.¹ The vendor will not be permitted to make the defense that his purchaser has not complied

absence of a showing as to the inadequacy of compensation in damages, to be incapable of equitable enforcement.

Leasehold Interest.—An agreement for a lease for more than one year is an agreement for an "estate or interest in real property," and, in a proper case, is capable of equitable enforcement, on the same terms and under the like circumstances that any agreement concerning lands is or may be specifically enforced. *Wallace v. Scoggin*, 17 Oregon 476.

Equitable Interest.—One who, even as subpurchaser, has acquired an equitable interest in land under an executory agreement, may enter into an agreement for its sale to a third person, without waiting until he has obtained a deed, if the sale is made in good faith, and the title is fully perfected at the time specified for the completion of the sale. *Townshend v. Goodfellow*, 40 Minn. 312.

If the owner of an equitable title to real estate agrees to convey to another an interest therein, subject to the approval of the holder of the legal title, if such assignee will build a depot and side track near the same, and the latter does build the same, at his own expense, with the knowledge of the holder of the legal title, whereby the value of the tract is greatly enhanced, a court of equity will enforce the contract, subject to the rights of the holder of the legal title for any sum due him. *Borders v. Murphy*, 78 Ill. 81.

1. See *supra*, this title, *Equitable Maxims*; *infra*, this title, *Duty of Complainant—Tender and Performance*.

Murphy v. McVicker, 4 McLean (U. S.) 252; *Ridgely v. Clodfelter*, 43 Ill. 195; *Lawson v. McKenzie*, 44 Iowa 663; *Johnson v. Johnson*, 40 Md. 189; *Austin v. Hacks*, 30 Minn. 335; *Taylor v. Rowland*, 26 Tex. 293.

In *Stark v. Wilder*, 36 Vt. 752, the court decreed the specific performance of a contract to execute a quitclaim deed, the plaintiff having paid the purchase money and sold the premises,

and executed a warranty deed of them, in the belief that the quitclaim deed had been executed and recorded according to the defendant's promise, and that his title was perfect.

A *feme sole*, agreed before her marriage, that for a certain sum, which was paid her, she would release her dower in her husband's lands. After the marriage the husband conveyed a parcel of land to A by warranty deed. The husband died. *Held*, that equity, at A's instance, would compel the execution of a release of dower in the land. *Carpenter v. Carpenter*, 40 Hun (N. Y.) 263.

A contract for the conveyance of land, by which the purchaser may pay in money or labor, at his election, can be enforced in equity, if he elects to pay the money, and tenders the amount. *Owen v. Frink*, 24 Cal. 171.

The owner of land, who agrees in writing to convey it on certain terms, and at the same time, by another written agreement, promises to forfeit a sum of money if he fails so to convey, may be compelled in equity to convey the land, on performance of the terms of the agreement by the other party. *Dooley v. Watson*, 1 Gray (Mass.) 414.

Where a vendee has performed his part of the contract, he is entitled to a specific performance of it, and is not bound to receive back the purchase money, after the land has increased in value and he has made improvements thereon. *Buchanan v. Brown, Cooke* (Tenn.) 185.

Equity will enforce an agreement to convey land upon the completion of a building as designated, and the opening of business as agreed, and the fact that the building was afterwards converted to other purposes is immaterial. *Plymouth Mfg. Co.'s Appeal*, 81* Pa. St. 147.

Where two lessees held an option to buy the premises, and one assigned his interest to the other; but the joint notes of both conformable to the conditions of the option, were tendered for the purchase money, it was held that the assignment did not impair the right to

with his part of the contract, unless he shows that he was ready to fulfill his own obligation.¹ Nor will he be relieved from his obligation because of the failure of the vendee to pay the purchase price, if such failure came about through the act of the vendor.² Nor is the vendor excused by the return to his vendee of the consideration; for it requires the same mutual consent to cancel a contract that it requires to make one.³ While the purchaser may not be compelled to accept less than he has agreed to take, he has a right, rather than rescind, to enforce the contract for a part, if he so desires, where an enforcement of the contract in its entirety is impossible, and to claim an abatement of price as to that which he is unable to acquire by the suit.⁴ Thus, he may enforce the conveyance of land, although the

claim a conveyance. *Souffrain v. McDonald*, 27 Ind. 269.

Where a person agreed to convey a lot of land to a religious society, for the site of a church, was appointed on the building committee, and to obtain and collect subscriptions for the church; and in building the church previously to the incorporation of the society, expended his own money, over and above the amount of the subscriptions, the court, after the incorporation, would not compel him to convey the lot, before repayment of his money so expended. *Canajoharie, etc., Church v. Leiber*, 2 Paige (N. Y.) 43.

Although the only contract of which the assignee has notice recites that the consideration thereof has been paid, it is admissible for the vendor to show that the consideration was not money, but a bond to convey other land to the vendor, which land has never been conveyed; and thereupon the vendor will not be compelled to convey to the assignees until the vendee's contract to convey has been performed. *Thompson v. Allen*, 12 Ind. 539.

It was held, in *Humphrey v. Clement*, 44 Ill. 299, that it was no defense to a bill for specific performance of a contract for the conveyance of land on the payment of a sum specifically in coin, that the plaintiff would not pay in coin if he had tendered the sum in legal-tender notes.

If payment for the land was to be made in a specific article, as in labor, the vendee cannot enforce a performance by showing a tender of money in lieu of the article, in the absence of fault on the vendor's part. *Brewer v. Thorp*, 3 Ind. 262.

One who purchases land at a fixed price, payable in services for a definite

term, is entitled in a suit for specific performance, to credit for so much of such term as he may serve, and the vendor cannot apply the credit to another account. *Young v. Harris*, 36 Ark. 162.

1. *Mix v. Beach*, 46 Ill. 311.

2. *Bass v. Gilliland*, 5 Ala. 761.

3. A party who, in consideration of a promissory note and a mare, has entered into a written contract to convey certain real estate, cannot avoid specific performance of such contract by destroying the note and attempting to return the mare. *Avery v. Morrison*, 40 Kan. 151.

4. *May v. LeClaire*, 11 Wall. (U. S.) 217; *Meek v. Walthall*, 20 Ark. 648; *Bonner v. Little*, 38 Ark. 397; *Weatherford v. James*, 2 Ala. 170; *Bell v. Thompson*, 34 Ala. 633; *Bass v. Gilliland*, 5 Ala. 761; *Marshall v. Caldwell*, 41 Cal. 611; *Seegar v. Smith*, 78 Ga. 616; *Wilson v. Brumfield*, 8 Blackf. (Ind.) 146; *Jones v. Shackelford*, 2 Bibb (Ky.) 410; *Rankin v. Maxwell*, 2 A. K. Marsh. (Ky.) 488; 12 Am. Dec. 431; *Woodbury v. Luddy*, 14 Allen (Mass.) 1; 92 Am. Dec. 731; *Covell v. Cole*, 16 Mich. 223; *Mathews v. Patterson*, 2 How. (Miss.) 729; *Luckett v. Williamson*, 31 Mo. 54; *Bostwick v. Beach*, 103 N. Y. 422; *Jacobs v. Locke*, 2 Ired. Eq. (N. Car.) 286; *Henry v. Liles*, 2 Ired. Eq. (N. Car.) 407; *Ketchum v. Stout*, 20 Ohio 453; *Collins v. Smith*, 1 Head (Tenn.) 251; *Roberts v. Lovejoy*, 60 Tex. 253; *Evans v. Kingsberry*, 2 Rand. (Va.) 120; 14 Am. Dec. 779; *White v. Dobson*, 17 Gratt. (Va.) 262; *Morgan v. Brast*, 34 W. Va. 332; *Stockton v. Union Oil, etc., Co.*, 4 W. Va. 273; *Wright v. Young*, 6 Wis. 127; 70 Am. Dec. 453; *Docter v. Hellberg*, 65 Wis. 415.

vendor's title thereto be defective, as the vendor will not be permitted to take advantage of the weakness of his own title.¹

Instances.—Where a contract for the sale of land described it as bounded by the lands of other persons named, and as containing "1,000 acres, more or less," the court refused to decree a specific performance by the purchaser, upon proof that the land contained but 600 acres, except upon condition that the vendor would make a proportionate deduction in the price. *Leigh v. Crump*, 1 Ired. Eq. (N. Car.) 299.

A vendor of land cannot protect himself against a bill by the vendee for specific performance, on the ground that he has conveyed away portions of the land, thereby rendering a specific performance *in toto* impossible, if the vendee consents to receive what remains of the land, though such conveyances were made with the consent of such vendee. *Waters v. Travis*, 9 Johns. (N. Y.) 450.

Where a contract provides for the conveyance of land free from all incumbrances, the existence of incumbrances within the vendor's but not within the purchaser's knowledge, is no ground for a refusal to decree specific performance in favor of the purchaser, in so far as lies within the vendor's power. *Jerome v. Scudder*, 2 Robt. (N. Y.) 169.

Upon suit for the specific performance of a contract for the sale of four hundred acres of land, the complainant may have a specific performance as to eighty acres only. The discrepancy, in such cases, is not a matter by which the defendant can be injured, and he cannot complain of it. *Bogan v. Daughdrill*, 51 Ala. 312.

1. *St. Louis, etc., R. Co. v. Beidler*, 45 Ark. 17; *Harding v. Parshall*, 56 Ill. 219; *Litsey v. Whittemore*, 111 Ill. 267; *Bragg v. Olson*, 128 Ill. 540; *Anderson v. Kennedy*, 51 Mich. 467; *Gartrell v. Stafford*, 12 Neb. 545; 41 Am. Rep. 767; *Peters v. Delaplaine*, 49 N. Y. 362; *Voorhees v. DeMyer*, 3 Sandf. Ch. (N. Y.) 614; *Corson v. Mulvaney*, 49 Pa. St. 88; 88 Am. Dec. 485; *Dalzell v. Crawford*, 1 Pa. Law J. R. 155. *Roberts v. Lovejoy*, 60 Tex. 253.

A vendor of lands cannot object to a specific performance, on the ground that a bare legal title is held in trust for him by another party, if the purchaser is content with the title. *Hyde v. Kelly*, 10 Ohio 215.

Where a tenant in common contracted to sell a portion of his undivided half, and afterwards made a partition, with the consent of his vendee—held, that the partition was no objection to a bill, by the vendee, for a specific performance, his right attaching to his vendor's share, upon partition. *Waters v. Travis*, 9 Johns. (N. Y.) 450.

Equity will enforce specific performance of a devisee's contract to convey, under a devise "subject to the support and maintenance" of a third person, although he set up the defense that it would involve a breach of trust. Title vests in the devisee, subject to that incumbrance, and the vendor may convey such title as he has. *Downer v. Church*, 44 N. Y. 647.

A vendee, who has purchased by writing requiring deed of general warranty, will not be required to pay all the purchase money, when a part of the land sold is claimed by others, and the title thereto is defective. If the purchaser can show clearly that the title is defective, he will not be required to pay the purchase money until such defect is removed, or a proper abatement is decreed, if the vendee insists on having as much as he can have under good title. *Heavner v. Morgan*, 30 W. Va. 335.

Defendant cannot defeat a suit upon his contract to give a quitclaim deed for a strip of land, by a claim that the public are using it as a highway, where it appears that the record title is in defendant, and that no deed or written dedication has been made to the public or village authorities, and that part of the strip only has been so used. *Canham v. Mooney* (Mich. 1889), 41 N. W. Rep. 223.

In a suit for specific performance of a contract to convey land, the title to which is in litigation between the vendor and a third person, the vendor cannot refuse to convey whatever title he has, though the litigation concerning it is still undetermined. *Bragg v. Olson*, 128 Ill. 540.

Nor can he successfully resist by a mere pretense that he cannot convey.

Where a party has given his obligation for a conveyance of land, he cannot set up an executory contract, in which he was the obligor, and which he has

Where the defects in the title are known to all parties at the time the contract is made and are contemplated in the making of it, the vendee can only compel the conveyance of such title as he agreed to accept, and will not be allowed to claim a perfect title.¹ He may sue the vendor and compel a conveyance of his interest, even though the vendor's wife has refused to convey hers,² and the court will award him compensation for the interest which he fails to acquire under his decree,³ or compel the vendor to furnish

never executed, as a ground of refusal to make the conveyance. *Oldham v. Farris*, 3 A. K. Marsh. (Ky.) 405.

Nor is the fact that defendant before suit brought, but after the contract was made, had entered into an agreement with another for the conveyance of the same land. *Snowman v. Harford*, 57 Me. 397.

Where a party has covenanted to convey a title to a tract of land, a court of equity will not permit him to resist a claim by the vendee for specific performance, by a pretense that a part of the title is in others; that he has in vain endeavored to procure a conveyance from them, and that, therefore, he is unable to complete the title; and especially where he was cognizant of his want of title. *Love v. Kamp*, 6 Ired. Eq. (N. Car.) 209; 51 Am. Dec. 419.

In a suit for the specific performance of a contract for the sale of land, it is no defense in the vendor to say that he has disabled himself to comply with the same. The vendee is entitled to a decree compelling the vendor to make reasonable efforts to reacquire the title and convey to him. *Welborn v. Sechrist*, 88 N. Car. 287.

The vendor will not be heard to defend on the ground that he has conferred an equitable interest in a portion of the land upon another. *Westervelt v. Matheson*, Hoffm. Ch. (N. Y.) 37.

Nor Can He Take Advantage of His Own Wrong.—A land agent of the commonwealth who, as such, has sold a bond of the commonwealth for the conveyance of land, and afterwards individually taken an assignment of it from the purchaser, cannot defend a suit for the specific performance of an agreement afterwards made by him to transfer the bond upon the ground that the contracts under which he held were void as against public policy. *Pingree v. Coffin*, 12 Gray (Mass.) 288.

1. *Winne v. Reynolds*, 6 Paige (N. Y.) 407.

When, at the time of the sale of real

estate, the vendor offers the vendee all the title he has in the premises, both parties knowing at the time that the vendor's title is not perfect, and the vendee, at a subsequent day, brings a bill in equity to enforce against the vendor the conveyance of a perfect title, the bill will be dismissed. *Mills v. Van Vorhis*, 23 Barb. (N. Y.) 125.

The rule that when a vendor cannot comply with the contract, by reason of not having the legal title to all the land, the vendee is entitled to specific performance for such as he has title, with compensation for the residue, does not apply when the vendee knew at the time of purchase that the vendor had not full title. *Knox v. Spratt*, 23 Fla. 64.

Where A contracted to convey to B, "by a good and valid conveyance in law," a farm, a quit-rent on the farm of 54 cents per year, which was known to B at the time of the contract, was held to be no objection to a decree of specific performance, especially as such rent had not been demanded for many years. *Ten Broeck v. Livingston*, 1 Johns. Ch. (N. Y.) 357.

2. *Hall v. Hall*, 125 Ill. 95; *Wilson v. Brumfield*, 8 Blackf. (Ind.) 146; *Wingate v. Hamilton*, 7 Ind. 73; *Hazelrig v. Hutson*, 18 Ind. 481; *Martin v. Merritt*, 57 Ind. 34; 26 Am. Rep. 45; *Presser v. Hildenbrand*, 23 Iowa 483; *Park v. Johnson*, 4 Allen (Mass.) 259; *Davis v. Parker*, 14 Allen (Mass.) 94; *Sansborn v. Nockin*, 20 Minn. 178; *Bostwick v. Beach*, 103 N. Y. 414; *Wright v. Young*, 6 Wis. 127; 70 Am. Dec. 453.

3. **Compensation for Outstanding Dower.**—And the gross value of the dower right will be the measure of compensation to be allowed the purchaser by way of abatement of the price. *Martin v. Merritt*, 57 Ind. 34; 26 Am. Rep. 45; *Woodbury v. Luddy*, 14 Allen (Mass.) 1; 92 Am. Dec. 731;

indemnity against her claims.¹ This right the vendee cannot maintain against senior equities subsisting in innocent third

Davis v. Parker, 14 Allen (Mass.) 94; *Sternberger v. McGovern*, 56 N. Y. 19; *Bostwick v. Beach*, 103 N. Y. 422; *Wright v. Young*, 6 Wis. 127; 70 Am. Dec. 453.

A decree for specific performance of an agreement to convey land, where the wife refuses to release her dower, should calculate the amount to be abated on this account from the agreed price, not by estimating the full sum to which she would then be entitled if her husband were dead, but by a calculation of the present value of her interest, calculated by the proper tables. *Hazlrig v. Hutson*, 18 Ind. 481.

Exceptions.—A substantially contrary doctrine has been announced, but it does not seem to be sustained by the best authority. Thus the Pennsylvania courts, which adopt a very narrow construction of the chancery powers, have held in *Riesz's Appeal*, 73 Pa. St. 485, that where the vendor's wife refuses to join in his deed the vendee cannot compel a conveyance of the husband's sole interest unless he is willing to pay the full purchase price for both estates and accept the vendor's deed alone, and they relegate the vendee to the courts at law for relief. *Hanna v. Phillips*, 1 Grant's Cas. (Pa.) 253; *Clark v. Seirer*, 7 Watts (Pa.) 107; 32 Am. Dec. 745; *Corson v. Mulvaney*, 49 Pa. St. 88; 88 Am. Dec. 485; *Burk's Appeal*, 75 Pa. St. 141; 15 Am. Rep. 587. See *Harrigan v. McAleese* (Pa. 1888), 16 Atl. Rep. 31.

And in *New Jersey*. *Reilly v. Smith*, 25 N. J. Eq. 158.

And in *Alabama*, under a statute forbidding a sale of the homestead without the wife's consent a sale of the husband's interest cannot be enforced. *Moses v. McClain*, 82 Ala. 370. And see *Conboy v. Kansas City, etc., R. Co.*, 42 Kan. 658.

A and his wife contracted to convey land to B by warranty deed but without release of dower, it appearing from the circumstances of the sale, which were known to B, that A would have refused to contract for such a conveyance. The wife voluntarily refused to join in the deed. *Held*, that B was not entitled to specific performance with abatement for the dower interest. *Lucas v. Scott*, 41 Ohio St. 636.

A husband and wife, owners of separate and undivided interests in a hotel and saloon business, entered into an executory agreement to sell it as an entirety for a fixed sum, the contract being void as to the wife because not acknowledged by her. *Held*, that the purchaser could not compel the husband to convey his undivided interest, as it is not to be inferred that when he entered into the contract he intended to leave his wife a cotenant with the purchasers. *Jackson v. Torrence*, 83 Cal. 521.

Under a contract to sell land where it appears there is a great deficiency in the quantity of the land, the court will not, in the absence of fraud, compel the vendor to complete the sale, making a deduction in price for the shortage. *Rugge v. Ellis*, 1 Desaus. (S. Car.) 160.

1. Indemnity for Dower Interest.—*Young v. Paul*, 10 N. J. Eq. 401; 64 Am. Dec. 456.

Upon a bill for specific performance, the court will not render a decree requiring a husband to procure his wife to join in the execution of a deed for the purpose of releasing her inchoate right of dower, if she is unwilling to do so. The husband, however, may be compelled to convey and to give indemnity against the claim of the wife. But a decree of indemnity will only be made where it appears that the wife's refusal to convey is not her voluntary act, but made in bad faith, by the device of the husband, to escape his just obligation. *Peeler v. Levy*, 26 N. J. Eq. 330.

Indemnity refused in *Flaherty v. Blake* (N. J. 1887), 10 Atl. Rep. 158.

A decree for specific performance of a contract to sell and convey land, directing a conveyance on payment by the purchaser of the amount due on the contract, but authorizing him, in case the vendor's wife refuses to join in the deed, to retain a certain sum (in this case, \$250) out of the purchase-money, as an indemnity against the contingent right of dower, is erroneous. *Humphrey v. Clement*, 44 Ill. 299.

While the husband is still living there is no basis on which to determine the injury to the title by the wife's refusal to release her dower. *Humphrey v. Clement*, 44 Ill. 299.

parties or strangers to the suit,¹ nor has he any equitable remedy where the vendor has no title to the land and can make none; but he is left to an action at law upon the covenants in his deed.² But where the vendor subsequently acquires title and the vendee has meanwhile made payments of the purchase price and has gone into possession and made improvements, the vendor's subsequent acquisition of title inures to the purchaser's benefit, and he may compel a conveyance to himself of such after-acquired interest.³ A deed made by one who, at the time, has no title, is regarded as a covenant to convey.⁴ The vendor will be required to re-execute a deed where, without the purchaser's fault, the first deed has been accidentally lost or destroyed before it could be recorded,⁵ or where he has obtained possession of it, after it has been once executed and delivered, and has destroyed it.⁶

b. SUITS BY THE VENDOR—(1) *In General*.—Though the vendee's duty in these contracts generally consists in nothing beyond the payment of money, for which the law would seem to afford a sufficient remedy, yet the vendor has a right, in a court of equity, to compel him to comply with his agreement by accepting the land and paying for it. This is permissible, under the equitable doctrine that the enforcement of contracts must be mutual, and that where the vendee would have a right to a decree compelling the conveyance of the land to him, his vendor must likewise be permitted in equity to compel the acceptance of his deed and the payment of the consideration for it. And this the vendor may do, even though he may have an action at law for the purchase money.⁷ The vendor has no standing before the

1. *Shields v. Trammell*, 19 Ark. 51; *Ferrier v. Buzick*, 2 Iowa 136; *Russell v. Moffitt*, 6 How. (Miss.) 303; *Brueggeman v. Jurgensen*, 24 Mo. 87.

2. *Fitzpatrick v. Featherstone*, 3 Ala. 40; *Shields v. Trammell*, 19 Ark. 51; *Ferrier v. Buzick*, 2 Iowa 136; *Middlekauff v. Barrick*, 4 Gill (Md.) 290; *Peeler v. Levy*, 26 N. J. Eq. 330; *Stevenson v. Buxton*, 15 Abb. Pr. (N. Y.) 352; *Nicol v. Carr*, 35 Pa. St. 381; *Love v. Cobb*, 63 N. Car. 324; *Hill v. Fiske*, 38 Me. 320.

3. *Moore v. Crawford*, 130 U. S. 122; *Dodson v. Hays*, 29 W. Va. 577; *Thompson v. Myrick*, 20 Minn. 205.

The vendee has a right to a decree for the specific performance of a contract for the sale of land, according to the terms of the contract, notwithstanding that, before bringing his bill, he claimed a right of way under it, to which he was not entitled. *Prothro v. Smith*, 6 Rich. Eq. (S. Car.) 324.

4. *Moore v. Crawford*, 130 U. S. 122.

5. *Cummings v. Coe*, 10 Cal. 529; *Conlin v. Ryan*, 47 Cal. 71; *Blight v. Banks*, 6 T. B. Mon. (Ky.) 192; 17 Am. Dec. 136; *Wade v. Greenwood*, 2 Rob. (Va.) 474; 40 Am. Dec. 759.

6. *Tolar v. Tolar*, 1 Dev. Eq. (N. Car.) 456; 18 Am. Dec. 598; *Tyson v. Harrington*, 6 Ired. Eq. (N. Car.) 329.

A court of equity will not decree the execution of a new deed, in the place of one alleged to have been fraudulently destroyed, where the evidence leaves it in doubt whether the former deed was ever delivered. *Sterne v. Woods*, 11 Mo. 638.

7. *Andrews v. Sullivan*, 7 Ill. 327; 43 Am. Dec. 53; *Heatherwick v. Heatherwick*, 32 Ill. 73; *Haven v. Lowell*, 5 Met. (Mass.) 35; *Hilliard v. Allen*, 4 Cush. (Mass.) 532; *Old Colony R. Co. v. Evans*, 6 Gray (Mass.) 25; 66 Am. Dec. 394; *Memphis, etc., R. Co. v. Scruggs*, 50 Miss. 284; *Paris v. Haley*, 61 Mo. 453; *Davy v. Dakota*

chancellor until he has "done equity" by showing a tender of full performance upon his own part according to the spirit of his obligation.¹

(2) *Title*.—The vendor must be ready and able to convey a marketable title,² which has been defined to be "a title that is

Co., 19 Neb. 721; *State v. Sheridan*, 1 Clarke Ch. (N. Y.) 533; *Brown v. Haff*, 5 Paige (N. Y.) 235; 28 Am. Dec. 425; *Phyfe v. Wardell*, 6 Paige (N. Y.) 283; 28 Am. Dec. 425; *Stone v. Lord*, 80 N. Y. 60; *Rindge v. Baker*, 57 N. Y. 219; 15 Am. Rep. 475; *Baumann v. Pinckney*, 118 N. Y. 604; *Springs v. Sanders*, Phill. Eq. (N. Car.) 67; *Finley v. Aiken*, 1 Grant Cas. (Pa.) 83; *Larison v. Burt*, 4 W. & S. (Pa.) 27; *Cathcart v. Robinson*, 5 Pet. (U. S.) 264.

The remedy in a case where the obligee of a title bond had not paid the purchase money, is to file a bill against him to compel a specific performance. *White v. Hooper*, 6 Jones Eq. (N. Car.) 152.

A husband and wife, having duly executed and acknowledged their joint deed of land and placed it in the hands of a third person to be delivered by him to the purchaser, upon payment of the purchase money, may compel a specific performance, by the purchaser, of the terms of the joint contract of sale, in pursuance of which the deed was made. *Farley v. Palmer*, 20 Ohio St. 223.

In an action to enforce a contract to purchase land, it is no defense that a person, to whom defendant was attempting to sell the property at the time of making the contract, had sometime afterwards said that he could not take it. *Northrup v. Gibbs* (Supreme Ct.), 1 N. Y. Supp. 465.

1. See *infra*, this title, *Duty of Complainant—Tender*.

2. **Marketable Title Defined—Instances.**—Says the court by Sharswood, C. J., in *Swayne v. Lyon*, 67 Pa. St. 436: "The vendee has the right not merely to have conveyed to him a good, but an indubitable title. Only such a title is deemed marketable. It has been held that a title is not marketable where it exposes the party holding it to litigation." See also *Emmert v. Stouffer*, 94 Md. 543.

A purchaser cannot be compelled to accept a title which is so doubtful that it may expose him to litigation, although the court may believe it good.

It must be a marketable title, which is defined as "one that is free from reasonable doubt." *Vought v. Williams*, 120 N. Y. 253; *Hymers v. Branch*, 6 Mo. App. 511; *Vreeland v. Blauvelt*, 23 N. J. Eq. 483. See *Bigelow v. Armes*, 108 U. S. 10; *Sohier v. Williams*, 1 Curt. (U. S.) 479; *Adams v. Valentine*, 33 Fed. Rep. 1; *Brown v. Cannon*, 10 Ill. 174; *Close v. Stuyvesant*, 132 Ill. 607; *Smith v. Turner*, 50 Ind. 367; *Richmond v. Gray*, 3 Allen (Mass.) 25; *Park v. Johnson*, 7 Allen (Mass.) 378; *Sturtevant v. Jaques*, 14 Allen (Mass.) 526; *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400; *Jeffries v. Jeffries*, 117 Mass. 187; *Allen v. Atkinson*, 21 Mich. 351; *Powell v. Conant*, 33 Mich. 396; *Richmond v. Koenig*, 43 Minn. 480; *Luckett v. Williamson*, 31 Mo. 54; *Taylor v. Williams*, 45 Mo. 80; *St. Mary's Church v. Stockton*, 8 N. J. Eq. 520; *Dobbs v. Norcross*, 24 N. J. Eq. 327; *Seymour v. De Lancey*, Hopk. (N. Y.) 436; 14 Am. Dec. 552; *In re Ladue*, 54 N. Y. Super. Ct. 528; *Burwell v. Jackson*, 9 N. Y. 535; *Brooklyn Park Comrs. v. Armstrong*, 45 N. Y. 234; 6 Am. Rep. 70; *Shriver v. Shriver*, 86 N. Y. 575; *Fleming v. Burnham*, 100 N. Y. 1; *Ferry v. Sampson*, 112 N. Y. 415; *Moore v. Williams*, 115 N. Y. 586; *Speakman v. Forepaugh*, 44 Pa. St. 363; *Freetly v. Barnhart*, 51 Pa. St. 279; *Swain v. Fidelity Ins., etc., Co.*, 54 Pa. St. 455; *Swayne v. Lyon*, 67 Pa. St. 436; *Pratt v. Eby*, 67 Pa. St. 396; *Herzberg v. Irwin*, 92 Pa. St. 48; *Littlefield v. Tinsley*, 26 Tex. 353; *Linkous v. Cooper*, 2 W. Va. 67; *Boggs v. Bodkin*, 32 W. Va. 566.

The question as to whether the title is marketable is one for the court, and it is not error to exclude evidence of attorneys to that point. *Moser v. Cochrane*, 107 N. Y. 35.

In *Shriver v. Shriver*, 86 N. Y. 575, the court by Folger, C. J., said: "As a general rule, a title which is open to judicial doubt is not a marketable title. What is a sufficient ground for judicial doubt is not to be conclusively reduced to fixed and determinate principles, for it depends, in some degree,

upon the discretion of the court. (*White v. Damon*, 7 Ves. 35.) Thus it is said in *Price v. Strange* (6 Madd. 159), that, in attempting to lay down a rule, it may be stated that a purchaser is not to take property which he can only acquire in possession by litigation and judicial decision. A title may be doubtful, which is to say, unmarketable, because of the uncertainty of some matter of fact appearing in the course of the deduction of it. And if, after the vendor has produced all the proofs that he can, a rational doubt still remains, a title is not marketable. It seems that a rational doubt may be said to exist when a court of law would not feel called upon to instruct a jury to find that the fact existed on the existence of which the vendor's title depends. (*Emery v. Grocock*, 6 Madd. 54; *Lowe v. Lush*, 14 Ves. 548.)

A marketable title is one that is free from reasonable doubt. The purchaser is not compelled to take property, the possession of which he may be compelled to defend by litigation. He should have a title that will enable him to hold his land in peace, and if he wishes to sell it, be reasonably sure that no flaw or doubt will arise to disturb its market value. *Vought v. Williams*, 120 N. Y. 253.

Specific performance will not be decreed to compel a purchaser to accept title while an action is pending to set aside for fraud a deed on which such title depends. *Aldrich v. Bailey*, 55 Hun (N. Y.) 607.

An objection which is supported by a decision of the supreme court in general term will defeat a suit for specific performance. *Ferris v. Plummer*, 42 Hun (N. Y.) 440.

Equity will not compel the specific performance of a contract to buy land, where the title was derived through a mortgage given to "Joseph D. Beers, president of the North American Trust & Banking Company, his successors and assigns," without words of inheritance, where, as in *New Jersey*, such words are essential to a fee simple. *Cornell v. Andrews*, 35 N. J. Eq. 7; 15 Cent. L. J. 8.

But this rule that a purchaser will not be required to accept a title which may be exposed to litigation, does not prevail where no question of fact is involved and all parties interested are before the court. *Chesman v. Cummings*, 142 Mass. 65.

If there be any reasonable chance that some third person may raise a question against the owner of the estate after the completion of the contract, the court considers this a circumstance which renders the bargain a hard one for the purchaser, and one which it will not in the exercise of its discretion compel him to execute." *Brooklyn Park Comrs. v. Armstrong*, 45 N. Y. 234; 6 Am. Rep. 70; *Seaman v. Vawdrey*, 16 Ves. 390.

Specific performance of a contract of sale will not be decreed at the instance of the vendor, unless his ability to make a good title is unquestionable. *Tomlin v. McChord*, 5 J. J. Marsh. (Ky.) 135; *Garnett v. Macon*, 6 Call (Va.) 308; *Owings v. Baldwin*, 8 Gill (Md.) 337.

The title must be free from reasonable doubt. *Hepburn v. Auld*, 5 Cranch (U. S.) 262; *Watts v. Waddle*, 6 Pet. (U. S.) 389; *Bartlett v. Blanton*, 4 J. J. Marsh. (Ky.) 426; *Jarman v. Davis*, 4 T. B. Mon. (Ky.) 115; *Hightower v. Smith*, 5 J. J. Marsh. (Ky.) 542; *Beckwith v. Kouns*, 6 B. Mon. (Ky.) 222; *Beer v. Leonard*, 40 La. Ann. 845; *Chambers v. Tulane*, 9 N. J. Eq. 146; *Brown v. Haff*, 5 Paige (N. Y.) 235; 28 Am. Dec. 425; *Bates v. Delavan*, 5 Paige (N. Y.) 299; *Delavan v. Duncan*, 49 N. Y. 485; *Hinckley v. Smith*, 51 N. Y. 21; *Bostwick v. Beach*, 103 N. Y. 414; *Toole v. Toole*, 112 N. Y. 333; *Ferry v. Sampson*, 112 N. Y. 415; *Nicol v. Carr*, 35 Pa. St. 381; *Lowry v. Muldrow*, 8 Rich. Eq. (S. Car.) 241; *Butler v. O'Hear*, 1 Desaus. Eq. (S. Car.) 382; 1 Am. Dec. 671; *Starnes v. Allison*, 2 Head (Tenn.) 221; *Collins v. Smith*, 1 Head (Tenn.) 251; *Gober v. Hart*, 36 Tex. 141; *Littlefield v. Tinsley*, 26 Tex. 353; *Middleton v. Selby*, 19 W. Va. 167.

A vendee cannot be compelled on a bill for specific performance to accept a doubtful title unless it is so stipulated in the contract. *Powell v. Conant*, 33 Mich. 396.

The rule prevails whether the doubt arise upon the facts, or whether the question be one of law. *Jordan v. Poillon*, 77 N. Y. 518; *Fleming v. Burnham*, 100 N. Y. 8; *Abbott v. James*, 111 N. Y. 673. See *Hayes v. Nourse*, 114 N. Y. 395; 11 Am. St. Rep. 700; *Townshend v. Goodfellow*, 40 Minn. 312.

If there is any doubt concerning the title and the vendor can remove that

doubt at trifling expense, he cannot have specific performance unless he first perfect his title. *Reformed, etc., Dutch Church v. Mott*, 7 Paige (N. Y.) 77; 32 Am. Dec. 613.

Where the contract merely calls for a deed, this implies a good title. *Bowen v. Vickers*, 2 N. J. Eq. 520; 35 Am. Dec. 516.

It has been held that where the contract is for a "good title" a quitclaim deed is sufficient if the vendor has a good title. *Pugh v. Chesseldine*, 11 Ohio 109; 37 Am. Dec. 414.

Title by Adverse Possession Sufficient.

—Title by adverse possession, such as may be proven by parol proof, will justify a decree. But it must be established beyond question. *Murray v. Harway*, 56 N. Y. 344; *Shriver v. Shriver*, 86 N. Y. 575; *Seymour v. DeLancey*, 1 Hopk. (N. Y.) 436; 14 Am. Dec. 552.

But not where the title of the vendor rests only on adverse possession, and it is impossible to determine from the evidence what claim of title was made by the vendor's grantor, and the person in whom is the outstanding title is not a party to the suit. *McCabe v. Kenny*, 52 Hun (N. Y.) 514.

Adverse possession under color of title, if there is no reasonable doubt as to the superiority of such title, will entitle the vendor to a decree. *Crowell v. Druley*, 19 Ill. App. 509. See *O'Connor v. Huggins*, 113 N. Y. 511; *Methodist, etc., Church Home v. Thompson*, 1 Silvernail (N. Y.) 564.

Thirty years of adverse possession will sustain a title that equity will compel the vendee to accept. *New York Steam Co. v. Stern*, 46 Hun (N. Y.) 206; *Kennedy v. Gramling*, 33 S. Car. 367.

And a title one link of which is a defective assignment made seventy years earlier. *New York Steam Co. v. Stern*, 46 Hun (N. Y.) 206.

Fifty-five years' continuous possession cures the absence of a deed in the chain of title. *Bohm v. Fay*, 18 Abb. N. Cas. (N. Y.) 175.

So, with ninety years' adverse possession. *Abrams v. Rhoner*, 44 Hun (N. Y.) 507.

And sixty years, where there are no outstanding minorities which could be set up against it. *Ottinger v. Strasburger*, 33 Hun (N. Y.) 466.

In 1835, Kip sold land to Delavan and took a mortgage for the purchase money. In 1840, Delavan made a gen-

eral assignment for the benefit of creditors, which provided for the return to him of any surplus. The same year Kip brought a foreclosure suit, and made Delavan a party, but not Delavan's assignee. Kip bid off the property and received a master's deed, which he recorded in 1841. Delavan lived thirty years after this, and his assignee twenty-five, and Kip's title was never questioned. *Held*, that in 1875 Kip's title was sufficiently good to compel its acceptance by a purchaser under an executory contract. (*Reversing* 53 N. Y. Super. Ct. 1.) *Kip v. Hirsh*, 103 N. Y. 565; 18 Abb. N. Cas. (N. Y.) 167.

It is not a defect of title for which the vendee may defeat a decree for specific performance that, after fifty-one years' acquiescence in a public grant, private parties possibly had rights which they might have asserted. *Lyman v. Gedney*, 114 Ill. 388; 55 Am. Rep. 869.

But this rule that title by adverse possession is sufficient is not universal, for in *Schultz v. Rose*, 65 How. Pr. (N. Y.) 75, the contrary was held. And in *Lewis v. Herndon*, 3 Litt. (Ky.) 358; 14 Am. Dec. 68.

Particularly where the title by adverse possession depends on a long and difficult investigation of facts, although it may be good. *Noyes v. Johnson*, 139 Mass. 436.

Adverse possession will not answer where the contract implies that the purchaser should have a good record title. *Noyes v. Johnson*, 139 Mass. 436.

The possession under which title is claimed must be distinctly hostile, and where the land is unoccupied and unclosed the title has been pronounced insufficient. *Kip v. Hirsh*, 53 N. Y. Super. Ct. 1; 103 N. Y. 565.

Mere naked possession will not support a decree for conveyance, where title is in question. Rights growing out of possession are matters purely of legal cognizance. *Smith v. Hollenback*, 51 Ill. 223.

Title dependent on the Statute of Limitations will sustain a decree. *Shober v. Dutton*, 6 Phila. (Pa.) 185; *O'Connor v. Huggins*, 113 N. Y. 511; *Kip v. Hirsh*, 103 N. Y. 565; *Core v. Wigner*, 32 W. Va. 277.

Equitable Title.—The title must be a good equitable title as well as a good legal one. *Creigh v. Shatto*, 9 W. & S. (Pa.) 82.

A purchaser at a master's sale, under

a decree of court, will not be compelled to complete his purchase if he is not informed, at the sale, of any defect in the title, unless a title can be given which shall be good in equity, as well as at law. *Coster v. Clarke*, 3 Edw. Ch. (N. Y.) 428.

A *cestui que trust* cannot dispose of his interest in the estate devised in trust for him, and a court of equity will not decree specific execution of an agreement of sale made by him. *Shankland's Appeal*, 47 Pa. St. 113.

Title Dependent on Parol Proof Is Generally Sufficient.—A title, proof whereof rests partly in parol, is not necessarily so doubtful that specific performance by the purchaser will not be decreed. "It has been held that where one of the paper links of title was defective, the lapse might be supplied by parol proof of possession under color of title sufficient to establish a good adverse possession, and that such a title is enough on which to found a decree." *Murray v. Harway*, 56 N. Y. 344.

In *Smith v. Death*, 5 Madd. 371, the question was whether a first son had been brought up and educated as a member of the established Church of England and was a constant frequenter of that church. The fact being satisfactorily proven, the exceptions to the title were overruled.

Spencer v. Topham, 22 Beav. 573, was a suit for specific performance where title was objected to because it required parol proof to establish it, to determine whether a solicitor (Phillips) who was the plaintiff's grantor had dealt fairly with his client (Bate) who was the vendor to him. Decree granted.

But compare *Irving v. Campbell*, 121 N. Y. 353, where the contrary doctrine is announced. In that case the vendor was refused a decree where it appeared that a defective record was the only written evidence of a conveyance from one who was conceded to have had title less than twenty years before, even though the execution of such deed was satisfactorily proved by parol. *Reversing* 56 N. Y. Super. Ct. 224.

Defects Which Will Prevent a Decree.—**Instances.**—Following have been held to be flaws in the title sufficient to defeat a conveyance:

A mortgage. *Swihart v. Cline*, 19 Ind. 264; *Hinckley v. Smith*, 51 N. Y. 21.

Even a mortgage that has been satis-

fied of record, where the vendee has notice that it has never been paid. *Conley v. Dibber*, 91 Ind. 413. And a mortgage, the satisfaction of which was forged, the vendee having notice of the forgery. *Charleston v. Blohme*, 15 S. Car. 124; 40 Am. Rep. 690.

An outstanding dower interest. *Sternberger v. McGovern*, 56 N. Y. 12; *Bostwick v. Beach*, 103 N. Y. 414; *Ely v. Perrine*, 2 N. J. Eq. 396.

Where, in the chain of title, a former deed has passed which, on account of error in its terms is liable to reformation and thus to impair the title, the vendee is not bound to perfect his purchase. *Scholle v. Scholle*, 113 N. Y. 261.

Unsatisfied tax liens. *Cooper v. Tiler*, 46 Ill. 462; 95 Am. Dec. 442; *Wilson v. Tappan*, 6 Ohio 120.

Liability of vendor as surety. *Secrest v. McKenna*, 1 Strobb. Eq. (S. Car.) 356. See *Butler v. O'Hear*, 1 Desaus. Eq. (S. Car.) 382; 1 Am. Dec. 671.

The purchaser cannot be compelled to take a title where there is at least a probability that certain persons whose deed is tendered to make a title, are not the sole and only heirs of their ancestor. *Walton v. Meeks*, 41 Hun (N. Y.) 311.

A vendor of land should not have specific execution of his contract, when he cannot show a good and perfect title at the hearing, though he may have been thrown off his guard by the purchaser; and want of proof that the grantors in a deed are the heirs, and only heirs, of one who died seised, is a fatal defect. A recital in the deed is not sufficient to establish the fact. *Barnett v. Higgins*, 4 Dana (Ky.) 565. See *Kilpatrick v. Barron*, 125 N. Y. 751.

A defective acknowledgment in a former deed may be a fatal objection to the title. So held where the statute required a married woman executing a deed to be examined separate and apart from her husband, and that the officer examining her should explain the contents and question her as to her willingness, and the officer's certificate had omitted some of these particulars. *Black v. Aman*, 6 Mackey (D. C.) 131. See also *Fryer v. Rockefeller*, 63 N. Y. 268; *Brown v. Witter*, 10 Ohio 142; *Ludlow v. O'Neil*, 29 Ohio St. 181; *Mullins v. Aiken*, 2 Heisk. (Tenn.) 535.

Where there is a substantial defect with respect to the nature, character,

situation, extent or quality of the estate, which was unknown to the purchaser, he will not be compelled to accept the title. *Ellicott v. White*, 43 Md. 145.

Reservations and Conditions.—A covenant in a former deed that a part of the lot shall be left vacant for courtyard and never built on. *Wetmore v. Bruce*, 54 N. Y. Super. Ct. 149; 118 N. Y. 319. But compare *Riggs v. Purcell*, 66 N. Y. 193, where the contrary view was taken of a similar covenant on the ground that the reservation operated to the advantage of the lot.

In *Jeffries v. Jeffries*, 117 Mass. 184, a condition forbidding the erection of stable roofs on the premises beyond a certain height was held sufficient to defeat a decree.

One will not be compelled to accept a conveyance containing restrictions of which he had no previous knowledge, prohibiting the erection of dwelling houses of a less width than seventeen feet, and the laying out of streets, lanes, alleys, courts and avenues of a less width than fifty feet, and the building upon certain streets and avenues. *Anders' Estate*, 12 Phila. (Pa.) 45.

Equity will not enforce a contract to purchase against a vendee where a former owner conveyed the lot in question and adjacent lots by deeds containing restrictions as to the use of the premises, and afterwards re-purchased the lot, and re-conveyed it by a deed containing no restrictions, certain later mesne conveyances also containing no restrictions. The restrictions can be enforced by the adjacent owners. *Raynor v. Lyon*, 46 Hun (N. Y.) 227.

One will not be compelled to accept a title which may be incumbered with a condition, even though there be doubt as to the validity of the condition. *Post v. Bernheimer*, 31 Hun (N. Y.) 247.

In *Drake v. Shiels* (Supreme Ct.), 7 N. Y. Supp. 209, the court refuses to enforce a contract to buy a lease of premises known as "75 Fourth Avenue," it appearing that one wall of the building in question was not on the demised premises, as the vendor's title is to that extent defective.

A prohibition against use of the property for the manufacture of soap or other disagreeable purposes is such an incumbrance as will excuse a vendee from compliance. *Raynor v. Lyon*, 46 Hun (N. Y.) 227.

In *Adams v. Valentine*, 33 Fed. Rep. 1, the condition was that "no building shall be erected nearer to Olive street

than the house of H. G. Otis now stands," and was deemed sufficient to defeat plaintiff's claim.

The restriction upon the title in *Gilbert v. Peteler*, 38 N. Y. 165, was that no structure was to be erected on the land that would impair in any manner the view of the bay from any part of the dwelling of J. C. Green, and a decree was refused.

A condition as to character, location and use of buildings to be erected, held sufficient to defeat vendor's suit. *Newbold v. Peabody Heights Co.*, 70 Md. 493.

A reservation of an easement. *Hymers v. Branch*, 6 Mo. App. 511; *Mott v. Mott*, 68 N. Y. 246; *Seaman v. Hicks*, 8 Paige (N. Y.) 655; *James v. Freeland*, 5 Grant Ch. 302; *Kronsbien v. Gage*, 10 Grant Ch. 572; *Boulton v. Bethune*, 21 Grant Ch. 478.

A purchaser is not bound to accept a title that is clouded by a right of reverter in the heirs of the original grantor by reason of a diversion from the uses limited in his conveyance. Nor will the fact that the legislature attempted to authorize an absolute disposition by the original grantee, notwithstanding the limitation, make any difference. *Second Universalist Soc. v. Dugan*, 65 Md. 460.

See, generally, in reference to limitations upon the use of the premises, *Bentley v. Craven*, 17 Beav. 204; *Corless v. Sparling*, 1r. Rep., 9 Eq. 595; *Brookes v. Drysdale*, L. R., 3 C. P. Div. 52; *Foley v. McKeown*, 4 Leigh (Va.) 627.

Title Dependent on Irregular Legal Proceedings.—The vendee will not be compelled to accept a title that is defective, by reason of imperfect or irregular legal proceedings, as where necessary parties have been omitted in foreclosure proceedings, or sales have been irregularly conducted by guardians, personal representatives or public officers, and the vendor has acquired his title, either proximately or remotely, through such sales. *Richmond v. Gray*, 3 Allen (Mass.) 25; *Kilpatrick v. Barron*, 125 N. Y. 751; *James v. Meyer*, 41 La. Ann. 1100.

See also *Swayne v. Lyon*, 67 Pa. St. 436; *Tevis v. Richardson*, 7 T. B. Mon. (Ky.) 654; *Morgan v. Morgan*, 2 Wheat. (U. S.) 290.

Equity will not decree specific performance in the vendor's favor where the title is imperfect because certain grandchildren of a testator, who pos-

seased a vested remainder in the estate, were not made parties to foreclosure proceedings. *Lockman v. Reilly*, 29 Hun (N. Y.) 434.

See also *Martin v. Porter*, 4 Heisk. (Tenn.) 407; *Littlefield v. Tinsley*, 26 Tex. 353.

A purchaser will not be compelled to accept a title derived from a foreclosure sale, where the summons in the foreclosure was served under an order for publication made by the special term of the supreme court, instead of by a judge as required by statute. *Crosby v. Thedford*, 13 Daly (N. Y.) 150.

Specific performance will not be granted where the plaintiff claims title through a deed from an assignee in bankruptcy; and the facts that no debts were proved against the estate of the bankrupt before his discharge, and only one small debt afterwards; that the land was sold by the assignee in bankruptcy for but two dollars, without any proof that even that was paid, or that any binding contract for the sale was made; that no deed was given by the assignee until after the lapse of twenty-two years, when no conveyance could have been compelled; that the deed was then given without any order of the court, and that no possession ever accompanied the title under the assignee's sale, leave the plaintiff's title involved in infirmity and uncertainty. *Palmer v. Morrison*, 104 N. Y. 132.

Specific performance of an agreement to assign certain tax leases of the city of New York, refused, the leases being found irregular and defective. After such agreement it appeared that the promisee purchased and received a conveyance from the owner of the lands. But it was held that this did not cure the defects in the promisor's title, being adverse thereto. *Bensel v. Gray*, 80 N. Y. 517.

At an assignee's sale in bankruptcy the land was bid off by Reed. Townshend claimed to have purchased Reed's bid from Reed's administrator, and the assignee accordingly made a deed to Townshend. No possession accompanied the deed under the assignee's sale. *Held*, that one who, many years afterwards, claimed under Townshend could not give a title which, in a suit for specific performance, a purchaser should be compelled to accept, the heirs of Reed being the proper parties to have conveyed, and the administrator having had no interest or authority to assign. *Palmer v.*

Morrison, 104 N. H. 132. And see *Scholle v. Scholle*, 113 N. Y. 261.

A bill in equity was filed against the purchasers of an estate under an order from the probate court, for a specific performance of the contract. The sale not having been confirmed—held, that the court would not take jurisdiction of such a bill. *Bickley v. Biddle*, 33 Pa. St. 276.

Property in which A had a life estate, and her daughter B, a minor, the remainder in fee, was sold by order of court and purchased by A, who should have paid the price, or most of it, to the trustee, to be invested for B, but who, instead, retained it in her own right and as guardian of B. Notwithstanding this, she received a deed, under order of court. *Held*, that a purchaser would not be compelled to accept her title. *Gill v. Wells*, 59 Md. 492.

A will authorized the executors to sell or mortgage realty whenever necessary to do so, to pay any expenses or bequests therein provided for, or to save or improve any other portion of the property while undistributed. A report of the executors showed a balance of \$904.93, to be provided for, but it did not appear whether this had been approved. Long before making this report, the executors had contracted to sell the land in question to plaintiff's vendor, for \$6,000. They afterwards conveyed to plaintiff. *Held*, not a marketable title, the power of the executors to convey the land being a doubtful question of fact. *Townshend v. Goodfellow*, 40 Minn. 312. See *Scholle v. Scholle*, 113 N. Y. 261.

A sale of land was made by an administrator, on September 20, 1860, and by the conditions of the sale, the deed was to be delivered on the first Monday of December. Administrator's intestate claimed title through a deed of commissioners appointed to make partition of land, and the defendant declined to accept a deed on the ground of defective title. *Held*, that in a bill to enforce a specific performance, a court of equity would not compel a purchaser to accept a title dependent on an illegal or invalid sale, while it remained open to revision at the discretion of a court of law, although the judgment unreversed might be conclusive of the parties' rights. *Young v. Rathbone*, 16 N. J. Eq. 224; 84 Am. Dec. 151.

A purchaser at a judicial sale will not be compelled to accept a title of two or three executors, where it is a matter of doubt whether there was a renunciation of office by the executor not joining in the deed, and where a question of law is fairly open, besides, on a matter of descent. (*Reversing* 36 Hun (N. Y.) 456). *Fleming v. Burnham*, 100 N. Y. 1.

Where an infant's interest in the land had been sold in partition without the appointment of a guardian for the infant, the title was held defective. *Swain v. Fidelity Ins., etc., Co.*, 54 Pa. St. 455; *Vail v. Nelson*, 4 Rand. (Va.) 478.

Plaintiff contracted personally to sell to defendant land to an undivided one-third of which she had title, title to the residue being in her infant wards. She then applied for, and obtained from the probate court, permission to sell her wards' land at private sale. No sale was, in fact made under this order of court, but a report was filed reciting a sale to defendant, which was confirmed and a guardian's deed ordered to be executed. Plaintiff tendered this guardian's deed to defendant together with her own deed to the premises; but defendant refused to accept them. *Held*, that defendant would not be compelled to take the title offered, as it was doubtful whether there was such a compliance with the order of court to sell as would bind the wards. *Williams v. Schembri*, 44 Minn. 250. See *Richmond v. Gray*, 3 Allen (Mass.) 25. But compare *Kip v. Hirsh*, 103 N. Y. 565.

Titles Defective for Doubt and Uncertainty.—Under a will of a married woman, providing that her husband should "not only have out of my estate what the laws of this commonwealth prescribe, but the entire use, income and profits of all my real and personal estate during his natural life; and furthermore, that if in his judgment it shall be necessary to his personal comfort to expend and consume any portion of the principal or capital of my said estate, he may freely appropriate so much thereof, even to the last cent, as may be justly deemed necessary for that purpose; and I do give and bequeath the same to him accordingly"—*held*, that the husband's title was not sufficiently clear to justify a specific performance of an agreement to purchase. *Butts v. Andrews*, 136 Mass. 221.

Where an heir of a former owner had

disappeared twelve years before and had failed to convey his interest, the title was held to be unmarketable. *Vought v. Williams*, 120 N. Y. 253.

Plaintiff held title through a devise to executors and trustees, with power to sell either publicly or privately. All the estate was bequeathed in trust to be divided among testator's children and their heirs, with the clause: "And if either of my daughters shall die without lawful issue, or leaving issue which shall not attain the age of twenty-one years, and without issue," then to be divided among his other children. Testator died in 1817, and in 1829, all the daughters having lawful issue, minors, the trustees, through a third person, conveyed one-third of the real estate to each daughter and her husband, there being no sale, but the transaction appearing from the deeds to be a scheme to free the land of the trust and bar the contingent remainder. There was a possibility that one of the daughters might have had issue dying under the age of twenty-one, but leaving issue, that might take as remainderman. On account of this doubt specific performance was refused. *McPherson v. Smith*, 49 Hun (N. Y.) 254.

Specific performance of a contract to sell land will not be decreed in favor of the vendor unless his ability to make a title be unquestionable. Thus, where executors sold a house and lot, the testator's title to five-sixths being clear, but for the other sixth of which no deed could be found either in the clerk's office or among the testator's papers, and the former owner being dead, her husband testified that she did make a deed of it, but there was doubt whether he was not mistaken as to the property conveyed, the purchaser was not required to complete the purchase. *Griffin v. Cunningham*, 19 Gratt. (Va.) 571.

In *Francis v. St. Germain*, 6 Grant Ch. 363, it appeared in December, 1854 that vendor's grantor was insane, and had been "since February or March, 1854," and his deed bore date February 14, 1854. See *Frost v. Beavan*, 17 Jur. 369; *Elliott v. Ince*, 3 Jur. (N. S.) 597; *Hinchman v. Ballard*, 7 W. Va. 152.

Where there was uncertainty whether the land had been conveyed for the use of the vendor church or for all churches in the town. *St. Mary's Church v. Stockton*, 8 N. J. Eq. 520.

The fact that one of the boundary lines is disputed. *Bruck v. Tucker*, 42 Cal. 346; *Voorhees v. DeMyer*, 3

free from reasonable doubt," to all of the land which he has bound himself to sell.¹

Sandf. Ch. (N. Y.) 614; Walsh v. Hall, 66 N. Car. 233.

A mistake in the description in a former deed. Smith v. Turner, 50 Ind. 367.

A doubt as to construction of a proviso in the deed. Whitlock's Case, 32 Barb. (N. Y.) 48; Post v. Well, 8 Hun (N. Y.) 418.

Where a trust was created and the *cestuis que trustent* were not named. Butler v. O'Hear, 1 Desaus. Eq. (S. Car.) 382; 1 Am. Dec. 671.

Where one who was owner of the equity of redemption took an assignment of the mortgage to himself, "trustee and his heirs and assigns," his heirs could not give a good title without proof that the mortgage had been satisfied, or that the trust implied in the deed had expired. Sturtevant v. Jaques, 14 Allen (Mass.) 523.

A vendee found in the chain of title of the estate bargained for by him a record of an executor's sale of the land to one of the same surname, and a deed back, five days afterwards, to the executor, both deeds being recorded within five minutes of one another, and the transaction having taken place within twenty years. Held, that the vendee would not be required to take the title. People v. Open Board, etc., 28 Hun (N. Y.) 274.

Where a deed recited that certain grantors were the heirs of one deceased, but did not state that they were the only heirs, title was rejected. Barnett v. Higgins, 4 Dana (Ky.) 565.

A title depending upon a judicial construction of odd phraseology in a will, will not be deemed "marketable" even though the court may incline to the belief that the title is good. For if there is a fair ground for doubt the court cannot determine the question in the absence of all parties whose interests such doubts involve. Jeffries v. Jeffries, 117 Mass. 184; Cunningham v. Blake, 121 Mass. 333; Butts v. Andrews, 136 Mass. 221.

Contract of purchaser calls for a "first-class" title. He will not be compelled to take one which is good only upon the presumption that a certain person, whose conveyance, were he alive, would be indispensable, went away twenty-three years before and has not been heard from since. Vought v. Williams, 46 Hun (N. Y.) 638.

Danger of Litigation.—In Jeffries v. Jeffries, 117 Mass. 184, the court by Wells, J., says: "A defendant in proceedings for specific performance shall not be compelled to accept a title in the least degree doubtful. It is not necessary that he should satisfy the court that the title is defective, so that he ought to prevail at law; it is enough if it appears to be subject to adverse claims which are of such a nature as may reasonably be expected to expose the purchaser to controversy to maintain his title or rights incident to it. He ought not to be subjected, against his agreement or consent, to the necessity of litigation to remove even that which is only a cloud upon his title." See Butts v. Andrews, 136 Mass. 221; Christian v. Cabell, 22 Gratt. (Va.) 82.

In a suit for specific performance of a contract to exchange land, it appeared that plaintiff's title was derived from settlers who had entered the land, but who had not yet received patents; that such settlers had made entry at the earliest period allowed by law, though by waiting they might have obtained title at less expense; that they had sold to complainant within a very few days after entry; that complainant had held possession of the land before entry, and had paid very inadequate prices to the settlers for it. The court refused a decree in the vendor's favor, holding that the chance that the entries would be canceled for fraud, on the ground that the settlers had entered it for complainant's benefit, contrary to the prohibition of U. S. Rev. St. §§ 2262, 2263, made the title too doubtful. Close v. Stuyvesant, 132 Ill. 607.

Lis Pendens.—The record of *lis pendens* notice will ordinarily be such a defect of title as will justify the purchaser in refusing the land. Sinn v. McLean, 80 Ala. 360; Earl v. Campbell, 14 How. Pr. (N. Y.) 330; Bull v. Kutchens, 32 Beav. 615.

The presence of such notice does not necessarily create a flaw in the title. It must appear that the pending suit or claim has some merit or substance before defendant can successfully resist specific performance. Hayes v. Nourse, 114 N. Y. 595; 11 Am. St. Rep. 700.

1. He must be ready to convey all that he agreed to convey, or he shall

A trifling variation in the description, or a trifling incumbrance on the title which cannot be removed, or a trivial defect in the property, may be the subject of compensation, and will not stand in the way of a decree of specific performance.¹ One who has contracted for a "satisfactory title" cannot be compelled to

have no equitable relief. *Hepburn v. Auld*, 5 Cranch (U. S.) 262; *May v. LeClaire*, 11 Wall. (U. S.) 217; *Wilson v. Brumfield*, 8 Blackf. (Ind.) 146; *McKean v. Read*, Litt. Sel. Cas. (Ky.) 395; 12 Am. Dec. 318; *McKinney v. Watts*, 3 A. K. Marsh. (Ky.) 273; *Terrill v. Farrar*, Walk. (Miss.) 417; *Luckett v. Williamson*, 31 Mo. 54; *Bryan v. Read*, 1 Dev. & B. Eq. (N. Car.) 78; *Reed v. Noe*, 9 Yerg. (Tenn.) 283; *Cunningham v. Sharp*, 11 Humph. (Tenn.) 116.

A purchased of B 686 acres of land for cultivation, and the vendor's title to 209 acres thereof was found defective. *Held*, that the vendee should not be compelled to take the residue, although it lay distinct and separated from the other portion by a public road. *Jackson v. Ligon*, 3 Leigh (Va.) 161.

Plaintiff bought of defendants at auction a lot in New York city, paying 10 per cent. of the purchase price. Printed handbills had been issued and circulated by defendants, prior to the sale, giving a diagram of the lot, which represented it as a parallelogram, 25 by 100 feet, its size being so stated in the printed text. Plaintiff purchased, relying upon this handbill, without examining the lot. The terms of sale described it as "twenty-five feet, front and rear, more or less." The lot was to be conveyed by warranty deed free of incumbrance. A building upon the adjoining lot encroached upon the lot, and had stood there for more than 25 years. Defendants knew this at the time of the sale, but made no mention thereof in the handbill or in the terms of sale or at the time of the sale. Plaintiff refused to complete his purchase, and brought this action to recover the percentage paid. Defendants set up the contract, alleged a readiness and tender of performance and asked for a specific performance against plaintiff. *Held*, that plaintiff's bid having been obtained by the suppression of a material fact, the defendants could not enforce the purchase; that plaintiff was entitled both to the possession of the whole lot and to a title to it, not simply a right of action for its

recovery, which, conceding the title to be good, was all that defendants could convey as to the part encroached upon; and held, further, that the insertion of the words "more or less" in the terms of sale did not, under the circumstances, affect the rights of the parties. *King v. Knapp*, 59 N. Y. 462.

Where a contract to convey land is void as to a part, the court cannot decree specific performance as to the rest of the land, unless the party is willing to accept it. *Donner v. Redenbaugh*, 61 Iowa 269.

Exceptions.—This is not an absolute requirement. For, under the decisions, the vendor might, under certain circumstances, compel the vendee to accept a substantial compliance on his part, with compensation for any insignificant portion which the vendor could not convey. For example a deficiency of 208 acres out of 6,000 acres would be so slight that their value might be a proper subject of compensation. *Hepburn v. Auld*, 5 Cranch (U. S.) 262. So with a deficiency of four acres out of 300. *Stevenson v. Polk*, 71 Iowa 278.

And so, where two adjoining lots were sold together for one price, and the buildings on one of the lots projected two feet over on the other lot, performance was decreed against the vendee with compensation to him for any diminution in value to be deducted from the price. *King v. Bardeau*, 6 Johns. Ch. (N. Y.) 38; 10 Am. Dec. 312.

In *Morgan v. Brast*, 34 W. Va. 332, the vendor sold a tract of land supposed to contain 300 acres, more or less, at \$11 an acre. Upon a survey the tract was found to contain only 254 acres, of which the vendor could not give title to 20 acres. He was given a decree against his vendees for the 234 acres with an abatement of the contract price for the land lost.

1. *King v. Bardeau*, 6 Johns. Ch. (N. Y.) 38; 10 Am. Dec. 312; *Winne v. Reynolds*, 6 Paige (N. Y.) 407; *New York Steam Co. v. Stern*, 46 Hun (N. Y.) 206; *D'Wolf v. Pratt*, 42 Ill. 198; *Towner v. Tickner*, 112 Ill. 217; *Stevenson v. Polk*, 71 Iowa 278; *Creigh v. Boggs*, 19 W. Va. 240.

accept one that is not satisfactory to him, even though it appear to be altogether unobjectionable.¹

"A purchaser cannot justify his refusal to perform his contract by a mere captious objection to the title rendered him; nor is it sufficient for him, when the jurisdiction of an equity court is invoked to compel him to perform his contract, merely to raise a doubt as to the vendor's title. Before he can successfully resist performance of his contract on the ground of defect of title, there must be at least a reasonable doubt as to the vendor's title—such as affects its value and would interfere with its sale to a reasonable purchaser, and thus render the land unmarketable. The defect in the record title may, under certain circumstances, furnish a defense to the purchaser. But there is no inflexible rule that a vendor must furnish a perfect record or paper title. It has frequently been held that defects in the record or paper title may be cured or removed by parol evidence."² If he refuses

For example, a shortage of 4 acres out of 300. *Stevenson v. Polk*, 71 Iowa 278. Compare *McGrane v. Kennedy*, 10 N. Y. Supp. 119. A rent charge of 54 cents a year which had not been demanded for many years. *Ten Broeck v. Livingston*, 1 Johns. Ch. (N. Y.) 357.

Compare *Foley v. Crow*, 37 Md. 51, where the court holds that a vendor who from any cause, not involving bad faith on his part, is unable to convey all of the land which he has contracted to sell, and it appears that the part that cannot be conveyed is of small importance, or is immaterial to the purchaser's enjoyment of that which may be conveyed to him, may insist upon performance with compensation to the vendee or an abatement from the price, if that has not yet been paid. This is not to be done, however, if the portion which he cannot convey is considerable, or if it is by nature material to the enjoyment of that part about which there is no defect.

1. *Crigler v. Blair*, 4 Ohio Cir. Ct. 324.

2. *Hellreigel v. Manning*, 97 N. Y. 58. See *Murray v. Harway*, 56 N. Y. 337; *Shriver v. Shriver*, 86 N. Y. 575.

Trivial Objections to Title.—"As the law does not regard trifles, a bare possibility that the title may be affected by the existing causes which may subsequently be developed, when the highest evidence which the nature of the case admits, amounting to a moral certainty, is given that no such cause exists, will not be regarded as a

sufficient ground for declining to compel a purchaser to perform his contract." *Schermerhorn v. Niblo*, 2 Bosw. (N. Y.) 161. Quoted in *Moser v. Cochrane*, 107 N. Y. 41. See *Smith v. Death*, 5 Madd. 371; *Spencer v. Topham*, 22 Beav. 573; *Welfley v. Shenandoah Iron, etc., Co.*, 83 Va. 768.

While a purchaser will not be compelled to take a doubtful title, the doubt must be more than a bare possibility. *Stevenson v. Polk*, 71 Iowa 278; *Webb v. Chisolm*, 24 S. Car. 487; *Thompson v. Dalles*, 5 Rich. Eq. (S. Car.) 370; *Laurens v. Lucas*, 6 Rich. Eq. (S. Car.) 217; *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400; *First African M. E. Soc. v. Brown*, 147 Mass. 296; *Chambrelleng v. Purton*, 125 N. Y. 610.

First African M. E. Soc. v. Brown, 147 Mass. 296, was a suit brought by the church against Brown to enforce an agreement to purchase land. Defendant refused the title on the ground that one John Scott, plaintiff's grantor, had filed in the public records a caveat setting forth that the deed from him had been obtained by fraud and giving notice thereby that it was his intention to dispute the validity of the deed. This claim Scott had not pressed for over six years. The court, by Devens, J., took the position that such a paper, not being entitled to record, constituted no cloud upon the plaintiff's title. See *Nickerson v. Loud*, 115 Mass. 94.

"A doubt must be considerable, rational, and such as would induce a prudent man to pause and hesitate."

Lord Eldon in *Stapylton v. Scott*, 16 Ves. 272.

The mere fact that the date of a deed is subsequent to the date of its acknowledgment, is not a substantial ground of objection. *Dresel v. Jordan*, 104 Mass. 407.

The mere possibility that there may be outstanding unrecorded deeds to the land will not defeat a decree in the absence of a showing of the existence of such deeds. *Dow v. Whitney*, 147 Mass. 1.

Instances of Conditions of Title that Will Not Defeat a Decree.—A reservation of minerals and water privileges, where there is no evidence of the existence of minerals or of the possibility that water privileges could ever be required, is not a sufficient defect to preclude a decree. *Winne v. Reynolds*, 6 Paige (N. Y.) 407.

The possibility of there being an outstanding and unpublished will, which might defeat a conveyance by the heirs, cannot be set up as a defense where there is no evidence of the existence of such a will. *Spring v. Sanford*, 7 Paige (N. Y.) 550.

To the same point and further, that the decedent's estate had not been finally closed and there might be debts against it which the personal effects of decedent would be insufficient to pay, held not to be a valid objection. *Moser v. Cochrane*, 107 N. Y. 35. See *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400.

Bill in equity for the specific performance of a contract to sell real estate. The vendors were sole heirs at law of a party who died late in 1855. They made the contract to sell February, 1856. This cause came on for trial January, 1857. Strict search had been made, and no will of the deceased could be found. His personal estate was worth over \$10,000, and the indebtedness of the estate, so far as ascertained, did not exceed \$500. *Held*, that the possible existence of a will, or of other indebtedness, was not sufficient ground for refusing a specific performance. *Schermerhorn v. Niblo*, 2 Bosw. (N. Y.) 161.

Where a legacy is not expressly charged on the real estate, although no fund or property is specifically appropriated to its payment, and the personal estate is sufficient for its payment, and there are no debts and no suggestions of the irresponsibility of the executor, one who has contracted to buy a parcel

of land from a devisee cannot escape his obligation by setting up the defense that the legacy remains unpaid. (*Bockes, J.*, dissenting.) *Wiltzie v. Shaw*, 29 Hun (N. Y.) 195.

Equity will not compel the vendee of land to take an estate of which the vendor was not the owner at the time of the sale, or had not the legal or equitable means to make himself so. But the owner of the land sold for taxes has the legal means to perfect his title, and can compel his vendee to take the land. *Ley v. Huber*, 3 Watts (Pa.) 367.

Mortgages Barred by Limitation.—An uncanceled mortgage sixty years old is no valid objection to the title where there is no evidence to rebut the legal presumption that it has been satisfied. *Belmont v. O'Brien*, 12 N. Y. 394.

So with an unsatisfied mortgage thirty years old, where a satisfaction piece is shown, though not so authenticated as to be entitled to record. *Pangburn v. Miles*, 10 Abb. N. Cas. (N. Y.) 42.

Other Instances.—A married woman, who owned land as her separate estate, conveyed the same, her husband joining upon a nominal consideration of one dollar, as recited in the deed. Plaintiff becoming the owner of the land, sold it to defendant, who refused the title because the married woman had not received valuable consideration for her conveyance. In a suit for specific performance, the married woman and her husband filed their answer, disclaiming any interest in the land, and ratifying their former deed. *Held*, that defendant might properly be compelled to take the title. *Robinson v. Henning* (Ky. 1887), 4 S. W. Rep. 322.

One Armstrong died in 1803 seised of land in New York City, which by will he devised to his son Robert. The latter, who then lived in New York, left, prior to 1842, twenty-two years old and unmarried. He returned on a visit that year and went away again, and in 1846 wrote his mother from Missouri that he was on his way home via New Orleans. This was the last heard from him. Until then he had frequently written to his mother. After 1846, letters were written him by members of his family but were never answered, and although frequent inquiries were made about him nothing further was heard of him. His relatives believed him dead, and his mother took possession of his property in question and built improvements upon it. She died in 1859. The

family had never heard that Robert had married, and no widow or children ever made claim to the estate. At a partition sale in 1887, the purchaser declined to complete his purchase on the ground that Robert was not shown to be dead, or to have died intestate, or without widow, or issue surviving him. The court held the excuse untenable, and decreed a specific performance of the purchase. *Ferry v. Sampson*, 112 N. Y. 415.

A, being the owner of 13,500 acres of land, sold 322 acres, parcel thereof, to B, and there being some doubt of A's title, his brother joined him in the conveyance, with covenants of general warranty. The whole tract had been formerly purchased of a person in London, and a mortgage given on the land for the purchase money, which had never been recorded in this State, and had never been released, though there were strong reasons for believing the whole of the mortgage debt had been paid. *Held*, that this constituted no objection to a decree in favor of A against B for the balance of the purchase money. *Richards v. Mercer*, 1 Leigh (Va.) 125.

A died in 1872, leaving certain heirs-at-law, who, believing in the existence of a will that, however, was not discovered until 1877, made a compromise among themselves, some selling their interests to the others, who entered into possession of the property and sold it at public auction, when B bought it. B died, and the property was sold by order of the probate court, and bought by C, who refused to accept the title offered, because of the existence of the will which constituted A's legal heirs his universal legatees, and gave legacies of money. Decree was rendered requiring C to accept the title, the compromise having been made in view of the existence of the will, and therefore being binding upon the parties to the compromise, and the legal mortgage in favor of the special legatees not having been recorded. *Dupuy's Succession*, 33 La. Ann. 277.

In *Batt v. Mallon*, 151 Mass. 477, land was conveyed to a "trustee for" a married woman and to his successors and assigns. The trustee devised it to his wife for life, remainder to the said beneficiary who survived the trustee's wife and devised it to her daughter, who conveyed it to a third person. This last grantee obtained confirmatory releases from the grantor of the orig-

inal trustee and from one who had been duly appointed successor in trust to the trustee. Upon due proceedings the trust was then terminated. *Held*, that the grantee could convey a marketable title.

Land was conveyed to a woman in 1851. A conveyance made by her in 1861 described her as a married woman, and the certificate of acknowledgment recited that she had been examined apart from her husband. Beyond this there was nothing to show the husband's consent to her conveyance. The land was sold at executor's sale, under the order of the surrogate, in 1888. Nothing could be learned regarding the existence of the woman or of her husband, nor of the marriage. *Held*, that the purchaser should be compelled to take the title. *Cromwell v. Phipps*, 6 Dem. (N. Y.) 60.

In *Fairchild v. Marshall*, 42 Minn. 14, the vendor's title was derived through mesne conveyances from W, who had conveyed during coverture without his wife joining. W afterwards died, leaving the widow surviving. It was afterwards decided that the widow, by her election to take under W's will, had precluded herself from claiming dower. *Washburn v. Van Steenwyk*, 32 Minn. 336. *Held*, that the widow's election to take under the will barred her claim of dower in the land conveyed by him without her joining, and that plaintiff held thereunder by a marketable title not doubtful or unmarketable, and specific performance was properly decreed.

In the chain of title the land passed to Electa Wilds. The next conveyance was made by Electa Wilder, the officer taking her acknowledgment, having testified that the grantee in the former deed and the grantor in the latter were the same person, and it appearing that for fourteen years up to the time of the trial the title under the deed last named had not been questioned. The court decreed a specific performance in favor of the vendor. *Hellreigel v. Manning*, 97 N. Y. 56.

And where a former owner had acquired title as "Edward" and had executed his deed thereto as "Edmund." *Middleton v. Findla*, 25 Cal. 76.

Invalid Improvement Lien.—Where an assessment for a local improvement has been adjudged void by the court of appeals because of want of statutory authority to make the improvement,

to complete the purchase on account of an objection to the title or to the condition of the property, he is bound to state the objection and give his vendor an opportunity to cure it.¹ And he cannot object to the vendor's title so long as he fails to restore possession of the land to the vendor.²

It is not necessary that the vendor possess such a title at the time the contract is entered into, provided he show that he made the contract in good faith and will be able to convey by the time the decree is rendered.³ But he will be liable for the costs.⁴

a purchaser from another owner of land similarly assessed cannot refuse to complete his purchase because of the assessment. *Chase v. Chase*, 95 N. Y. 373.

1. *McWhorter v. McMahan*, 10 Paige (N. Y.) 386.

Under a contract to buy a lot of land for \$50,000, the existence of a mortgage upon a part of it for \$1,000, which latter sum, with interest to the day of its payment at maturity, the vendor, upon making tender of a good and sufficient deed of the premises at the time mentioned in the contract, offered to deduct from the sum payable, is not ground for a refusal to perform. *Guynet v. Mantel*, 5 Duer (N. Y.) 86.

2. *Gans v. Renshaw*, 1 Pa. St. 34; 44 Am. Dec. 152; *Kennedy v. Woolfolk*, 3 Hayw. (Tenn.) 195.

3. *Hepburn v. Auld*, 5 Cranch (U. S.) 262; *Hepburn v. Dunlop*, 1 Wheat. (U. S.) 179; *Langford v. Pitt*, 2 P. Wms. 630; *Mortlock v. Buller*, 10 Ves. 315; *Coffin v. Cooper*, 14 Ves. 205; *Stevenson v. Spratt*, 35 N. Y. Super. Ct. 503; *Weaver v. Childress*, 3 Stew. (Ala.) 363; *Hays v. Hall*, 4 Port. (Ala.) 374; 30 Am. Dec. 530; *Mason v. Caldwell*, 10 Ill. 196; 48 Am. Dec. 330; *Dresel v. Jordan*, 104 Mass. 407; *Townshend v. Goodfellow*, 40 Minn. 312; *Luckett v. Williamson*, 37 Mo. 395; *Clute v. Robinson*, 2 Johns. (N. Y.) 595; *Pierce v. Nichols*, 1 Paige (N. Y.) 244; *Brown v. Haff*, 5 Paige (N. Y.) 235; 28 Am. Dec. 425; *Winne v. Reynolds*, 6 Paige (N. Y.) 407; *Wells v. Smith*, 7 Paige (N. Y.) 22; 31 Am. Dec. 274; *Reformed, etc., Dutch Church v. Mott*, 7 Paige (N. Y.) 77; 32 Am. Dec. 613; *Viele v. Troy, etc., R. Co.*, 20 N. Y. 184; *Hinckley v. Smith*, 51 N. Y. 21; *Jenkins v. Fahey*, 73 N. Y. 355; *Wilson v. Tappan*, 6 Ohio 172; *Moss v. Hanson*, 17 Pa. St. 379; *Townsend v. Lewis*, 35 Pa. St. 125; *Dubose v. James*, 1 McMull. Eq. (S. Car.) 55;

Lyles v. Kirkpatrick, 9 S. Car. 265; *Fraker v. Brazelton*, 12 Lea (Tenn.) 278; *Core v. Wigner*, 32 W. Va. 299.

An agreement for the purchase of land required a cash payment of ten dollars, the balance (\$3,690), to be paid as soon as the abstract could be examined. There were attachment liens on the property, and, pending the vendor's removal of these liens, he demanded the reserved payment to be made within five days, and this not being done, declared the contract at an end. The purchaser, notwithstanding, was held to be entitled to a specific performance. *Mastin v. Grimes*, 88 Mo. 478.

But this doctrine is questioned in *Richmond v. Gray*, 3 Allen (Mass.) 25.

And compare *Moroney v. Townsend*, 5 Phila. (Pa.) 357, where the court ruled that before the vendor can enforce specific performance he must be able to show that his title was "clear" before suit was brought.

4. *Lyles v. Kirkpatrick*, 9 S. Car. 265; *Peers v. Barnett*, 12 Gratt. (Va.) 410; *Reformed, etc., Dutch Church v. Mott*, 7 Paige (N. Y.) 77; 32 Am. Dec. 613.

It is no defense to a suit to enforce an agreement to purchase land that there are mortgages on it of which the vendee knew and to which he did not object. He is only required to remove them on the consummation of the trade. *Oakey v. Cook*, 41 N. J. Eq. 350.

Specific performance of a contract will not be refused on account of a conflict between the rights agreed to be granted, and other rights secured by a prior grant, if it is in the power of the grantor to fulfill his agreement. *Conant v. Bellows Falls Canal Co.*, 29 Vt. 263.

The general rule that the vendor can compel the acceptance of his deed even though he be unable to give a good title, until the time of the decree, is not to be applied where the vendor has been in

And the court will even allow him a reasonable time, as a matter of favor, to perfect his title.¹ But this will never be done where it would prejudice the rights of the vendee, as it would where time was of the essence of the contract.²

The burden of proof is on the plaintiff to establish his title when it is put in issue by the defendant.

The purchaser who knows that the title is insufficient at the time he contracts for it and that it will take time to make it perfect, or who, learning this after his purchase, acquiesces in the delay and enters further into the execution of the purchase, is bound by such acquiescence, and will not be heard to complain of the title offered him, or the delay in perfecting it.³ But if, after he has gone into possession under such a contract, he discovers that the vendor is unable to fulfill his promise to make title by the day named, and, immediately upon such discovery, surrenders possession, the fact that he originally contracted with a knowledge of the condition of the title will not authorize a court to compel him to accept such title as the vendor can furnish.⁴ Nor will the fact of his having gone into possession preclude his objecting to the final execution of the contract, where he has discovered a defect in the title, provided he abandons possession as soon as he learns of the defect.⁵

Where the defects of title are in view at the time the contract is made, and the vendor expressly sells such title only as he possesses, without binding himself to warrant the title in any way, he may enforce his contract against the purchaser and compel the

any way guilty of fraud. "The injured party has a right to elect to rescind and recover the purchase money, or he may proceed upon the covenant in his deed. If the rule were otherwise, it would offer a reward for injustice, and a party knowing he had no title could sell, and if the property declined in price, he could purchase the outstanding title for less than he received and tender it to the purchaser. And if the property advanced, all he would be required to do would be to refund the purchase money with legal interest. All the wrongs would be on his side, and yet he would enjoy all the advantages of the market. The risk of loss would be entirely thrown upon the innocent, while the chance of gain would be on the side of the guilty party. But as the rule of law is different, the innocent party has his election either to take the title if it can be had of the vendor, or recover the purchase money with interest." *Alvarez v. Brannan*, 7 Cal. 503; 68 Am. Dec. 274.

Nor will it excuse the vendor from diligence. *Cook v. Bean*, 17 Ind. 504.

1. *Logan v. Bull*, 78 Ky. 607; *Dresel*

v. Jordan, 104 Mass. 407; *National Webster Bank v. Eldridge*, 115 Mass. 424; *Christian v. Cabell*, 22 Gratt. (Va.) 82; *Rader v. Neal*, 13 W. Va. 373.

But in *People v. Open Board*, etc., 92 N. Y. 98, a title was found to be defective in a suit to enforce specific performance of an agreement to buy the land; and it was held that the purchaser was entitled to be relieved from his contract, and that an order of court directing him to complete the purchase, if the vendor should obtain evidence showing a confirmation of an executor's sale to himself, such evidence to be taken in a proceeding to be instituted within sixty days, was improper, and should be set aside. *Reversing* 28 Hun (N. Y.) 274.

2. *Logan v. Bull*, 78 Ky. 607.

3. *Vail v. Nelson*, 4 Rand. (Va.) 478; *Rader v. Neal*, 13 W. Va. 373. See, generally, on the subject of laches and its effect, *LACHES*, vol. 12, p. 533.

4. *Jackson v. Ligon*, 3 Leigh (Va.) 161.

5. See *Haggart v. Scott*, 1 R. & M. 293; *Taml. 500*; *Richmond v. Gray*, 3 Allen (Mass.) 25.

acceptance of such title as the parties contemplated in the original agreement.¹ And where the defect or failure of title is the result of any fault on the part of the vendee, the vendor will be entitled to a decree.²

Where, by the terms of a sale, provision is made by which the purchaser may examine the title, and, if not satisfied, may refuse it, the vendor has no right to a specific performance, even though the court of appeals pronounces the title good, if the vendee in good faith is not satisfied with it.³

It is no defense to the vendor's suit that he has no title to the land if he shows that he is able to procure a conveyance from the real owner.⁴ And the same rule which forbids a vendee, in his suit for specific performance, from asserting his rights against the secret prior equities of innocent third parties, prevents a vendor from compelling the purchase, where it appears that the land was subject to such equities at the time the contract was made and the purchaser was ignorant thereof.⁵

Where the deed contains an undertaking on the part of the grantee to perform certain acts, this undertaking becomes binding on the grantee upon the delivery of the deed to him. And if he then refuses to fulfill the obligations created by the deed the court will compel him to fulfill them.⁶

1. *Palmer v. Richardson*, 3 Strobb. Eq. (S. Car.) 16; *Broyles v. Bee*, 18 W. Va. 514.

Where the purchaser knew, at the time of the purchase, that the land was subject to a pre-emption right in a third person, he was compelled to take the title subject to the incumbrance, and with compensation therefor, although such incumbrance was not mentioned in the contract of sale. *Winne v. Reynolds*, 6 Paige (N. Y.) 407.

It is no defense to a suit for the specific performance of a contract of purchase of land in gross that some three acres of the land is occupied by a third party where the defendant purchaser by reason of his occupancy of the adjacent land at the time of the sale is chargeable with notice as to the three acres. *Blakemore v. Kimmons*, 3 Baxt. (Tenn.) 470.

If the vendor agrees to make a "good and sufficient conveyance, with full warranty only against" his heirs and personal representatives, he is bound only to convey such title as he has. *Thompson v. Hawley*, 14 Oregon 199.

2. Where a purchaser had the uninterrupted possession of the land but through his own fault prevented the title from being conveyed, it was held

that he should be compelled to execute the contract though he had commenced an action before the bill was filed, and obtained judgment for breach of covenant. *Hughes v. McKinsey*, 5 T. B. Mon. (Ky.) 38.

3. *Averett v. Lipscombe*, 76 Va. 404.

4. *Shreck v. Pierce*, 3 Iowa 350.

As where title is in the wife of the obligor. See *Logan v. Bull*, 78 Ky. 607.

5. Thus, where property known to be subject to a lease, was bought at foreclosure sale by one who was in ignorance of the tenant's right to remove a valuable building from the realty, the vendor was denied a specific performance. *Beckenbaugh v. Nally*, 32 Hun (N. Y.) 160.

The rule of equity, that one who hears another bargain with a third person for an estate, and sees such third person pay for it, or expend money on it, without making known his own title, shall not be permitted to disturb him in the enjoyment of the estate, cannot be applied to cases of parol contract, where all the parties fully understand the state of the title, and one of them seeks relief from another. *Wilton v. Harwood*, 23 Me. 131.

6. *Post v. West Shore R. Co.*, 123 N. Y. 580.

c. CONSIDERATION; WHEN INCAPABLE OF ENFORCEMENT.—In these contracts, the nature of the consideration has an important bearing upon the question whether they shall be enforced. Where the consideration consists of personal acts on the purchaser's part, which by their nature are incapable of equitable supervision and enforcement, equity will not compel the conveyance for which such acts are the consideration. This under the rule that equity will not compel one party to a contract to fulfill his obligation unless it can render a like decree against the other.¹

d. DESCRIPTION—(1) *In General*.—If a decree for the specific performance of a contract relating to real estate is to possess any value, the contract must describe the land involved with such accuracy and clearness that it can be identified, its quantity known, and its boundaries determined beyond the possibility of future controversy.²

1. *Wollensak v. Briggs*, 119 Ill. 453. But compare *Burton v. Shotwell*, 13 Bush (Ky.) 271. In that case a contract by B for a sale of land to S, to be paid for in a transfer by S to B of shares in a corporation to be thereafter formed, cannot be specifically enforced against S, if the organization of the company has been abandoned without fault of S. But if it is the fault of S, he may be compelled to accept the conveyance, and pay a sum of money to be ascertained as equivalent to the stock.

Where defendant had offered to convey land upon condition that plaintiffs would take care of and support him during his life, and plaintiffs had performed their part of the contract as fully as defendant would permit, the court refused them a decree compelling defendant to convey. *Ikerd v. Beavers*, 106 Ind. 483; *Lindsay v. Glass*, 119 Ind. 301; *Denlar v. Hile*, 123 Ind. 68. Compare *Watson v. Mahan*, 20 Ind. 223.

2. See also *infra*, this title, *Essentials to an Enforceable Contract—Certainty*. *Johnson v. Craig*, 21 Ark. 533; *Jordan v. Deaton*, 23 Ark. 704; *Ferris v. Irving*, 28 Cal. 645; *Day v. Griffith*, 15 Iowa 104; *Miller v. Ramsdell*, Harr. (Mich.) 373; *Wiegert v. Franck*, 56 Mich. 200; *Shelton v. Church*, 10 Mo. 774; *Camden, etc., R. Co. v. Stewart*, 18 N. J. Eq. 489; *Voorhees v. DeMeyer*, 3 Sandf. (N. Y.) 614; *Prater v. Miller*, 3 Hawks (N. Car.) 628; *Brown v. Lord*, 7 Oregon 302; *Cortelyou's Appeal*, 102 Pa. St. 576; *Ruff's Appeal*, 117 Pa. St. 310; *Taylor v. Ashley*, 15 Tex. 50; *Bracken v. Hambrick*, 25 Tex. 408;

Graham v. Hendren, 5 Munf. (Va.) 185; *Patrick v. Horton*, 3 W. Va. 23; *Mathews v. Jarrett*, 20 W. Va. 415. Compare *Hanley v. Blackford*, 1 Dana (Ky.) 1; 25 Am. Dec. 114.

In *Reed v. Lowe* (Utah), 29 Pac. Rep. 740, the suit was to enforce a contract to convey "a piece of land from 6 by 10 or 6 by 20 rods deep," to be taken either way from the grantor's house. The evidence was that the grantor's lot was 20 rods square at the corner of two streets in the city of Ogden. The house was on the corner, and there was a vacant frontage on one street of 16 rods, and on the other of 18 rods. The court held the specific performance of this contract to be impracticable on account of the uncertainty as to which frontage the six rods was to have.

Instances—Defective Descriptions.—Specific performance was refused in the following instances for deficient descriptions:

In *Bread v. Munger*, 88 N. Car. 297, the description was omitted altogether, only the quantity of land ("one hundred acres") being named. Decree refused. So in *Jones v. Carver*, 59 Tex. 293, the contract being to convey "a piece of land supposed to be forty acres."

"We will give you our woolen mills, situated in the northwest corner of public square of Franklin, Indiana, for 640 acres of land in Anderson county, Kansas." Held, too vague as to the Kansas land. *Baldwin v. Kerlin*, 46 Ind. 426.

"Five acres, lot 3, sec. 23," etc., there being nothing further to show what five acres is meant, is too vague. *Nipolt v. Kammon*, 39 Minn. 372.

A "tract containing 9 acres and 66 poles near the junction of B street, Nashville," etc. *Dobson v. Litton*, 5 Coldw. (Tenn.) 616.

"Five acres located near a certain factory" with no means of identification. *Hamilton v. Harvey*, 121 Ill. 469.

"A certain piece of land in the county aforesaid adjoining the lands of" A and B, "being a part of the Alexandria tract, supposed to contain 30 or 35 acres." *Grier v. Rhyne*, 69 N. Car. 346.

"A tract of land lying on the north side of the Watery Branch in the County of — and State of —, containing 150 acres." *Capps v. Holt*, 5 Jones Eq. (N. Car.) 153.

"A lot of land joining a small tract now occupied by Michael Micue." *Jordan v. Fay*, 40 Me. 130.

"Two lots of land situated in H Township, B County," without any statement as to ownership or other means of identifying the lots. *King v. Ruckman*, 20 N. J. Eq. 316. See *Nichols v. Williams*, 22 N. J. Eq. 63.

"One house and lot in the town of Hillsborough purchased of me" in a receipt for the purchase money. *Murdock v. Anderson*, 4 Jones Eq. (N. Car.) 77. See *Ellis v. Deadman*, 4 Bibb (Ky.) 466.

"Some lots in the city of Oakland," vendor having a large number of lots there. *Ferris v. Irving*, 28 Cal. 645.

A tract "adjoining the Saltworks estate, containing about 350 acres, and known as the Campbellsville tract," where no evidence was given identifying "the Campbellsville tract." *Preston v. Preston*, 95 U. S. 200.

"One house and lot in the town of H, purchased of me." *Murdock v. Anderson*, 4 Jones Eq. (N. Car.) 77. See *Allen v. Chambers*, 4 Ired. Eq. (N. Car.) 125.

"Estate on Congress street owned by Sarah A. Hill" insufficient where it did not appear that the estate sought to be conveyed was the only property answering that description. *Doherty v. Hill*, 144 Mass. 467.

"A lot on the right hand of S street, going towards the river, being twenty feet wide and running back to T street" where the lot appears to be merely a portion of a larger tract owned by defendant. *Holthouse's Appeal* (Pa. 1888), 12 Atl. Rep. 340.

"Ellen Whelan paid me \$20 for a piece of land I have sold her before

witness (no survey), which I do promise to give her a warranty deed when required. Said land being in Mitteneague or West Springfield." *Whelan v. Sullivan*, 102 Mass. 204.

A contract "for the sale of the houses on Smithfield street," without any further designation of the situation, size, material of, and area of ground embraced by the houses, and without disclosing to whom they belonged at the date of the alleged contract, is not sufficiently certain to be enforced by specific execution in equity. *Hammer v. McEldowney*, 46 Pa. St. 334.

Thus, in *Hyde v. Cooper*, 13 Rich. Eq. (S. Car.) 250, plaintiff's prayer was denied because the memorandum of agreement to sell did not describe the land, but referred for its identification to a verbal agreement between the parties.

And in *Patrick v. Sears*, 19 Fla. 856, where the agreement was to convey five acres near K city, to be selected by the vendee's agent, specific performance was not granted.

The quantity must be known where the boundaries are not given.

"I agree to deed to said Lynes from 26,000 to 28,000 feet of land situate on Walden street and Vassal lane in Cambridge when the bounds are fixed and the streets laid out," etc. Specific performance refused. *Lynes v. Hayden*, 119 Mass. 482.

The following descriptions were held to be too uncertain to authorize a decree:

"Received of M. H. \$100 as part payment on a piece of property on the corner of Main and Pearl streets, city of Natchez, county of Adams, State of Mississippi." *Holmes v. Evans*, 48 Miss. 247; 12 Am. Rep. 372.

"A subscription for church of \$50 and a lot to build on." *Church of the Advent v. Farrow*, 7 Rich. Eq. (S. Car.) 378.

"A lot for a paint shop, on the west side of" a road named, the location to be determined later. *Camden, etc., R. Co. v. Stewart*, 18 N. J. Eq. 489.

"One hundred and seven acres of land on Laurel." *Reed v. Reed*, 93 N. Car. 452.

"Fifty acres of land on Pond waters in Morgan county, Ky." *Caskey v. Williams* (Ky. 1889), 11 S. W. Rep. 11.

"Forty acres off the South Fork end of my tract of 147 acres on Beech Fork in C. county." *Westfall v. Cottrills*, 24 W. Va. 763.

"Fifteen acres more or less" is not conclusive as to the amount of land to be conveyed. *Hodges v. Knowing*, 58 Conn. 12.

"Rec'd of L. \$408.45, first payment on the Bradley Sand Bank purchase," etc., insufficient, there being no showing as to the county or State. *Johnson v. Kellogg*, 7 Heisk. (Tenn.) 262.

"Rec'd of C. F. \$500 on account on the price of the lot of ground formerly occupied by A. G. Ward." *Fisher v. Kuhn*, 54 Miss. 480.

"That two acres of land be sold." *Carr v. Passaic Land, etc., Co.*, 19 N. J. Eq. 424.

"The 120 acres of land in Shannon County, Missouri." *Miller v. Campbell*, 52 Ind. 125. See also *Boston, etc., R. Co. v. Babcock*, 3 Cush. (Mass.) 228.

A failure to name the city, county, or State will render the description too uncertain. *Ross v. Allen*, 45 Kan. 231. But compare *Ross v. Purse* (Colo. 1891), 28 Pac. Rep. 473.

A contract whereby the purchaser of land agrees to lay out a town, and reconvey a block to the vendor, including the land on which his house stands, of an average size with the other blocks of the town, not to exceed a certain number of feet square, is too uncertain in its terms to be enforced after the town is platted, and the size of the blocks established; and the continuance of the vendor in possession is not such part performance as cures the defect. *Hollenbeck v. Prior*, 5 Dak. 298.

A description by section but not by township and range. *Johnson v. Craig*, 21 Ark. 533.

Instances—Descriptions Sufficient.—But in the following cases descriptions precisely similar have been held sufficiently definite to justify a decree of specific performance:

It is sufficient to describe it as "the A B farm" provided the tract thus called is capable of being otherwise identified. *Simmons v. Spruill*, 3 Jones Eq. (N. Car.) 9.

"Mem. 28 of May, 1852. I agree to sell R. H. Ives the Peckham farm, now owned and occupied by me, say about forty-five acres in Newport, for fifteen thousand dollars, payable the 25th of March, when possession is to be given." *Ives v. Hazard*, 4 R. I. 14; 67 Am. Dec. 500.

"The Knapp House property." *Goodenow v. Curtis*, 18 Mich. 298.

"Mr. Ogilvie's House." *Ogilvie v. Foljambe*, 3 Mer. 53.

"The house," etc., "in Newport." *Owen v. Thomas*, 3 M. & K. 353.

"The Snow Farm." *Hollis v. Burgess*, 37 Kan. 487.

"A certain tract, called Mount Hope, containing about forty acres situated on the southerly side of Neponset River in Quincy." *Old Colony R. Co. v. Evans*, 6 Gray (Mass.) 25; 66 Am. Dec. 394.

Specific performance of a contract will not be refused because, in the description of the land, it omitted to state the town in which it lies, where the description is otherwise rendered definite. *Robeson v. Hornbaker*, 3 N. J. Eq. 60.

An agreement was to convey fifty-nine acres of a certain section, which contained about eighty acres, without stating definite boundaries; the complainant asked for a deed in the words of the bond, and the relief was granted, the agreement being held to be sufficiently certain, although under certain circumstances it might require further litigation between him and the owner of the residue to locate their tracts. *Ring v. Ashworth*, 3 Iowa 452.

That a deed describes land as on the south side of a river, and refers to the patent which places it on the west side, is immaterial, the identity sufficiently appearing, and specific performance should be decreed. *Newson v. Davis*, 20 Tex. 419.

A contract of sale designated the premises as part of the "land lately bought by L from O; to-wit, a part bounded by the section line running from the northeast corner of said tract to stake put up by B, on the southeast; thence in a due northeast course until it strikes the main road; thence along the said road till it strikes the northern line of said tract; thence to the beginning." *Held*, that the description was sufficiently definite to support a decree for specific performance. *Hooper v. Laney*, 39 Ala. 336.

"The lot of land containing fourteen acres more or less, which lies on the northerly side and adjoining the estate owned by Sally Wheelock in the town of Grafton, Mass." *Baker v. Hathaway*, 5 Allen (Mass.) 103.

Ten acres in a certain section lying south of a certain railroad track, if there be but ten acres in such section south of the track named. *Edwards v. Fry*, 9 Kan. 417.

In a contract for the conveyance of land, the land was described as "lying on the southwest side of Black

The words of description are presumed to relate to an estate owned by the vendor; and where the description applies equally well to land owned by him and to land owned by another, through the terms of description being too general, the presumption always prevails that they were intended to apply to that of the vendor.¹

river, adjoining the lands of William Haffland and Martial." *Held*, that the description was sufficiently certain to entitle the vendee to a specific performance of his contract. *Kitchen v. Herring*, 7 Ired. Eq. (N. Car.) 190.

That part of a certain government subdivision "lying south of the grove," held sufficiently certain. *Minneapolis, etc., R. Co. v. Cox*, 76 Iowa 306; 14 Am. St. Rep. 216.

Letters containing an offer of sale subsequently accepted, which describe the land as "situated 6 miles N. W. from V., Tex., consisting of 2,500 acres of land," and as "situated on the south side of White Oak creek, one mile from the bottom," and describe the buildings, etc., are sufficiently definite as to the property sold to justify a decree of specific performance. *Watson v. Baker*, 71 Tex. 739.

A contract to convey described the land as beginning at a given point, and running in a given direction, on a certain road, 400 feet, extending back along another line to "another line to be fixed, sufficient, with said frontage, to make two acres of land." *Held*, that, as the last line might be determined absolutely, the description was sufficient. *Felty v. Calhoun*, 139 Pa. St. 378.

In another case the land was described as "part of N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of sec. 23, T. 24, R. 26, 37 acres, and S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of sec. 23, T. 24, R. 26, 80 acres; total, 117 acres," and a specific performance was decreed. *Egbert v. Chas. H. Heer Dry Goods Co.*, 102 Mo. 512.

A memorandum of an agreement to convey which describes the land as "1 acre in S, described as follows: to-wit, in the S. W. corner of section 5, township 16, range 22, all sold to W M for value received," and is signed by defendant, is sufficient to be enforced by specific performance. *Mann v. Higgins*, 83 Cal. 66.

See also *Brown v. Munger*, 42 Minn. 482.

1. See *Dobson v. Litton*, 5 Coldw. (Tenn.) 616.

With this presumption, "a house

and lot situated on Amity street, Lynn, Mass.," was held a sufficient description where no other such property appeared to belong to the vendor. *Hurley v. Brown*, 98 Mass. 545; 96 Am. Dec. 671. See *Scanlan v. Geddes*, 112 Mass. 15.

But, where it appears that other lands of the vendor come within the same description, identification becomes impossible and specific performance will be denied. *Doherty v. Hill*, 144 Mass. 467.

So, where the instrument refers to the land as occupied by the vendor that reference identifies the land sufficiently to authorize a decree. *McFarland v. Reeve*, 5 Del. Ch. 118; *Simmons v. Spruill*, 3 Jones Eq. (N. Car.) 9; *Falls of Neuse Mfg. Co. v. Hendricks*, 106 N. Car. 485; *Docter v. Hellberg*, 65 Wis. 415.

A contract for the sale of "ten acres of land bought of B, and now in my possession, . . . \$500 to be paid when the contract is delivered," is not void for uncertainty, either as to the land or as to the time of payment, and parol evidence is admissible to show that the land was the same which the vendor held under a contract between himself and B, which contract was to be assigned to the vendee on payment of the \$500. *Stout v. Weaver*, 72 Wis. 148.

Where the land was described as "the house and lot now occupied by James H. Henham," and the description was supplemented by extraneous testimony, it was held sufficiently identified to support a decree *pro confesso*. *Angel v. Simpson*, 85 Ala. 53.

In *Waring v. Ayers*, 40 N. Y. 357, the description was, "two lots owned by me in 116th street, New York, between 8th and 9th avenues, said lots being 25 feet front by about 75 feet deep." It was found by parol evidence that no other lots than the two involved in the suit would answer the description and a decree was granted.

The language of an agreement was as follows: "I have this day sold my lot to A B, on the plat in the town of South Bend, on the plat of said town

Where the description is inconsistent with itself, specific performance is not possible.¹

It must be evident that there was a distinct mutual understanding as to the identity of the tract and the amount of lands covered by the contract.² Where the intention of the parties in this particular can be ascertained from the entire instrument and the acts of the parties, even though the descriptions and terms be obscure, a decree will be granted.³

The land to be conveyed must be identified by the language of the agreement in an intelligible way. If the description, so far as it goes, is inconsistent, the ambiguity may be explained and the defective description made complete by parol testimony, provided that a new description is not introduced into the body of the contract, and provided the land is identified by the writing.⁴

on the river bank, etc. (Signed) C. D." *Held*, that parol evidence was admissible to identify the particular lot intended to be conveyed, and the contract was therefore sufficiently certain to be the ground of a bill for specific performance. *Colerick v. Hooper*, 3 Ind. 316; 56 Am. Dec. 505.

"I have this day purchased of W., Silver Lake Place," etc., giving the name of the owner, the town near by, and the number of acres. *Winn v. Henry*, 84 Ky. 48.

Land situated six miles from V, Texas, containing 2,500 acres, situated on the south side of White Oak Creek, one mile from the bottom, and describing the buildings thereon. *Watson v. Baker*, 71 Tex. 739.

1. In *Blankenship v. Spencer*, 31 W. Va. 510, a decree was refused where the land was described as "a certain piece of land containing sixty-seven and one-half acres, being the lower end of a certain survey sold and conveyed to S by W, and adjoining the lands of H and of R, in the district of F, in the county of G, in the State of W. Va.," and the survey was shown by extrinsic evidence to contain one hundred and seventeen acres.

Where a tract was originally surveyed in a block with other tracts of land, and from fixed monuments on the ground, and other circumstances, it appears probable that there is a serious interference between the various tracts, the title will not be deemed marketable so as to entitle a vendor thereof to a decree for specific performance of a contract for its sale. *Holt's Appeal*, 98 Pa. St. 257.

An executory contract for the sale of land will not be specifically en-

forced in favor of the vendor when the land offered by him is not all within the boundaries of the premises described in the contract, and that within the boundaries is less than is described in the written memorial. *Snedaker v. Moore*, 2 Duv. (Ky.) 542.

Where the inconsistency could not mislead and the true meaning is evident in the instrument, the rule does not prevail. *Brookman v. Kurzman*, 94 N. Y. 272; 66 How. Pr. (N. Y.) 237.

But it has been held in *Illinois*, that where the decree does not rest entirely on parol evidence a latent ambiguity in the description amounting to an actual conflict in the boundaries may be explained by parol, and that such evidence may be resorted to for the purpose of identifying the premises or applying the calls of the deed. Thus, in *Lyman v. Gedney*, 114 Ill. 388; 55 Am. Rep. 869, the land was described as the "north half of the north half" of a certain lot, "namely, known as the Cook & Glover block," there being a discrepancy of two and a half feet between the two, and the court rejected the former description as repugnant to the latter and held that the contract was for the conveyance of the latter. See *Cossitt v. Hobbs*, 56 Ill. 231; *McLennan v. Johnston*, 60 Ill. 306.

2. *Tedford v. Trimble*, 87 Mo. 226; *Cortelyou's Appeal*, 102 Pa. St. 576.

3. *White v. Hermann*, 51 Ill. 243; 99 Am. Dec. 543; *Puttman v. Haltey*, 24 Iowa 425; *Lewis v. Reichy*, 27 N. J. Eq. 240; *Hodges v. Horsefall*, 1 R. & M. 116.

4. *Miller v. Travers*, 8 Bing. 244; *Nichols v. Johnson*, 10 Conn. 192;

(2) *Parol and Extrinsic Evidence*.—Where a sufficient description is given, parol evidence must be resorted to, in order to fit the description to the thing; but where an insufficient description is given, or where there is no description, such evidence is inadmissible.¹ But the courts never receive parol evidence both to describe the land and then to apply the description.²

A patent ambiguity in the description is not to be explained by parol testimony, but the courts will endeavor to give all possible effect to the intention of the parties as they can ascertain it from the remainder of the contract, even to the contradiction of an erroneous call in the description.³ Where, however, the

Baldwin v. Kerlin, 46 Ind. 426; Miller v. Campbell, 52 Ind. 125.

Compare the earlier Indiana case of Torr v. Torr, 20 Ind. 118; also, Waring v. Ayres, 40 N. Y. 357.

A contract for the conveyance of a right of way was held to be sufficiently definite for the court to enforce specific performance where the terminal points and line of way were so fixed as to be readily determinable by the government surveys, though the length of way was not stated with certainty in the contract. Puttman v. Haltey, 24 Iowa 425.

"I agree to sell A two acres and 150 square perches of land, commencing 170 feet from the south side of Green street with a front of one acre on Broad street, at \$1,225," held too vague a description to identify the land without parol proof of metes and bounds. Crockett v. Green, 3 Del. Ch. 466.

See McGrane v. Kennedy (Supreme Ct.), 10 N. Y. Supp. 119.

1. Murdock v. Anderson, 4 Jones Eq. (N. Car.) 77.

See Allen v. Chambers, 4 Ired. Eq. (N. Car.) 125; Combs v. Scott, 76 Wis. 662.

In Gerrish v. Towne, 3 Gray (Mass.) 82, the court, by Bigelow, J., says: "Where general terms only are used to designate the subject-matter of the agreement or conveyance, or the description is of a nature to call for evidence to ascertain the relative situation, nature, and qualities of the estate, then parol evidence is not only admissible, but is absolutely essential to ascertain the true meaning of the instrument, and to determine its proper application with reference to extrinsic circumstances and objects. In such cases parol evidence is not used to vary, contradict or control the written contract of the parties, but to apply it to the subject-matter, and thereby to

render certain what would otherwise be doubtful and indefinite. For this reason, any evidence which tends to indicate the nature of the subject-matter included in a written contract, which would otherwise be uncertain and ambiguous, and to determine its applications relatively to other objects, is admissible, as affording just means of interpretation of the intention of the parties. In the application of this general rule, it has, therefore, been held competent for parties to a written contract to show in aid of its interpretation the position of the land and its condition, the mode of its use and occupation, that it had acquired a local designation or name by which it was known and distinguished, and also to show whether it was parcel of a particular estate."

Parol evidence is admissible to apply the description to the land. Ferguson v. Staver, 33 Pa. St. 411; Smith's Appeal, 69 Pa. St. 474; Hollis v. Burgess, 37 Kan. 487; Ross v. Allen, 45 Kan. 231.

Specific performance may be decreed of an option on "one-half interest of [the vendor] in horses and ranch" as the ranch may be identified by extrinsic evidence. Easton v. Thatcher (Utah 1891), 25 Pac. Rep. 728.

2. Baldwin v. Kerlin, 46 Ind. 426; Ferguson v. Staver, 33 Pa. St. 411.

3. Hamilton v. Harvey, 121 Ill. 469; Carr v. Passaic Land, etc., Co., 19 N. J. Eq. 424; Brookman v. Kurzman, 94 N. Y. 272.

It is no defense to a suit for specific performance of a contract of sale of the next lot that the courses and distances in the description of an improved city lot will cause it to overlap such adjoining lot five feet where the description of the improved lot also designates it by a specific street number, and bounds it by two party-walls, as these will con-

reference to the land to be sold is vague and uncertain and a description will have to be supplied, such uncertainty cannot be cured by parol testimony.¹

Insufficiency in the description of a portion of the land included in the contract, will, as a general rule, prevent the court from taking jurisdiction to enforce the balance of the contract. In such cases a partial enforcement with compensation for the deficiency will be refused and the suitor relegated to his legal remedy.²

A modification of the general principle that a description in the contract which will not identify the tract will be insufficient to enable a court of equity to enforce the agreement is found where the parties by their subsequent conduct have determined the identity of the land, as where the purchaser has gone into possession of it. No question can ordinarily arise thereafter as to the certainty of the description, for the fact of taking possession has served to identify the tract and thus made it possible for parol proof to be heard in aid of the description, if needed.³

trol the courses and distances. *Muhlker v. Ruppert* (N. Y.), 26 N. E. Rep. 313.

1. *Baldwin v. Kerlin*, 46 Ind. 426; *Miller v. Campbell*, 52 Ind. 125; *Gigos v. Cochran*, 54 Ind. 593; *Newman v. Perrill*, 73 Ind. 153; *Ryan v. Davis*, 5 Mont. 505; *Jones v. Carver*, 59 Tex. 293.

As where the contract calls for "five acres, lot 3, sec. 23," etc., with no language to identify the particular five acres. *Nippolt v. Kammon*, 39 Minn. 372.

So, with an agreement, "I have this day sold to D a certain tract of land containing nine acres and sixty-six poles near the junction of Broad street, Nashville, and the Hillsboro Turnpike, Davidson county, Tennessee, for the sum of four-thousand dollars," etc., nor can it be aided by parol proof. *Dobson v. Litton*, 5 Coldw. (Tenn.) 616.

2. *King v. Ruckman*, 20 N. J. Eq. 316. See *Youell v. Allen*, 18 Mich. 108.

3. *Purinton v. Northern Ill. R. Co.*, 46 Ill. 297; *Old Colony R. Co. v. Evans*, 6 Gray (Mass.) 25; 66 Am. Dec. 394; *Messer v. Oestreich*, 52 Wis. 684; *Whitney v. Robinson*, 53 Wis. 309.

A defective description of land in a contract for conveyance may be remedied by putting the purchaser into possession. *Ottumwa, etc., R. Co. v. McWilliams*, 71 Iowa 164; 29 Am. & Eng. R. Cas. 544. But compare *Taylor v. Ashley*, 15 Tex. 50, where it was held that part performance would not cure an uncertainty of description.

Goodenow entered into an agreement with Curtis to purchase certain prem-

ises well known as the "Knapp House property," understanding that he was purchasing the entire piece so called and inclosed, and Curtis knowing that Goodenow was contracting with that understanding. The description in one of the deeds as dictated by Curtis, specified the lots as the "Knapp House property," importing that the lots conveyed constituted the whole of the property so called. Goodenow took possession under his purchase of the whole property, and afterwards discovering that his deed did not cover the whole piece, filed a bill to compel Curtis to convey to him certain lots included within the piece, but omitted in the conveyance. *Held*, that Goodenow was entitled to the relief sought. *Goodenow v. Curtis*, 18 Mich. 298.

An agreement to convey a right of way eighty feet wide over a tract of land becomes sufficiently definite to be enforced in equity, if the grantee subsequently enters upon the land and lays out his road with the acquiescence of the grantor. *Purinton v. Northern Ill. R. Co.*, 46 Ill. 297.

Upon a suit for specific performance of a written contract to purchase "forty acres of the eighty-acre tract at Biggs," plaintiffs offered evidence that defendant agreed to purchase the east half of the tract if plaintiffs would agree to sell the west half to one B, and that the west half had been sold to B under a contract made at the same time as defendant's. The evidence was held to be admissible, and that it showed an agreement by defendant to purchase

If the writing is explicit enough to fix the identity of the tract concerned, the fact that it does not give, in accurate detail, the dimensions and boundaries will not prevent a decree.¹ So where the contract refers for greater particularity as to description to another writing, there may be a decree.²

Extrinsic evidence is not always needed to fix the particular parcel of land which the parties had in mind. Such questions have been determined by judicial construction. For example, a contract to convey by congressional township, section and range, without naming the county, has been held to be sufficiently explicit, the court taking notice of the United States system of surveys.³ So an exception of a certain number of acres at one corner of a tract has been construed to mean so many acres laid off in a square at the corner named;⁴ and the particular word employed, if capable of more than one meaning, is by construction limited and applied so as to give full effect to the language of the contract.⁵

c. TITLE BONDS.—A title bond with a condition and a penalty in a definite sum is in equity enforceable as a contract to convey, and the vendee cannot be confined to his action at law for the amount of the penalty, but may choose his remedy.⁶

the east half of the tract. *Preble v. Abrahams*, 88 Cal. 245.

In *Overstreet v. Rice*, 4 Bush (Ky.) 1; 96 Am. Dec. 279, the contract described the land thus: "We . . . have this day swapped farms." The parties identified the lands exchanged by entering into possession, and a decree of specific performance was awarded.

1. *King v. Bardeau*, 6 Johns. Ch. (N. Y.) 38; 10 Am. Dec. 312.

A vendor cannot resist a bill to enforce the specific performance of a contract to convey lands on the ground of uncertainty of description, where the bill describes the property by metes, bounds and other means, and the answer admits that it is the land which defendant actually agreed to sell. *Flaharty v. Blake* (N. J. 1887), 10 Atl. Rep. 158.

2. *Lewis v. Reichy*, 27 N. J. Eq. 240; *Wiswall v. McGowan*, Hoffm. Ch. (N. Y.) 126.

3. *Richards v. Snider*, 11 Oregon 197; *White v. Hermann*, 51 Ill. 243; 99 Am. Dec. 543.

Description of land as "in sections 22 and 28, Tp. 79, R. 13, Poweshiek County, Ia.," sufficient. *Ottumwa, etc., R. Co. v. McWilliams*, 71 Iowa 164; 29 Am. & Eng. R. Cas. 544.

4. *St. Louis, etc., R. Co. v. Beidler*, 45 Ark. 17; *Langert v. Ross* (Wash.

1890), 24 Pac. Rep. 443; *Vail v. Tillman* (Wash. 1891), 27 Pac. Rep. 76.

5. "We agree to purchase of H his place at S, containing 15 acres, more or less." "Place" is construed to mean "homestead" or place of residence. *Hodges v. Kowing*, 58 Conn. 12.

"My interest in my lands in — counties" construed to mean the entire interest. *Ragsdale v. Mays*, 65 Tex. 255.

In the same way the force of familiar abbreviations is recognized judicially. A description is not open to objection for uncertainty because using "Tp." as an abbreviation for township, and "R." for range, or because not stating whether the range is east or west, the county being given, and that fixing it. *Ottumwa, etc., R. Co. v. McWilliams*, 71 Iowa 164; 29 Am. & Eng. R. Cas. 544.

6. *Hopson v. Trevor*, 1 Stra. 534; *Fulcher v. Daniel*, 80 Ga. 74; *Fitzpatrick v. Beatty*, 6 Ill. 454; *Lyman v. Gedney*, 114 Ill. 388; 55 Am. Rep. 871; *Hull v. Sturdivant*, 46 Me. 34; *Ensign v. Kellogg*, 4 Pick. (Mass.) 1; *Plunckett v. Methodist, etc., Soc.*, 3 Cush. (Mass.) 561; *Dooley v. Watson*, 1 Gray (Mass.) 414; *Hooker v. Pyncheon*, 8 Gray (Mass.) 550; *Lee v. Kirby*, 104 Mass. 420; *Thornburgh v. Fish* (Mont. 1891), 27 Pac. Rep. 381.

Where a person takes a bond for title by assignment, under a contract

If, however, the contract give the obligor his choice between conveying or paying the penalty named, and the payment of the penalty be distinctly understood to be an alternative obligation, the obligor may insist upon his rights to pay the forfeit. And a parol agreement by the vendor that he will execute a title bond as soon as he shall have acquired title himself, has been enforced.¹

f. OPTIONS.—It has been held that an option on real estate, if accepted and acted upon before it has been withdrawn, may be enforced as a valid contract to convey, even though given without consideration.²

The option has no force until it has been accepted in strict accordance with its terms.³

to pay the purchase money due to the original vendor, he may be compelled by a court of equity to perform his contract. It is not a parol promise to answer for the debt of another, nor is it a parol contract for the sale of land. *Ford v. Finney*, 35 Ga. 258.

But it has been held in *Montana*, that where a deed absolute was given in exchange for grantee's note for \$5,500 with a bond by the grantees stipulating that should they not reconvey upon the payment of \$5,500 with interest by a given date, "then this obligation to be void," etc., specific performance would be denied on the ground that the obligation was not to reconvey, but to forfeit \$5,500 on a failure to reconvey. *Kleinschmidt v. Kleinschmidt*, 9 Mont. 477. But compare *Thornburgh v. Fish* (Mont. 1891), 27 Pac. Rep. 383, where *Kleinschmidt v. Kleinschmidt*, 9 Mont. 477, is distinguished and criticised.

Cathcart v. Robison, 5 Pet. (U. S.) 264.

1. *Sterling v. Klepsattle*, 24 Ind. 94; 87 Am. Dec. 319. See *infra*, this title, *Penal Bonds*.

2. *Calanchini v. Branstetter*, 84 Cal. 249; *Perkins v. Hadsell*, 50 Ill. 216; *Boston, etc., R. Co. v. Bartlett*, 3 Cush. (Mass.) 224; *Bell v. Boston*, 101 Mass. 510; *Souffrain v. McDonald*, 27 Ind. 269; *Smith's Appeal*, 69 Pa. St. 474; *Sylvester v. Born*, 132 Pa. St. 467; *Byers v. Denver Circle R. Co.*, 13 Colo. 552. Compare *Schroeder v. Gemeinder*, 10 Nev. 355. See *infra*, this title, *Essentials to an Enforceable Contract—Mutuality; Consideration*.

The owner of land proposed in writing to sell the same on certain terms, a part of the price to be paid down at the time of the purchase, the offer to

be binding if accepted within one year. It appeared that the party to whom the offer was made was in possession under a lease from the party making the offer, and died within the year without giving any notice of acceptance, or making any payment, or securing the balance by notes and mortgage as required in the offer. It was held that these facts failed to show an acceptance, and that there was no valid contract that could be specifically enforced. *Sutherland v. Parkins*, 75 Ill. 338.

3. *Bentz v. Eubanks*, 41 Kan. 28; *Erickson v. Wallace*, 45 Kan. 430; *Langellier v. Schaefer*, 36 Minn. 361; *Schields v. Horbach*, 30 Neb. 536; *Weaver v. Burr*, 31 W. Va. 736. See *infra*, this title, *Assent*.

A letter to the owner of a building proposing to lease it, specifying the term and rental, upon condition of alterations in accordance with "plans to be mutually agreed upon," and a letter from the owner accepting the offer, do not, in the absence of any agreement on the plans for alterations, constitute a contract for a lease, of which specific performance will be enforced. *Mayer v. McCreery*, 119 N. Y. 434.

Under such circumstances, the condition as to alterations was not waived by a subsequent letter from the owner refusing to lease the premises, nor by a tender of the rent at the time for the beginning of the term. *Mayer v. McCreery*, 119 N. Y. 434.

The letter of acceptance proposed (but not as a condition of the acceptance) to transact the business through a bank in H (near plaintiff's residence), and defendant, in reply, waiving his right to have the money paid him at his own place of residence, offered to

g. CONTRACTS TO EXCHANGE.—Contracts to exchange land are enforceable by either party,¹ but only when certain in their terms and capable of enforcement against both parties alike.²

h. LEASES.—Leases of real estate, agreements to lease, and contracts in relation thereto, including covenants in contracts of lease, are enforceable specifically.³

come out to H, and transact the business in person. *Held*, that this did not vary the terms of the contract, nor affect the plaintiff's right to a specific performance. *Matteson v. Scofield*, 27 Wis. 671.

In *Langellier v. Schaefer*, 36 Minn. 361, it was held that where the promisee, in answer to defendant's offer fixed a different place for the delivery of the deed and the payment of the consideration, the acceptance was not unconditional and the contract not to be enforced at his instance.

1. *Purcell v. Miner*, 4 Wall. (U. S.) 513; *Armes v. Bigelow*, 3 MacArthur (D. C.) 442; *Overstreet v. Rice*, 4 Bush (Ky.) 1; 96 Am. Dec. 279; *Park v. Johnson*, 4 Allen (Mass.) 259; *Boyn-ton v. Hazelboom*, 14 Allen (Mass.) 107; 92 Am. Dec. 738; *Parrill v. McKinley*, 9 Gratt. (Va.) 1; 58 Am. Dec. 212; *Rader v. Neal*, 13 W. Va. 373; *Boggs v. Bodkin*, 32 W. Va. 566.

Where A, having a bond for title to land, upon payment of the purchase money exchanged such land for land owned by B, agreeing to give B the benefit of all payments previously made by him, and B was compelled to surrender the land because of his failure to pay the rest of the purchase money. *Held*, that A might maintain a bill to compel B to give him title to the land which he acquired by the exchange. *Goodlett v. Hansell*, 66 Ala. 151.

2. *Cooper v. Chittenden* (Neb. 1891), 50 N. W. Rep. 2; *Sternberger v. McGovern*, 56 N. Y. 12.

A parol contract to exchange lands will not be specifically enforced unless it is proven that the parties have good title to their respective lands; and, if the validity of the plaintiff's title is dependent on the question whether he had ten years' adversary possession of the land, he must, before he can enforce such contract, specifically establish that fact by clear evidence; and, where it appears that he has declined to defend an action of ejectment brought by a stranger to test his title, this will be regarded as showing that his title is so doubtful that the court

ought not to require it to be received as a good title by the other party to the contract; and, being unable to make the other party a good title, the contract will not be enforced. *Boggs v. Bodkin*, 32 W. Va. 566. See *Bigelow v. Armes*, 108 U. S. 10.

Where two parties promise to exchange lands, "each agreeing to furnish good titles satisfactory to both parties," but without mentioning in such agreement certain mortgages with which each property is incumbered, a decree for specific performance may be granted at the suit of one party, notwithstanding the allegation of the other that the party seeking to enforce the contract is unable to clear off his mortgage and to give a good title. *Oakey v. Cook*, 41 N. J. Eq. 350.

Where, under a contract to exchange lands, A elected to take possession of B's land, although he knew that B could not give a valid title to the entire tract. *Held*, that B was entitled to specific performance against A. *Beck v. Bridgman*, 40 Ark. 382.

3. See also *infra*, this title. *Parol Contracts Relating to Land—Statute of Frauds*. See *Smith v. St. Philips Church*, 107 N. Y. 610.

Agreements to Execute Lease.—*McCarger v. Rood*, 47 Cal. 138; *Wendell v. Stone*, 39 Hun (N. Y.) 382; *Wallace v. Scoggin*, 17 Oregon 476; *Seaman v. Aschermann*, 51 Wis. 678; 37 Am. Rep. 849.

A bill to enforce a contract to lease a building when completed cannot be maintained while the building is in course of construction. *Friedman v. McAdory*, 85 Ala. 61.

A specific performance of a lessee's contract to assign will not be enforced, nor will damages be given where the lessor's consent is necessary and is not given. *Hurlbut v. Kantzler*, 112 Ill. 482.

An agreement for the lease of mines to be worked in a specific manner will be enforced. *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266.

Agreements to Renew.—*Robinson v. Perry*, 21 Ga. 183; 68 Am. Dec. 455;

i. MORTGAGES.—Mortgages frequently form the basis of contracts whose enforcement equity will compel. Such contracts include agreements to execute mortgages, agreements to perform the covenants contained in mortgages already executed,¹ agreements to satisfy or remove mortgage liens,² and agreements between senior and junior mortgagees as to the foreclosure and sale and the protection of their respective interests therein.³

Ryder v. Robinson, 109 Mass. 67; Smith v. St. Philips Church, 107 N. Y. 610.

A court of equity can compel the specific performance of an absolute covenant to renew a lease at a rent to be fixed by arbitrators. Johnson v. Conger, 14 Abb. Pr. (N. Y.) 195.

Agreements to Sell.—Agreements to sell at the expiration of term if certain payments are kept up, enforceable. Davis v. Robert, 89 Ala. 402; Hall v. Center, 40 Cal. 63.

An agreement in a lease to sell at the expiration of the term for a price to be fixed by three appraisers, held, specifically enforceable, where plaintiff took possession and made improvements. Herrman v. Babcock, 103 Ind. 461.

At the time of leasing certain property, the lessor covenanted with the lessee and his assigns to convey the property in question for a specific sum, at any time before the expiration of the lease. Held, that the filing of a bill for specific performance, with a tender of the price stipulated, was such a substantial compliance on the part of the assignees of the lessee with the terms of the covenant, as to entitle them to have it specifically executed. Maughlin v. Perry, 35 Md. 352.

Other Contracts in Connection with Lease.—West Virginia Oil, etc., Co. v. Vinal, 14 W. Va. 637.

The supreme court has power to decree a specific performance of a covenant by a landlord in a lease, to make repairs. But this power will only be exercised when it appears that the tenant would be irreparably injured without a specific performance of the covenant to repair, and that damages would not afford a sufficient compensation. Valoton v. Seignett, 2 Abb. Pr. (N. Y.) 121.

A defendant lessor who has reserved in his lease the right to cancel the lease in case a sale of the land is made, is liable to specific performance in favor of the purchaser with damages for delay, where a sale has been made with his consent within the time specified in

the lease and he has refused to cancel the lease. Thurman v. Pointer, 67 Miss. 297.

Equity will entertain a bill by a lessee for specific performance of an agreement in the lease, that the improvements made upon the premises by the lessee should, after the expiration of the term, remain the property of the lessor, on his making fair compensation therefor to the lessee, though the bill is purely for compensation and damages, provided specific performance may be decreed, and the complainant can have adequate relief only in equity. Berry v. Van Winkle, 2 N. J. Eq. 269.

On such bill, the court will not suffer alleged infringements on the rights of the lessee during his term to be drawn in question. Berry v. Van Winkle, 2 N. J. Eq. 269.

1. An agreement to execute a mortgage on real estate will be enforced. Irwine v. Armstrong, 31 Minn. 216.

An agreement to execute a note and mortgage. Hicks v. Turck, 72 Mich. 311.

Even if in parol. See *infra*, this title, *Parol Contracts—Statute of Frauds*. Shields v. Whitaker, 82 N. Car. 516; Cole v. Cole, 41 Md. 301. Dean v. Anderson, 34 N. J. Eq. 496. Compare Stoddard v. Hart, 23 N. Y. 556. A parol agreement to execute a chattel mortgage will be enforced if not within the Statute of Frauds. Triebert v. Burgess, 11 Md. 452. *Contra*, Johnson v. Hoover, 72 Ind. 395.

2. Brewer's Appeal, 104 Pa. St. 417; Barkley v. Barkley, 14 Rich. Eq. (S. Car.) 12.

A party, who is entitled to a specific execution of an agreement to release his land from the lien of a mortgage, may maintain a bill for that purpose, notwithstanding, before the filing of the bill, he has conveyed away the land, such conveyance being with warranty. Bennett v. Abrams, 41 Barb. (N. Y.) 919.

3. See Pearson v. Pearson, 131 Ill. 464.

An agreement that the holder of a second mortgage should foreclose his

j. CONTRACTS TO RE-CONVEY.—A contract for the re-conveyance of land upon the performance of a condition or upon failure thereof, is enforceable specifically at the demand of the obligee.¹

k. AGREEMENTS TO DEVISE.—Equity takes cognizance of valid agreements to devise. These, if founded upon a sufficient consideration, are enforceable against heirs, devisees, or representatives as though the deceased obligor were a party to the suit.²

mortgage, and if he should buy at the foreclosure, pay a sum on account of the first mortgage, is capable of enforcement. *Livingston v. Painter*, 19 Abb. Pr. (N. Y.) 28; 28 How. Pr. (N. Y.) 517; 43 Barb. (N. Y.) 270.

And the holder of a first mortgage, who is induced to take a third mortgage by the written unsealed agreement of the holder of the second that the third shall take precedence of the second, may enforce this agreement in an equitable action brought against him by the holder of the second for redemption of the land from the first. *Shaw v. Abbott*, 61 N. H. 254.

1. *Jackson v. Gray*, 9 Ga. 77; *Robinson v. Robinson*, 9 Gray (Mass.) 447; 69 Am. Dec. 301; *Love v. Sortwell*, 124 Mass. 446; *Coble v. Branson*, 98 N. Car. 160; *Combs v. Little*, 4 N. J. Eq. 310; 40 Am. Dec. 207.

Where a contract is made stipulating that land shall be re-conveyed "at a fair price," or "at a fair valuation," whenever the price to be paid can be ascertained consistently with the terms of the contract, specific performance will be enforced. *VanDoren v. Robinson*, 16 N. J. Eq. 256.

Where, on a contract to lend one money, take his deed as security, and give him a bond to reconvey on payment, the money was loaned, but by an oversight the deed was not signed, it was held that a bill for specific performance would lie. *Storey v. Weaver*, 66 Ga. 296.

An agreement by a surety to reconvey will be specifically enforced, where a defaulting administrator and his wife, to secure such surety, conveyed to him certain real estate, in consideration of the verbal promise of such surety to pay a certain amount of such defalcation, and to reconvey one of such tracts of land to such wife. Nor is such contract void by the Statute of Frauds. *Teague v. Fowler*, 56 Ind. 569. Compare *Lovering v. Fogg*, 18 Pick. (Mass.) 540.

2. *Manning v. Pippen*, 86 Ala. 357; 11 Am. St. Rep. 46; *Carlisle v. Fleming*, 1 Harr. (Del.) 421; *Maddox v. Rowe*, 23 Ga. 431; 68 Am. Dec. 535; *Weingaertner v. Pabst*, 115 Ill. 412; *Wallace v. Long*, 105 Ind. 525; 55 Am. Rep. 222 (in effect overruling *Stafford v. Bartholomew*, 2 Ind. 152); *Mundorff v. Howard*, 4 Md. 459; *Frisby v. Parkhurst*, 29 Md. 58; 96 Am. Dec. 503; *Wright v. Wright*, 31 Mich. 380; *Leonardson v. Hulin*, 64 Mich. 1; *Wright v. Tinsley*, 30 Mo. 389; *Gupton v. Gupton*, 47 Mo. 37; *Sutton v. Hayden*, 62 Mo. 101; *Johnson v. Hubbell*, 10 N. J. Eq. 332; 66 Am. Dec. 773; *Van Duyne v. Vreeland*, 12 N. J. Eq. 142; *Davison v. Davison*, 13 N. J. Eq. 246; *Rhodes v. Rhodes*, 3 Sandf. Ch. (N. Y.) 279; *Stephens v. Reynolds*, 6 N. Y. 459; *Parsell v. Stryker*, 41 N. Y. 480; *Shakespeare v. Markham*, 10 Hun (N. Y.) 311; *McClure v. McClure*, 1 Pa. St. 378; *Logan v. McGinnis*, 12 Pa. St. 32; *Taylor v. Mitchell*, 87 Pa. St. 518; 30 Am. Rep. 383; *Izard v. Middleton*, 1 Desaus. Eq. (S. Car.) 116; *Rivers v. Rivers*, 3 Desaus. Eq. (S. Car.) 190; 4 Am. Dec. 609; *Logan v. Wienholt*, 1 C. & F. 611; *Needham v. Smith*, 4 Russ. 318; *Lester v. Foxcroft*, Colles 108; *Fortescue v. Hennah*, 19 Ves. 67; *Walpole v. Orford*, 3 Ves. 402; *Goilmer v. Battison*, 2 Vern. 148; 2 Vent. 353; *Jones v. Martin*, 3 Anst. 882.

In consideration of the services of a son in managing his father's estate, the father promised to bequeath him certain sums of money, and in exchange for a lot of land conveyed to him by the son, to devise two specified lots of his own to him. The will to the above effect was invalid for want of three witnesses, and as against the heirs at law of the testator. Held, that a bill for specific performance as to the land would lie. *Maddox v. Rowe*, 23 Ga. 431; 68 Am. Dec. 535.

A father conveyed land to his daughter. The deed named a money consideration, although, in fact, no money was paid,

I. PARTICULAR REAL ESTATE CONTRACTS CONSTRUED.¹

m. PAROL CONTRACTS RELATING TO LAND; STATUTE OF FRAUDS—(1) *In General*.—Perhaps the one branch of this subject which is involved in the greatest confusion and uncertainty by reason of the conflict of decisions, is that which governs the specific enforcement of parol contracts in relation to real estate and determines the scope and applicability to such contracts of the Statute of Frauds.²

Nearly all the States permit the enforcement of parol contracts of tenancy, the limitation being made that such leases shall not extend beyond a term named, ranging in the several States from one to three years.³ The courts will not enforce an executory parol

the real consideration being an agreement to support her parents during their lives. *Held*, that a court of equity would compel the performance of the agreement and charge the support on the land. *Watson v. Smith*, 7 Oregon 448.

Compare Bourget v. Monroe, 58 Mich. 363.

In *Johnson v. Hubbell*, 10 N. J. Eq. 332; 66 Am. Dec. 773, the court, by *Williamson, Ch.*, said: "There can be no doubt but that a person may make a valid agreement, binding himself legally to make a particular disposition of his property by last will and testament. The law permits a man to dispose of his own property at his pleasure; and no good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual, or for a particular purpose, as well by will as by conveyance, to be made at some specified future period, or upon the happening of some future event." See *Rivers v. Rivers*, 3 Desaus. Eq. (S. Car.) 195; 4 Am. Dec. 609; *Jones v. Martin*, 3 Amb. 882; *Podmore v. Gurnsey*, 7 Sim. 644; *Parsell v. Stryker*, 41 N. Y. 480.

Carmichael v. Carmichael, 72 Mich. 76; 16 Am. St. Rep. 528, was a suit based upon a mutual agreement between husband and wife by which the two were to make a certain testamentary disposition of their several estates each in favor of the other as to a part, and in favor of their children as to the residue. The husband died having fully performed his part of the agreement and the wife accepted her portion thereunder by his will. It was held that the other parties in interest could compel her to perform the agreement and restrain her from the execution of any will in violation thereof. See

also *Bird v. Pope*, 73 Mich. 483, reported in note to 16 Am. St. Rep., p. 534.

But in a recent Kansas case, a testamentary agreement in relation to land was held to be incapable of specific enforcement. *Hazleton v. Reed*, 46 Kan. 73. See also *infra*, this title, *Parol Contracts Relative to Land*.

1. The following cases, involving particular facts too voluminous for insertion, may be referred to as illustrating the doctrines set forth above and applied by the courts in enforcing or refusing to enforce contracts relating to realty. *King v. Millard*, 15 R. I. 426; *Au Gres Boom Co. v. Whitney*, 26 Mich. 42; *Lovejoy v. Potter*, 60 Mich. 95; *Buttz v. Colton* (Dak. 1889), 43 N. W. Rep. 717; *Sims v. Knight*, 71 Ala. 197; *McClellan v. Cross*, 35 Wis. 693; *McConville v. Howell*, 17 Fed. Rep. 104; *Farrier v. Reynolds* (Va. 1891), 13 S. E. Rep. 393; *Usher v. Livermore*, 2 Iowa 117; *Harding v. Gibbs*, 125 Ill. 85; *Newbold v. Peabody Heights Co.*, 70 Md. 493; *Hamilton v. Harvey*, 121 Ill. 469; *Campbell v. Rust*, 85 Va. 653; *Middletown v. Newport Hospital*, 16 R. I. 319; *Coffin v. Lockhart* (Supreme Ct.), 14 N. Y. Supp. 719; *Hoard v. Chesapeake, etc., R. Co.*, 123 U. S. 222; *Snyder v. Greaves* (N. J. 1891), 21 Atl. Rep. 291; *Speer v. Craig* (Colo. 1892), 27 Pac. Rep. 891.

2. For a general consideration of this branch of the subject, see *FRAUDS, STATUTE OF*, vol. 8, pp. 740-745. See also article by Isaac N. Payne on *Specific Performance of Parol Contracts Relating to Lands*, 15 Cent. Law Jour. 166. See *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266.

3. The one-year limitation prevails in *Alabama, Arkansas, California, Connecticut, Florida, Iowa, Kentucky, Minnesota, Nebraska, New York*,

contract in relation to land. And, if there be a memorandum of the agreement, it must be definite in its terms.¹

Oregon, Tennessee, Wisconsin, Indiana and North Carolina permit parol leases for any period less than three years.

1. In *Phillips v. Thompson*, 1 Johns. Ch. (N. Y.) 131, the court by Kent, Ch., said: "This case, like many others, shows the utility of the Statute of Frauds, and the danger of relaxing the sanction of its provisions. I agree with those wise and learned judges, who have declared that the courts ought to make a stand against any further encroachment upon the statute, and not go one step beyond the rules and precedents already established." See *Beard v. Linthicum*, 1 Md. Ch. 345; *Gough v. Crane*, 3 Md. Ch. 133.

The Memorandum.—A memorandum of an agreement to convey which describes the land as "1 acre in S, described as follows, to-wit, in the S. W. corner of section 5, township 16, range 22, all sold to W M, for value received," and was signed by defendant, is sufficient to be enforced by specific performance. *Mann v. Higgins*, 83 Cal. 66.

Specific performance of a real estate contract in writing, that has been lost for twenty-three years will not be decreed where the only evidence as to its terms is by one who professes to give only its principal points. *Vanhorn v. Munnell* (Pa. 1891), 22 Atl. Rep. 985.

In *Ross v. Allen*, 45 Kan. 231, a memorandum in the following terms was held insufficient under the Statute of Frauds to sustain a suit by the vendor for specific performance: "Leavenworth, March 19, 1887, Received one hundred dollars of Mrs. D. Byington, account of Chas. J. Ross, to apply on payment of eight thousand dollars (\$8,000) for property number 617 and 619 Delaware street, block 74, city proper; two thousand to be paid when abstract and title is furnished, two thousand in ninety days, and balance two years, with interest at 8%; abstract to be furnished within 30 days. J. M. Allen, Agent."

A letter and its answer may constitute a sufficient memorandum of sale to entitle the purchaser to specific performance. *Blair v. Snodgrass*, 1 Sneed (Tenn.) 1; *Lee v. Cherry*, 85 Tenn. 707; *Kennedy v. Gramling*, 33 S. Car. 367; *Otis v. Payne*, 86 Tenn. 663;

Hollis v. Burgess, 37 Kan. 487; *Matteson v. Scofield*, 27 Wis. 671.

And it is not absolutely essential that the letters should be addressed by one of the parties to the other. *Hollis v. Burgess*, 37 Kan. 487; *Van Epps v. Clock* (Supreme Ct.), 7 N. Y. Supp. 21.

A record of the resolution of a board of supervisors, sufficient memorandum. *Grimes v. Hamilton Co.*, 37 Iowa 290.

A as B's agent wrote to C proposing to purchase for B land owned by C and his brothers. C wrote A a letter accepting his proposal. These letters were inclosed to B, who wrote to A thanking him for the purchase. C and his brothers brought a bill for specific performance of the contract. *Held*, that the contract should be enforced. *Wyeth v. Mahoney*, 32 Gratt. (Va.) 645.

An executory parol agreement to give a lien on land will not be specifically enforced. *Ladd v. Stevenson*, 112 N. Y. 325.

Executory Parol Agreements.—An executory parol agreement in reference to an interest in lands will not be enforced in equity. *Small v. Northern Pac. R. Co.*, 20 Fed. Rep. 753; *Fort Smith v. Brogan*, 49 Ark. 306; *Hickman v. Grimes*, 1 A. K. Marsh. (Ky.) 86; 10 Am. Dec. 714; *Gill v. Bicknell*, 2 Cush. (Mass.) 355; *Moote v. Scriven*, 33 Mich. 500; *Schulter v. Bockwinkle*, 19 Mo. 647; *Walker v. Hill*, 21 N. J. Eq. 191; *Buck v. Copeland*, 2 Call (Va.) 218; *Popp v. Swanke*, 68 Wis. 364.

Exceptions.—Equity will enforce an executory agreement made in contemplation of marriage, to the effect that the wife will share with the husband's heirs in lieu of dower. *Brooks v. Austin*, 95 N. Car. 474.

In *Tennessee*, a parol contract for the sale of real estate is not void, but voidable, and where both parties to a bill for specific performance treat the contract as valid, and differ only as to the amount due, it is error to dismiss the bill on the ground that the contract is in parol. *Brakefield v. Anderson*, 85 Tenn. 205.

Trusts.—Unless a trust has been created which it is the duty of equity to fulfill, an executory real estate contract in parol will not be enforced.

If one agrees by parol to take a lease of land for another, but takes the lease in his own name, equity will enforce the agreement, and compel him to make title to the principal; and, in such a case, the statute requiring contracts for leasing or agreeing to lease lands to be in writing does not apply. *Hargrave v. King*, 5 Ired. Eq. (N. Car.) 430.

Compare Scott v. Harris, 113 Ill. 447, where it was held that the mere refusal of a trustee to execute a parol trust, or the denial of its existence, is not such a fraud as to take the case out of the Statute of Frauds, and authorize equity to enforce the trust.

Compare Farnham v. Clements, 51 Me. 426.

Where the contract is in several separate writings, parol evidence is inadmissible to connect them. "They must afford intrinsic proof that they relate to the same contract." *Blair v. Snodgrass*, 1 Sneed (Tenn.) 1; *St. Louis, etc., R. Co. v. Beidler*, 45 Ark. 17. *Compare Mann v. Higgins*, 83 Cal. 66.

T, at her son's request, bought land for him, mortgaging it to her vendor for part of the purchase money, and then conveyed it to her son by a deed, which, after the usual warranty clause, said "except as to the notes given for the purchase money." Afterwards she was put to expense for the son who said verbally that he would convey the land to T to repay her. *Held*, that neither the exception from the warranty clause in the deed nor the matters resting in parol, conferred on T's heirs any rights in the land which they could assert as against the heirs of her son. *Boozar v. Teague*, 27 S. Car. 348.

Partnership in Lands.—Equity will not compel the specific performance of a verbal contract to enter into partnership to trade in lands. *Meason v. Kaine*, 63 Pa. St. 335.

A parol contract whereby one party agrees to bid off in his own name and enter into a contract for the purchase of land, and pay from his own funds the necessary amount for that purpose for the joint benefit of both, the other to reimburse one-half of the money so paid, cannot be enforced in equity. Such an agreement does not constitute a partnership between the parties, which would render an arrangement by parol valid. Nor does the party refusing to perform commit a fraud, where the contract is void, and there has been no

part performance or parting with valuable consideration by the other. *Levy v. Brush*, 45 N. Y. 589.

Instances.—In *New Jersey*, in a suit for the specific performance of a contract to sell land, made by L, president of the defendant company, parol evidence was held inadmissible to show that the defendant company was the real vendor, and hence liable on the contract, no fraud or mistake being alleged. *Schenck v. Spring Lake Beach Imp. Co.*, 47 N. J. Eq. 44.

Three persons verbally agreed that if either should be the purchaser of a lot of land at an administrator's sale, they all should be equally interested in the purchase, and that when the purchaser received the deed, he should convey one-third to each of his associates. The purchaser having refused to convey, on tender of one-third part of the purchase money by one of them, a bill in equity was brought to compel conveyance. *Held*, that equity would not afford relief, the agreement being within the Statute of Frauds. The defendant did not hold the land as trustee, nor was there any resulting trust. *Farnham v. Clements*, 51 Me. 426.

The parties verbally agreed that an existing mortgage should be considered security for a further advance, but did not in fact execute or contemplate the execution of any further writing; a court of equity refused to hold the land as security for the debt, or to compel the execution of a proper mortgage. *Stoddard v. Hart*, 23 N. Y. 556.

Specific performance of a parol agreement to convey land will not be decreed, even though the agreement was to convey to A's wife, after foreclosure, a part of the property which she joined A in mortgaging to the defendant in consideration of his promise. *Green v. Groves*, 109 Ind. 519.

A bill seeking the specific performance of a contract of sale of a stock of goods, the seller, as a part of the transaction, verbally agreeing to give the buyer a three years' lease of the storeroom, held to be properly dismissed, the contract being within the Statute of Frauds. *Strehl v. D'Evers*, 66 Ill. 77.

When A employs B to purchase real property, and B buys for himself with his own money, it is within the statute if there is no contract in writing, and A cannot compel B to convey. *Wallace v. Brown*, 10 N. J. Eq. 308.

(2) *Pleading the Statute.*—The defendant must claim the benefit of the Statute of Frauds, for otherwise, the parol agreement being admitted or proven, a specific enforcement will be decreed, the statute being an affirmative defense which must be pleaded

A made a parol agreement with the owner of land to bid it in at a tax sale, and to reconvey when the owner should refund the taxes so advanced. *Held*, that the agreement to reconvey was invalid as a trust for want of a writing; that it was not a mortgage, and not enforceable in equity. *Hain v. Robinson*, 72 Iowa 735.

Where it was alleged, upon the testimony of a single witness, that a trustee sold land and bid it in for a creditor, but no memorandum was made, nor was there anything like part performance, and the prior owner retained possession under an agreement to take the land at the bid, the court refused, upon the evidence, to charge the party with the responsibilities of a contract. *William & Mary College v. Powell*, 12 Gratt. (Va.) 372.

Under the *Mississippi* rulings, which recognize no efficacy in part performance, the written contract must definitely distinguish the lands intended to be conveyed, even though the purchaser under it has entered on a specific tract. *Fisher v. Kuhn*, 54 Miss. 480. See *McGuire v. Stevens*, 42 Miss. 724; 2 Am. Rep. 649; *Beaman v. Buck*, 9 Smed. & M. (Miss.) 210; *Box v. Stanford*, 13 Smed. & M. (Miss.) 93; 51 Am. Dec. 142; *Doherty v. Hill*, 144 Mass. 467.

Mixed Contract.—It is not sufficient that a part of the contract is in writing. It must all be written or it is a parol contract. *Farwell v. Lowther*, 18 Ill. 252; *Seymour v. Belding*, 83 Ill. 222; *Frazer v. Howe*, 106 Ill. 574; *Cloud v. Greasley*, 125 Ill. 313; *Fry v. Platt*, 32 Kan. 65.

Specific performance of an instrument acknowledging the receipt of \$100 "as part cash payment on the purchase of lots, total purchase price, \$1,100, balance due, \$450, on delivery of papers," cannot be decreed, as the contract is required by the Statute of Frauds to be in writing, whereas, on the face of the instrument it is evident that other terms and conditions must exist *aliunde* to make it a complete contract. *Brundige v. Blair*, 43 Kan. 364.

A written agreement to convey land

"for \$25,000, and mortgage to remain at five per cent. for five years," was held, in *Massachusetts*, not to be a sufficient memorandum of sale to be specifically enforced in equity. *Grace v. Dennison*, 114 Mass. 16.

Signatures.—It is not necessary that both parties sign the memorandum; signature by the party against whom a decree is sought being sufficient, although there must be proof that both parties assented, or acted upon it. *Davis v. Robert*, 89 Ala. 402; *Farwell v. Lowther*, 18 Ill. 252; *Old Colony R. Co. v. Evans*, 6 Gray (Mass.) 25; 66 Am. Dec. 394; *Dresel v. Jordan*, 104 Mass. 407; *Slater v. Smith*, 117 Mass. 96; *Atkinson v. Whitney*, 67 Miss. 655; *Miller v. Cameron*, 45 N. J. Eq. 95; *Dynan v. McCulloch*, 46 N. J. Eq. 11; *Woodward v. Aspinwall*, 3 Sandf. (N. Y.) 272; *Smith's Appeal*, 69 Pa. St. 474; *Ives v. Hazard*, 4 R. I. 14; 67 Am. Dec. 500; *Sylvester v. Born*, 132 Pa. St. 467; *Creigh v. Boggs*, 19 W. Va. 240.

But compare *Jacobs v. Peterborough*, etc., R. Co., 8 Cush. (Mass.) 223.

A decree for specific performance of a contract not signed by all the persons named as parties thereto, refused. *McIntire v. Bowden*, 61 Me. 153.

A vendee taking possession of land under the vendor's written proposition, who changes it so that it cannot be restored to its original condition, cannot contend that he did not sign an agreement to purchase it. *Lawrence v. Saratoga Lake R. Co.*, 36 Hun (N. Y.) 467.

A contract for the sale of land was signed by the vendor alone. The vendee corporation took possession, and, on its insolvency, its successor, occupied and used the land. *Held*, that the vendor's administrator could maintain a suit for specific performance against the latter company, although the *West Virginia* statute requires contracts for the sale of land to be signed by the party to be charged. *Steenrod v. Wheeling*, etc., R. Co., 27 W. Va. 1.

The fact that a contract for the sale of land was signed by the vendor only, is no defense to a suit for specific performance, as the filing of the complaint by the vendee binds him to the execu-

or deemed waived.¹ So the defendant may waive the benefit of the statute by his failure to object to the introduction of parol evidence establishing the contract sought to be enforced.² And it has been held that where the answer admits the agreement and that it was partially executed, the Statute of Frauds cannot be invoked,³ although the preponderance of authority seems to indicate that the defendant's admission of the contract will not estop him from pleading the statute.⁴

It has been held, however, in *New York*, that the denial in the answer of any essential particular of a parol contract concerning an interest in lands will defeat a specific enforcement;⁵ but the contrary doctrine is announced in *Delaware*.⁶ The defendant need not plead the statute if he denies the contract.⁷ The

tion of the contract. *Dynan v. McCulloch*, 46 N. J. Eq. 11.

Option.—An option on land signed by the vendor may be accepted verbally. *Smith's Appeal*, 69 Pa. St. 474; *Corson v. Mulvany*, 49 Pa. St. 88; 88 Am. Dec. 485.

1. *Cooth v. Jackson*, 6 Ves. 39; *Shakespeare v. Alba*, 76 Ala. 351; *Osborne v. Endicott*, 6 Cal. 149; 65 Am. Dec. 498; *Hollingshead v. McKenize*, 8 Ga. 457; *Dyer v. Martin*, 5 Ill. 146; *Hull v. Peer*, 27 Ill. 312; *Cloud v. Greasley*, 125 Ill. 313; *Esmay v. Gorton*, 18 Ill. 483; *Fall v. Hazelrigg*, 45 Ind. 581; 15 Am. Rep. 278; *Talbot v. Bowen*, 1 A. K. Marsh. (Ky.) 436; 10 Am. Dec. 747; *Douglass v. Snow*, 77 Me. 91; *Albert v. Winn*, 5 Md. 66; *Small v. Owings*, 1 Md. Ch. 363; *Winn v. Albert*, 2 Md. Ch. 169; *Artz v. Grove*, 21 Md. 456; *Newton v. Swazey*, 3 N. H. 9; *Tilton v. Tilton*, 9 N. H. 385; *Dean v. Dean*, 9 N. J. Eq. 425; *Walker v. Hill*, 21 N. J. Eq. 191; *Dodd v. Wakeman*, 26 N. J. Eq. 484; *Harris v. Knickerbacker*, 5 Wend. (N. Y.) 638; *Cozine v. Graham*, 2 Paige Ch. (N. Y.) 177; *Woods v. Dille*, 11 Ohio 455; *Meach v. Stone*, 1 D. Chip. (Vt.) 182; *Adams v. Patrick*, 30 Vt. 516. *Compare Manly v. Howlett*, 55 Cal. 94.

2. *Nunez v. Morgan*, 77 Cal. 427.

3. See 2 Story's Eq. Jur., § 759; *Smith v. Brailsford*, 1 Desaus. Eq. (S. Car.) 350; *Hutchinson v. Hutchinson*, 4 Desaus. (S. Car.) 77; *Bennett v. Tiernay*, 78 Ky. 580.

4. But it has been more generally held that he may admit the contract and yet plead the statute. *Barnes v. Teague*, 1 Jones Eq. (N. Car.) 277; 62 Am. Dec. 200; *Thompson v. Tod*, 1 Pet. (C. C.) 388; *Stearns v. Hubbard*, 8 Me. 320; *Lockett v. Williamson*, 37

Mo. 388; *Winn v. Garland*, 19 Ark. 23; 68 Am. Dec. 190; *Moore v. Edwards*, 4 Ves. 32; *Blagden v. Bradbear*, 12 Ves. 468.

Where the contract is admitted and the Statute of Frauds is not pleaded in bar, a decree may be granted compelling specific performance. *Baker v. Hollobaugh*, 15 Ark. 322; *Kirksey v. Kirksey*, 30 Ga. 156; *Winn v. Albert*, 2 Md. Ch. 169; *Artz v. Grove*, 21 Md. 456; *Worley v. Walling*, 1 Har. & J. (Md.) 209; *Woods v. Dille*, 11 Ohio 455; *Houser v. Lamont*, 55 Pa. St. 311; 93 Am. Dec. 755.

In *Child v. Godolphin*, 1 Dick. 39, Lord Macclesfield said: "If the defendant confessed the agreement the court would decree specific performance notwithstanding the statute, for such confession would not be looked upon as perjury or intended to be prevented by the statute." See *Wanley v. Sawbridge*, 1 Bro. C. C. 414; *Whitchurch v. Bevis*, 2 Bro. C. C. 559; *Dick*, 664; *Walters v. Morgan*, 2 Cox 369; *Auter v. Miller*, 18 Iowa 405.

5. *Haight v. Child*, 34 Barb. (N. Y.) 186.

Specific performance of a verbal promise to convey land was refused where but one witness testified to part performance, and his testimony on this point was in direct conflict with the answer. *Broughton v. Coffey*, 18 Gratt. (Va.) 184.

6. *Cannon v. Collins*, 3 Del. Ch. 132.

7. *Wynn v. Garland*, 19 Ark. 23; 68 Am. Dec. 190; *Allen v. Chambers*, 4 Ired. Eq. (N. Car.) 125; *Small v. Owings*, 1 Md. Ch. 363; *Billingslea v. Ward*, 33 Md. 48; *Semmes v. Worthington*, 38 Md. 298; *Morrill v. Cooper*, 65 Barb. (N. Y.) 512.

But it has been decided in *Indiana*

courts will not permit the statute to be invoked to shield a fraud.¹

In the absence of an averment in the pleadings as to the character of the contract, it will be presumed to be in writing and valid.²

(3) *Part Performance*.—See FRAUDS, STATUTE OF.³

(4) *Parol Testamentary Agreements*.—Parol agreements to make specific testamentary provision have been a source of difficulty to the courts. Such agreements are difficult to prove, and the courts, in order to prevent frauds, require strict proof. But where the evidence establishes a plain contract and a substantial performance on the promisee's part, a decree will be granted.⁴

that the general denial does not put the Statute of Frauds in issue. *Livesey v. Livesey*, 30 Ind. 398.

1. *Rook v. Jameson*, 67 Iowa 202; *Potter v. Jacobs*, 111 Mass. 32; *Howell v. Gibson*, 30 Miss. 464; *Hodges v. Howard*, 5 R. I. 149.

Thus, in *Adkinson v. Tanner*, 68 Ill. 247, G contracted with T to sell and set up for T certain machinery and fixtures, to be paid for in installments, the last of which was to fall due in fourteen months, the payments to be secured by chattel mortgage on the machinery when set up. T while insolvent obtained the machinery and fixtures, and then refused to give the mortgage. *Held*, that equity would enforce the contract and not let T avail himself of the Statute of Frauds.

Defendant's husband made an oral agreement to execute a mortgage upon land which he intends buying, to secure a loan made to him upon the faith of that promise, and then took title to the land in himself and wife. *Held*, that the wife having refused to execute the mortgage, could not plead the Statute of Frauds as a defense to an action to enforce the oral promise against the land. *Leahey v. Leahey*, 11 Mo. App. 413.

2. *Slingerland v. Slingerland*, 46 Minn. 100.

While ordinarily, when the complainant avers that two parties entered into an agreement for the sale of land, it will be presumed, nothing else appearing, that the agreement is in writing, yet that assumption will not be made in favor of a cross-complaint for specific performance of a land contract containing stipulations that by his answer in the same cause, defendant declares to have rested in parol. *Smith v. Taylor*, 82 Cal. 533; *Good v. Taylor* (Cal. 1890), 23 Pac. Rep. 220.

And see, generally, FRAUDS, STATUTE OF, vol. 8, p. 745, *et seq.*

3. Vol. 8, pp. 738-745.

Moulton v. Harris (Cal.), 29 Pac. Rep. 706.

4. See also *supra*, this title, *Contracts Relating to Land, Agreements to Devise*. *Brown v. Sutton*, 129 U. S. 238; *Graham v. Graham*, 34 Pa. St. 475; *McDowell v. Lucas*, 97 Ill. 489; *Smith v. Yocum*, 110 Ill. 145; *Walters v. Walters*, 132 Ill. 467; *Franklin v. Tuckerman*, 68 Iowa 572; *Johnson v. Hubbell*, 10 N. J. Eq. 332; 66 Am. Dec. 773.

A man and his wife promised to adopt plaintiff, and to leave her their estate. The adoption was never effected. Plaintiff lived with them, worked for them, and obeyed them until the man's death, and then continued to live with his wife and to obey and work for her. *Held*, that plaintiff could enforce her rights to the property, and that these acts of performance took the promise out of the Statute of Frauds. *Sharkey v. McDermott*, 91 Mo. 647; 60 Am. Rep. 270.

See *VanDyne v. Vreeland*, 11 N. J. Eq. 370; 12 N. J. Eq. 143; *Davison v. Davison*, 13 N. J. Eq. 246; *Maddox v. Rowe*, 23 Ga. 431; 68 Am. Dec. 535; *Benge v. Hiatt*, 82 Ky. 666; 56 Am. Rep. 912; *Wright v. Tinsley*, 30 Mo. 389; *Gupton v. Gupton*, 47 Mo. 37; *Sutton v. Hayden*, 62 Mo. 101; *West v. Bundy*, 78 Mo. 407; *Anderson v. Shockley*, 82 Mo. 250; *Rhodes v. Rhodes*, 3 Sandf. Ch. (N. Y.) 279.

Equity will enforce a parol promise, made to a testator, by a legatee, that he would hold the legacy for the benefit of a third person. *Williams v. Vreeland*, 32 N. J. Eq. 734.

Where, in consideration of the execution of a deed to certain land by the husband, the wife orally agreed to make

The chief difficulty in these cases lies in the nature of the evidence required to prove the contract.¹

The courts require that the terms and limitations of the alleged agreement be established and proven with certainty, and listen reluctantly to verbal statements of what dead men have said.²

a will in his favor, specific performance was refused on the ground that the Statute of Frauds controlled. *Manning v. Pippen*, 86 Ala. 357; 11 Am. St. Rep. 46.

Specific performance of a promise to make a will in favor of plaintiff denied under peculiar facts. *Cox v. Cox*, 26 Gratt. (Va.) 305.

In *Hudson v. Hudson*, 87 Ga. 678, a son who had fulfilled his obligations to reside on the "home-place" and care for his father under a promise by the father to devise the place to him, was allowed a sum of money against the father's estate equivalent to the value of such "home-place" upon a *quantum meruit*.

A father made a verbal arrangement with his son, that if the son would live upon a designated farm belonging to the father, and cultivate and improve it at his own expense, that he would give the farm to his son when he (the father) should have done with it. In reliance upon this agreement, the son entered into possession of the farm, and repaired, cultivated and improved it for twenty years, till he died, and thereafter his wife and his heir at law continued the performance of the contract till the father died. The contract was held to be a valid one and enforceable in equity by reason of the performance of it by and in behalf of the son, although not in writing. *Young v. Young*, 45 N. J. Eq. 27.

Where the contract was that if the daughter and her husband would live with the promisor, cultivate his farm, and care for and support himself and wife during their lifetime, such daughter should have a half interest in the farm, it was held, that the daughter possessed no interest, legal or equitable, until complete fulfillment on her part and the death of both parents. *Flower v. Cruikshank*, 77 Iowa 110.

1. The contract must be pleaded with the utmost accuracy and certainty and the proof must not only correspond in all essential particulars with the terms of the contract as pleaded, but be so explicit as to leave no room for reasonable doubt. *Semmes v.*

Worthington, 38 Md. 298; *Fardy v. Williams*, 38 Md. 298.

2. A parol contract between father and son that in consideration that the son would cultivate the farm on which they lived, pay taxes, etc., and pay the father annually \$100 as long as he lived, the farm, upon the father's death, should belong to the son, even if fully performed by the son, must be clearly and satisfactorily proven to entitle him to a decree for specific performance. *Ackerman v. Ackerman*, 24 N. J. Eq. 315.

A verbal promise by a father to convey land to his daughter upon consideration of her residing upon the land and improving it, will not be specifically enforced after the father's death, where the evidence as to the making of the contract is conflicting, and it appears that the daughter, after her father's death, offered to buy the land from the other heirs. *Shaw v. Schoonover*, 130 Ill. 448.

Shahan v. Swan (Ohio, 1891), 26 N. E. Rep. 222, was a suit brought by Mary J. Swan, to enforce specific performance of a parol contract, made forty-six years before. The plaintiff, when a child about two years old, attracted the attention of the defendant's decedent, James E. Woodbridge and his wife, who were wealthy and without children, and who entered into negotiations with the child's mother, whereby the child was delivered to them and became a member of their household, taking their name and being entered in the family bible as their child, and educated by them, and subsequently introduced into society as their daughter.

Years afterwards, Woodbridge and wife died, making no substantial provision for the child, and suit was brought to compel a performance of the implied contract to devise the entire estate of the adoptive parents. Plaintiff's application was denied on the ground that the evidence did not establish the fact that the acts upon which plaintiff based her claim were done pursuant to any clearly defined contract, and that such acts did not

(5) *Other Parol Contracts*.—Other parol contracts relating to or creating an interest in lands are subject to the principles that govern contracts for the sale of land.¹

satisfy the court's requirements as to part performance sufficient to take the case out of the Statute of Frauds. The opinion reviews a large number of like cases, both English and American, and is reported with a copious note by Edgar B. Kinkead in 32 Cent. L. J. 205.

In Wall's Appeal, 111 Pa. St. 460; 56 Am. Rep. 288, the court, by Green, J., said: "Claims of this nature against dead men's estates, resting entirely in parol, based largely upon loose declarations, presented generally years after the services in question were rendered, and when the lips of the party principally interested are closed in death, require the closest and most careful scrutiny to prevent injustice being done. We cannot too often repeat the cautions we have so frequently uttered upon this subject, and we feel that the present occasion is one which demands both their repetition and their application." See Pollock v. Ray, 85 Pa. St. 428. Compare Thompson v. Stevens, 71 Pa. St. 161; Graham v. Graham, 34 Pa. St. 475; Hudson v. Hudson, 87 Ga. 678.

In Wallace v. Long, 105 Ind. 522; 55 Am. Rep. 222, an agreement upon which the suit was based had been made between a husband and wife, who were without children, and the guardian of the husband's niece, a child seven years old; that if the child would live with them during their lifetime and until the death of both, and become and act toward them as their child and permit herself to be known as their child, and do such work in the way of housekeeping as she was capable of doing, and care for them in sickness, they would treat her as their child and make her their heir, and at their death would give their entire estate to her. It was held that this contract being in parol was governed by the Statute of Frauds and that part performance did not save the case.

This, however, was not an equity case.

In Woods v. Evans, 113 Ill. 186; 55 Am. Rep. 409, an agreement by the promisor to take, maintain and educate an orphan girl eleven years old and, for her services until she becomes eighteen, to leave her at his death "a child's part of his estate," was held to

be founded on too slight a consideration and to be too uncertain to warrant a decree.

And in Wallace v. Reppleye, 103 Ill. 249, an agreement to make the child an heir was held incapable of enforcement by reason of uncertainty as to the amount comprised in an heir's share.

A parol promise to devise all one's property to a child made to the child's father in consideration of his allowing the promisor to adopt the child, being void under the Statute of Frauds, is not enforceable in equity, though the child lived with the promisor as his daughter till her marriage, but never had possession of the property. Pond v. Sheean, 132 Ill. 312.

On a suit to compel the specific performance of a verbal contract to devise certain land to complainant, the evidence showed that complainant had been in the employ of the deceased from her childhood until she became twenty-one years of age. Complainant then married, and deceased promised that, if she would continue to live with and serve her, she, decedent, then eighty-three years old, would leave complainant the land in question. Complainant thereupon continued to serve deceased for twelve years longer. The only witness to this contract was complainant's husband. Defendant, the son of the deceased, introduced evidence of declarations by deceased inconsistent with any such agreement as alleged by complainant. He also showed that with his mother's consent he had made extensive improvements on the property in controversy after the date of the alleged contract. Just before her death deceased gave complainant \$3,000 in money. The evidence was conflicting whether this was a gratuity or in payment of the services rendered. Held, that complainant had not clearly established the contract, nor shown such part performance of it as to entitle her to a decree of specific performance. Sturges v. Taylor (N. J. 1890), 20 Atl. Rep. 369.

1. *Mortgages*.—Any agreement in parol in reference to the execution or satisfaction of a mortgage will be enforced in favor of a complainant who has performed his part, but not otherwise. Magee v. McManus, 70 Cal.

553; *Cole v. Cole*, 41 Md. 301; *Leahey v. Leahey*, 11 Mo. App. 413; *Dean v. Anderson*, 34 N. J. Eq. 496; *Stoddard v. Hart*, 23 N. Y. 556; *Baker v. Baker* (S. Dak. 1891), 49 N. W. Rep. 1064.

As where a mortgagee orally agrees to re-convey land, which he has purchased at a foreclosure sale, upon a repayment of the debt by the mortgagor. *Combs v. Little*, 4 N. J. Eq. 310; 40 Am. Dec. 207; *Coble v. Branson*, 98 N. Car. 160; *Rose v. Bates*, 12 Mo. 30. Compare *Corliss v. Conable*, 74 Iowa 58.

B sold to A, giving a bond for a deed, a tract of land that had been sold on a mortgage foreclosure, and, to cut off a dower right of the mortgagor's wife, procured an assignment of the certificate of purchase to C, B's son, who received a master's deed, investing him with a clear legal title. A, after paying the purchase money, procured B to become his surety on a note for \$1,000, orally agreeing that the title might remain in C as an indemnity to B until the note be paid. On a suit by A's assignee for specific performance, the agreement was held to be not within the Statute of Frauds, and specific performance was ordered. *Worden v. Crist*, 106 Ill. 326.

A parol agreement by the mortgagee to release the mortgagor from his personal liability if he will convey the lands to a third person may be enforced by the mortgagor after performance on his part. *Coyle v. Davis*, 20 Wis. 564.

H contracted with D for the purchase of land, and B furnished or loaned the money to H to pay for the land, and took a deed for the same in his own name, with the consent of H, agreeing with him verbally at the same time, that he, H, should have five years in which to repay the money, and that he might have the land at any time within that period on paying the sum loaned and 10 per cent. interest. Held, that this was not a contract prohibited by the Statute of Frauds, but that the parol agreement created a valid and legal trust in favor of H, and that the latter having tendered performance within the time, and brought suit to enforce the trust was entitled to a judgment decreeing its execution. *Bailey v. Harris*, 19 Tex. 108.

Where A obtained the legal title to land as security for the money advanced by him to B, the vendor, for C, the vendee, promising to reconvey the

same to C, on the repayment of the sum advanced, with 20 per cent. interest, but fraudulently sold the land to another, who bought with notice, held, that the contract was not void under the Statute of Frauds, and that under such circumstances a court of equity would adjudge the defendant's trustees for the party defrauded, and decree a specific performance of the contract, or pecuniary compensation for the property. *Jackson v. Gray*, 9 Ga. 77.

Contracts to Exchange Lands.—These may be enforced by either party. But great care should be exercised in determining what is part performance. *Overstreet v. Rice*, 4 Bush (Ky.) 1; 96 Am. Dec. 279.

Exchange of possession will take the case out of the statute. *Parrill v. McKinley*, 9 Gratt. (Va.) 1; 58 Am. Dec. 212; *Bennett v. Abrams*, 41 Barb. (N. Y.) 619.

Compare *Swain v. Burnette*, 89 Cal. 564. Contra, *Barnes v. Teague*, 1 Jones Eq. (N. Car.) 277; 62 Am. Dec. 200.

A debtor who conveys under an oral agreement that the land conveyed shall be held for, and applied to the payment of certain debts due the grantee and others, may enforce his oral contract. *Shields v. Whitaker*, 82 N. Car. 516.

Easements.—A verbal contract for a conveyance of a right of way over certain real estate will be enforced specifically. *Puttman v. Haltey*, 24 Iowa 425.

Parol Agreements of Partition.—*Petrar v. Howell*, 20 Ark. 615; *Weed v. Terry*, 2 Dougl. (Mich.) 344; 45 Am. Dec. 257.

Contracts in Compromise of Controversies.—*Watkins v. Watkins*, 24 Ga. 402.

E, who by his father's will was to receive the bulk of the estate and was threatened with a contest, made an agreement with the other heirs by which each undertook to bear his proportional part of an indebtedness owing by one of them to E, and agreed to set aside the will, and to insist upon the settlement of the estate as intestate. Held, that, although it was understood that a more formal agreement was afterwards to be drawn up, and a provision inuring to the benefit of E was omitted from the contract, specific performance could not be resisted by his heirs while the complainants offered to carry out the parol part of the contract. *Hall v. Hall*, 125 Ill. 95.

Rights that the purchaser has established by part performance he will not be permitted to lose altogether, where the vendor has put it out of his power to fulfill the contract specifically, by putting the title to the land into the hands of an innocent purchaser. Compensation will be awarded him in equity in the same manner that it would be awarded upon the breach of a written contract.¹

(6) *Evidence*.—From the nature of the contract it follows that in equity its terms and provisions must be established with certainty, and that the same certainty must be maintained as to the facts constituting part performance, where that is depended upon to take the contract out of the Statute of Frauds. And so of the consideration, the description of the land, and all other incidents to the contract, unless its essential features have been admitted by the defendant.² Sometimes, however, courts, in their discretion,

Plaintiff and defendant were in effect opposing parties in five actions. On the day of the trial of the most important, defendant promised orally, in consideration of a compromise and dismissal of the actions, to convey real estate to plaintiff on the day plaintiff married a certain lady. Plaintiff dismissed his actions, paid the agreed amounts in the others and married the lady. *Held*, sufficient part performance. *Slingerland v. Slingerland*, 39 Minn. 197.

1. See *Goodwin v. Lyon*, 4 Port. (Ala.) 314; *Aday v. Echols*, 18 Ala. 353; 52 Am. Dec. 225; *Phillips v. Thompson*, 1 Johns. Ch. (N. Y.) 131; *Pratt v. Law*, 9 Cranch (U. S.) 456.

2. *Aday v. Echols*, 18 Ala. 353; 52 Am. Dec. 225; *Goodwin v. Lyon*, 4 Port. (Ala.) 297; *Sutton v. Myrick*, 39 Ark. 424; *Williams v. Barnes*, 28 Ala. 613; *Shelburne v. Letsinger*, 52 Ala. 96; *Pike v. Pettus*, 71 Ala. 98; *Blum v. Robertson*, 24 Cal. 129; *Forrester v. Flores*, 64 Cal. 24; *Foster v. Maginnis*, 89 Cal. 264; *Printup v. Mitchell*, 17 Ga. 558; 13 Am. Dec. 258; *Shropshire v. Brown*, 45 Ga. 175; *Beall v. Clark*, 71 Ga. 818; *Clark v. Clark*, 122 Ill. 388; *Shaw v. Schoonover*, 130 Ill. 448; *Recknagle v. Schmaltz*, 72 Iowa 63; *Truman v. Truman*, 79 Iowa 506; *Beard v. Linthicum*, 1 Md. Ch. 347; *Reese v. Reese*, 41 Md. 554; *Corliss v. Conable*, 74 Iowa 58; *Gosse v. Jones*, 73 Ill. 508; *Marshall v. Peck*, 91 Ill. 187; *Phoenix Ins. Co. v. Rink*, 110 Ill. 538; *Woods v. Evans*, 113 Ill. 186; 55 Am. Rep. 409; *Williamson v. Williamson*, 4 Iowa 279; *Thomas v. Griffith*, 68 Iowa 11; *Bernhardt v. Walls*, 29 Mo. App. 206; *Berry v. Hartzell*, 91 Mo. 132; *Mundorff v. Howard*, 4 Md. 459; *Smith v. Crandall*, 20 Md. 482; *Hopkins v. Roberts*, 54 Md. 312; *Wil-*

son v. Wilson, 6 Mich. 9; *Kinyon v. Young*, 44 Mich. 339; *Brown v. Brown*, 47 Mich. 378; *Burke v. Ray*, 40 Minn. 34; *Smith v. McVeigh*, 11 N. J. Eq. 239; *Walker v. Hill*, 21 N. J. Eq. 191; *Wallace v. Brown*, 10 N. J. Eq. 308; *Cooper v. Carlisle*, 17 N. J. Eq. 525; *Strange v. Crowley*, 91 Mo. 287; *Bunton v. Smith*, 40 N. H. 352; *Charpiot v. Sigerson*, 25 Mo. 63; *Rutan v. Crawford*, 45 N. J. Eq. 99; *Wagonblast v. Whitney*, 12 Oregon 83; *Charnley v. Hansbury*, 13 Pa. St. 16; *McCue v. Johnston*, 25 Pa. St. 306; *Woods v. Farmare*, 10 Watts (Pa.) 195; *Lord's Appeal*, 105 Pa. St. 451; *Delp's Appeal*, 109 Pa. St. 277; *Taylor v. Ashley*, 15 Tex. 50; *Bracken v. Hambrick*, 25 Tex. 408; *Willis v. Matthews*, 46 Tex. 478; *Broughton v. Coffey*, 18 Gratt. (Va.) 184; *Campbell v. Fetterman*, 20 W. Va. 398; *McIneres v. Hogan*, 61 How. Pr. (N. Y.) 446; *Armes v. Bigelow*, 3 MacArthur (D. C.) 442.

Particularly where the promisor has died. *Berry v. Hartzell*, 91 Mo. 132; *Griggsby v. Osborn*, 82 Va. 371.

Evidence as to Description.—Equity will not enforce a parol contract on the ground of part performance, where the description is so indefinite that the contract would not be enforced had the memorandum required by the Statute of Frauds been made. *Blankenship v. Spencer*, 31 W. Va. 510.

Where Evidence Is Contradictory.—A parol agreement for the sale or gift of lands will not be specifically enforced, where the parol evidence of it is contradictory. *Rowton v. Rowton*, 1 Hen. & M. (Va.) 92; *Griggsby v. Osborn*, 82 Va. 371; *Gallagher v. Gallagher*, 31 W. Va. 9; *Reno v. Moss*, 120 Pa. St. 49.

In a suit for specific performance of a parol contract to convey land, brought

have granted the relief even where the proof might be said to lack definitiveness and conclusiveness.¹ The plaintiff must

by a son against his father, where the son's evidence that he had signed a deed to lots, in which the father had a life estate and he a remainder, in performance of his part of the contract and that it was understood in the family that he was to have the land in controversy, is met by evidence of the father denying the agreement altogether, and that there ever was any such understanding in the family, proof of the agreement and part performance, taken in connection with the fact that complainant had delayed bringing the action for fifteen years, is too uncertain to authorize a court of equity to interfere with the relief sought. *Ridgway v. Ridgway*, 69 Md. 242.

Under *Iowa Code*, § 3667, if a parol contract to convey land can be proven by the evidence of the defendant, specific performance will be decreed against him. *Dewey v. Life*, 60 Iowa 361.

The vendee under an oral contract for the sale of land cannot recover upon the loose declarations and admissions of the vendor as to the existence of the contract, unless corroborated by evidence which leaves no room for doubt. *Berry v. Hartzell*, 91 Mo. 132.

Evidence as to Matters Not Pledged.—

In a bill for the specific performance of a parol contract for the conveyance of land, the general facts relied upon, showing a part performance, must be specifically set forth. And where evidence has been taken in the case showing valuable improvements made by complainant on the land in controversy, but there was no allegation in the bill with respect to such improvements, held that such evidence could not be considered in the decision of the cause. *Bornier v. Caldwell*, 8 Mich. 463.

Evidence Competent in Particular Cases.—Where the land is contracted for at so much per acre, the purchase money to be paid in installments, to be secured by bond and mortgage, the deeds under which the defendant held the land are competent *prima facie* evidence of the number of acres, to show that the bonds and mortgages, tendered in pursuance of the contract, were for the proper amounts and evidence to show that the plaintiff had cut timber on part of the tract, under the contract, is relevant. *Hanna v. Phillips*, 1 Grant's Cas. (Pa.) 253.

Variance.—Specific performance of a

parol contract for the sale of lands will not be decreed where the proof of the contract is uncertain and contradictory, and variant from the allegations of the bill. *Goodwin v. Lyon*, 4 Port. (Ala.) 297.

On a bill for specific performance of a verbal contract for the sale of land, where the Statute of Frauds was not pleaded, proof on the part of the vendor that he had verbally sold the land to the deceased husband of the complainant in his lifetime—held not to be material to the issue, the question being whether he had sold to the complainant. The equities of the heirs of the deceased party could be settled in another suit. *Adkinson v. Tanner*, 68 Ill. 247.

Evidence Establishing Part Performance.—The evidence of a parol sale of lands between parents and children must be very clear to avoid the statute; all the acts necessary to its validity must have especial reference to it, and nothing else. *Poorman v. Kilgore*, 26 Pa. St. 365; 67 Am. Dec. 524; *Cox v. Cox*, 26 Pa. St. 375; 67 Am. Dec. 432.

In a bill for specific performance, the agreement as alleged, must be sustained by proof, and sufficient performance be shown to take it out of the Statute of Frauds; and it must also show certainty as to time and price, and also mutuality. *Olive v. Dougherty*, 3 Greene (Iowa) 371.

Where the evidence adduced by the plaintiff in support of his bill for specific performance, consisted mostly of facts tending to show a part performance of the agreement by him, such as money paid, possession taken, improvements made, and money expended, and such evidence was objected to generally as inadmissible—held, that such objection was not sustainable. *Annan v. Merritt*, 13 Conn. 478.

In order to enforce the fulfillment of a parol contract for the sale and conveyance of land, the complainant must show the existence of the contract, and also either that he paid a part of the purchase money or that he took possession under the contract. *Fairbrother v. Shaw*, 4 Iowa 570.

As to evidence sufficient to establish part performance, see *Townsend v. Hawkins*, 45 Mo. 286.

1. See *Switzer v. Gardner*, 41 Mich. 164.

Plaintiff and defendant entered into

establish the contract and whatever is required to take it out of the statute by a preponderance of the evidence.¹

If the contract contains a description of land complete and definite on its face a denial of the description becomes matter of defense.² And if the defendant show a discrepancy in the description or quantity of the land or misrepresentation by the vendor in reference thereto, he will defeat the vendor's suit.³

(7) *Parol Gifts*.—A parol gift of land, partly executed, may be enforced on the ground that the change of the donee's condition, the making of improvements to the permanent benefit of the land, and the expense and loss incident thereto to the donee, constitute a sufficient consideration to relieve the contract from the operation of the Statute of Frauds.⁴

a parol contract for the sale of land to be used as a cemetery. In an action for specific performance defendant was given judgment on the ground that improvements made by plaintiff were made against the will of defendant. It appeared that the latter had assisted in staking out the land, and that the plaintiff had built a fence with the knowledge of defendant, and without objection from him. *Held*, that a new trial should be granted. *Evergreen Cemetery Assoc. v. Armstrong*, 37 Minn. 259.

Where, at a first meeting it was agreed by plaintiffs and defendant that they would take the land next day if they liked it, and defendant should take a bond in part payment, and both plaintiffs testified that the next day the bond was delivered in pursuance of the agreement, but defendant claimed that he only took the bond for examination, held that there was sufficient evidence of part payment to support specific performance. *Miller v. Nelson*, 64 Iowa 458.

A father orally agreed to give land to his daughter and her husband if they would settle down near him, the husband then having an offer of work permanently in a distant place. No definite agreement was made as to the time during which they should live there, nor was there anything definite concerning improvements. The daughter and her husband continued to live on the land for several years and put improvements upon it. *Held*, that they could compel a specific performance of the parol contract to convey to them. *Welch v. Whelpley*, 62 Mich. 15.

A court of equity will be much more liberal in allowing parol evidence to contradict or control a written instrument, in order to reach the equities of

a case than courts of law. *Stoutenburgh v. Tompkins*, 9 N. J. Eq. 332.

Defendants in ejectment testified that the disputed property had been given to them in fee, and that the donor had agreed to make a deed to them. Other witnesses testified that the donor had admitted making a gift. It also appeared that he was under obligations to defendants for support furnished him during minority. The donor alone testified that the gift was conditional. *Held*, that the evidence showed an intention in the donor to convey an absolute estate to defendants. *International Bank v. Fife*, 95 Mo. 118.

1. *Swales v. Jackson*, 126 Ind. 282; *Wiley v. Colston*, 86 Va. 520.

2. *Williams v. Langevin*, 40 Minn. 180.

A provision in a lease promised to convey certain premises described as "our frame dwelling house, with barn and outbuildings, and all land now being used in connection therewith, being about seven acres, more or less, situated on C street, in S in the county of E." The complaint for specific performance described the premises, particularly alleging that they were the same set out in the agreement, which was not denied by the answer, and all the evidence referred to the same property. *Held*, that the evidence was sufficient, as to description, and a decree granted. *Sanders v. Bryer*, 152 Mass. 141.

An agreement sought to be enforced, though by parol, and thirty years old, must still be strictly and clearly proved as to its terms. *Van Duyne v. Vreeland*, 12 N. J. Eq. 147.

3. *Miller v. Chetwood*, 2 N. J. Eq. 199.

4. *Neale v. Neales*, 9 Wall. (U.S.) 1;

Crosbie v. McDoua, 13 Ves. 146; Manley v. Howlett, 55 Cal. 94.

Thus a gift from a parent to a child, where the donee has gone into possession and made substantial betterments will be enforced. *Guyann v. McCauley*, 32 Ark. 97; *Manley v. Howlett*, 55 Cal. 97; *Burlingame v. Rowland*, 77 Cal. 315; *Bakersfield, etc., Assoc. v. Chester*, 55 Cal. 102; *Anson v. Townsend*, 73 Cal. 415; *Langston v. Bates*, 84 Ill. 524; 25 Am. Rep. 466; *Wood v. Thornly*, 58 Ill. 464; *Atkinson v. Jackson*, 8 Ind. 31; *Peters v. Jones*, 35 Iowa 512; *Kurtz v. Hibner*, 55 Ill. 514; 8 Am. Rep. 665; *Drum v. Stevens*, 94 Ind. 181; *Irwin v. Dyke*, 114 Ill. 302; *Galbraith v. Galbraith*, 5 Kan. 402; *Hardesty v. Richardson*, 44 Md. 617; 22 Am. Rep. 57; *Welch v. Whelpley*, 62 Mich. 15; *Shepherd v. Devin*, 9 Gill. (Md.) 32; *Story v. Black*, 5 Mont. 26; 51 Am. Rep. 37; *West v. Bundy*, 78 Mo. 407; *Dawson v. McFaddin*, 22 Neb. 131; *Young v. Young*, 45 N. J. Eq. 27; *Patterson v. Copeland*, 52 How. Pr. (N. Y.) 460; *Freeman v. Freeman*, 43 N. Y. 34; 3 Am. Rep. 657; *McCray v. McCray*, 30 Barb. (N. Y.) 633; *Lobdell v. Lobdell*, 36 N. Y. 327; *Thomas v. Kyles*, 1 Jones' Eq. (N. Car.) 302; *Willis v. Matthews*, 46 Tex. 478; *Wells v. Davis*, 77 Tex. 636; *Burkholder v. Ludlam*, 30 Gratt. (Va.) 255; 32 Am. Rep. 668; *Frame v. Frame*, 32 W. Va. 463; *Marling v. Marling*, 9 W. Va. 79; 27 Am. Rep. 535.

In consideration of A's services as secretary of a homestead society, they gave him a lot, which he inclosed and retained possession of till his death, when he devised it to his widow, who conveyed all her interest therein to B. *Held*, that B was entitled to a deed from the trustee of the society, who held the legal title and knew of the original gift. *Hartman v. Streitz*, 17 Neb. 557.

In a suit by a son against his father to enforce specific performance of an agreement to convey, the complaint alleged that defendant divided his land between his children, and made a will devising it accordingly; that he caused the tract allotted to complainant to be surveyed, had it transferred to him on the assessment books, and put him in possession; that, relying on defendant's promises of a gift, complainant made valuable improvements on the land, rented it and paid the taxes, and thereafter the father served notice on the tenant to quit, and was seeking

to dispossess complainant. The bill prayed for specific performance, injunction pending suit, and general relief. *Held*, that the bill stated facts entitling complainant to the injunction asked, and to compensation for his improvements, and a decree establishing a lien on the land therefor. *Duckett v. Duckett*, 71 Md. 357.

Where a nephew, in pursuance of the parol promise of his uncle that, if the nephew will take certain lands and make improvements thereon, he will purchase it for the nephew's benefit, leaves his own land, takes possession of the purchased land, and makes the improvements, there is a sufficient part performance to take the contract out of the statute. *Hunter v. Mills*, 29 S. Car. 72.

In a recent West Virginia case it was held upon the parol contract sued on, between father and son, that, if the son would enter upon a certain parcel of land and improve it, the father would convey the same to him, where it appeared that in pursuance of such agreement, the son has entered upon the land, and occupied and improved it, the contract should be specifically performed. *Lorentz v. Lorentz*, 14 W. Va. 761.

A father verbally gave his son a tract of land and put him in possession, and the son made improvements on it and grew a crop of wheat. A person seeking to buy the land bargained with the son, whose rights he knew, but, failing to agree with him, closed a contract with the father, which it was agreed should be kept from the son's knowledge. The father afterwards refused to give a deed except subject to his son's claim for the wheat crop, and the purchaser filed a bill against him for specific performance. *Held*, not maintainable. *Dowling v. Bergin*, 47 Mich. 188.

Defendants' ancestor, a feeble, childless widower, 66 years old, and wealthy, on consideration that complainants, his niece and her husband, would live with and care for him until his death, gave them his verbal promise to convey to them the premises in return for their care. They did their part of the contract, making valuable improvements on the land, but his deed was vacated after his death, at the suit of his heirs, for mental incapacity. The property was but a small portion of his estate, and he was mentally sound when the agreement was made. *Held*,

This, however, has been denied, in some cases, where it has been held that the only remedy of the donee who had taken possession and made improvements was pecuniary compensation for the improvements.¹ But where courts have sustained the

that defendants should be required to execute the contract. *Fishburne v. Furguson*, 85 Va. 321.

Equity will enforce a parol promise of a parent to a child to convey land to him on condition fulfilled, that the latter take possession and expend money, etc., in improving it, there being such performance as to take the case out of the Statute of Frauds. *Bright v. Bright*, 41 Ill. 101; *Moore v. Pierson*, 6 Iowa 279; 71 Am. Dec. 409; *Bohanan v. Bohanan*, 96 Ill. 591; *Kurtz v. Hibner*, 55 Ill. 514; 8 Am. Rep. 665; *Ford v. Steele* (Neb. 1891), 48 N. W. Rep. 271.

But not where the donee did nothing beyond entering into possession under the promise. *Anderson v. Scott*, 94 Mo. 637.

A mere expression of an intention to make a gift of land, without proof that the promisee expended money or labor on the faith of it, will not sustain a suit for specific performance, especially where the suit is not brought until eleven years from the time when the promise is alleged to have been made, and three years after the death of the promisor, and no sufficient reason is shown for the delay. *Galloway v. Garland*, 104 Ill. 275; *Clark v. Clark*, 122 Ill. 388; *Pullman v. Johnson*, 55 Hun (N. Y.) 612.

Nor where the proof of the gift was not conclusive. *Griggsby v. Osborn*, 82 Va. 371; *Jones v. Tyler*, 6 Mich. 364.

A court of equity will not enforce specific performance of an alleged parol gift of real estate, as against the heirs of the grantor, unless the evidence clearly establishes an executed intent to make the gift, or possession or improvements in reliance upon it. *Johnston v. Johnston*, 19 Iowa 74.

Where a father promised his daughter, by parol, long before her marriage, to give her certain lands in case she married with his consent, and, after her marriage, put her in possession thereof, and she, with her husband, made certain improvements, and the father denied, in answer to a bill asking a conveyance, that he consented to the marriage, or gave her possession in pursuance of any promise, the court refused

to decree a conveyance. *Worley v. Walling*, 1 Har. & J. (Md.) 208.

In *Freeman v. Freeman*, 43 N. Y. 34; 3 Am. Rep. 657, the court, by Grover, J., said: "The ground upon which this equitable jurisdiction is exercised, although sometimes said to be part performance, really is to prevent a fraud being practiced upon the parol purchaser by the seller, by inducing him to expend his money upon improvements upon the faith of the contract, and then deprive him of the benefit of the expenditure, and secure it to the seller by permitting the latter to avoid the performance of his contract. In the case supposed, there has been no part performance of the contract, strictly speaking, except the taking possession; no part of the purchase-money having been paid, and yet the cases are numerous where performance of such contract has been decreed in equity, where possession has been taken under the contract and large expenditures upon permanent improvements made. In the present case possession has been taken under the promise and the expenditures upon improvements made, yet it is insisted that equity will not enforce the promise for the reason that it was to give, instead of having been to sell the land for a valuable consideration. Permitting the promisor to avoid performance operates as a fraud as much in the latter as in the former case, so far as expenditures upon improvements are concerned."

Possession of land worth \$400 having been taken under a parol gift, permanent improvements, costing \$187, will be deemed sufficient in value to justify a decree of specific performance, even though the value of the use and occupation has exceeded the cost of the improvements. *Wells v. Davis*, 77 Tex. 636.

1. *Forward v. Armstead*, 12 Ala. 124; 46 Am. Dec. 246; *Evans v. Battle*, 19 Ala. 398. See *Kaufman v. Cook*, 114 Ill. 11.

A promise by a father to a son, that, if he will remove from North Carolina and settle in Alabama, he will give him a particular plantation and slaves, cannot be enforced in equity by specific performance as a contract, it being a

donee's right to a conveyance they have required strict proof of the terms of the gift and the acts done in part performance.¹

Specific performance will not be granted on the uncorroborated declarations of parties deceased.² Even though acts of part performance be shown, the decree is granted in the discretion of the court in view of the circumstances of the case.³

2. Contracts Which Concern Personal Property—*a*. IN GENERAL.—Two other general classes of contracts, in addition to those affecting real estate, fall within the jurisdiction of equity in this department of its powers—namely, those which concern personal property and those which relate to personal conduct.

It was once the rule in *England* to refuse applications for the specific enforcement of contracts relating to chattels. It was but the rare exception when the chancellor extended his powers to reach such agreements. But the practice in the *United States* has been much more liberal, especially of recent years, and such is the tendency in the English courts to-day. The fact remains, nevertheless, that for the breach of such agreements, in most cases, the law affords an adequate remedy, and there is no occasion for equitable interposition.⁴

mere gratuity, although the son is by it induced to break up at a loss, and is put to trouble and expense in the removal; and part performance, by putting the son in possession, and his making improvements, will not warrant a court of equity in decreeing a conveyance by the heirs or devisees of the father after his death, no conveyance or written agreement, or promise to convey, being proved. *Forward v. Armistead*, 12 Ala. 124.

Equity will not enforce the specific execution of a parol gift of land by a father to his son, though accompanied by delivery of possession, either against the father himself or his heirs at law and personal representatives after his death. *Pinckard v. Pinckard*, 23 Ala. 649.

1. *Truman v. Truman*, 79 Iowa 506. In *Pullman v. Johnson*, 55 Hun (N. Y.) 612; it was said that mere declarations by a father of an intention to give his daughter certain land, and not resting on a valuable consideration, were insufficient, in the absence of an actual conveyance by him to create an enforceable obligation in her favor.

2. *Underwood v. Underwood*, 48 Mo. 527.

3. *Curran v. Holyoke Water Power Co.*, 116 Mass. 90; *Smith v. McVeigh*, 11 N. J. Eq. 239. See *Barnes v. Boston*, etc., R. R., 130 Mass. 388; 6 Am. & Eng. R. Cas. 606.

4. See *DETINUE*, vol. 5, p. 651. See

also article by W. F. Elliot, "Specific Performance of Contracts for the Sale of Goods and Chattels," 2 Am. L. Jour. (Ohio) 271.

As a general rule the specific performance of contracts relating to chattels will be denied; this on the ground that the law affords an adequate redress. *Kelly v. Dee*, 2 Thomp. & C. (N. Y.) 286; *Dilburn v. Youngblood*, 85 Ala. 449; *McGarvey v. Hall*, 23 Cal. 140; *Cowles v. Whitman*, 10 Conn. 121; 25 Am. Dec. 60; *Parker v. Garrison*, 61 Ill. 250; *Caldwell v. Myers*, Hard. (Ky.) 560; *Madison v. Chinn*, 3 J. J. Marsh. (Ky.) 230; *Jones v. Boston Mill Corp.*, 4 Pick. (Mass.) 507; 16 Am. Dec. 358; *Jones v. Newhall*, 115 Mass. 244; 15 Am. Rep. 97; *Kimball v. Morton*, 5 N. J. Eq. 26; 43 Am. Dec. 621; *Pennsylvania Coal Co. v. Delaware*, etc., Canal Co., 31 N. Y. 91; *Foll's Appeal*, 91 Pa. St. 434; 36 Am. Rep. 671; *Liaing v. Geddes*, 1 McCord Eq. (S. Car.) 304; 16 Am. Dec. 606.

In *Young v. Daniels*, 2 Iowa 126; 63 Am. Dec. 477, the court by Wright, C. J., said: "In contracts respecting real property, however, courts of equity are in the habit of interposing to grant relief to a far greater extent than in cases respecting personal property; and while in cases respecting chattels this jurisdiction is limited to special circumstances, in cases of land contracts it is universally maintained.

When the courts compel the specific performance of contracts relating to chattels, they weigh such contracts with greater nicety than they do real estate contracts and never enforce them as a matter of course.¹

In respect to their subject-matter, contracts touching personal property cover a wide range. The following have been considered proper subjects for equitable cognizance:

"As a general rule, contracts relating to personalty, unless possessing some element to show that relief at law may not be adequate, will not be enforced in equity." *Cohen v. Mitchell*, 115 Ill. 124.

1. *Roundtree v. McLain*, 1 Hempst. (U. S.) 245; *Mechanics' Bank v. Seton*, 1 Pet. (U. S.) 299; *Savery v. Spence*, 13 Ala. 561; *Johnson v. Rickett*, 5 Cal. 218; *Justices v. Croft*, 18 Ga. 473; *Sullivan v. Tuck*, 1 Md. Ch. 59; *Waters v. Howard*, 1 Md. Ch. 112; *Phillips v. Berger*, 2 Barb. (N. Y.) 608; *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365; 32 Am. Rep. 315; *Johnson v. Brooks*, 93 N. Y. 343; *Lloyd v. Wheatley*, 2 Jones Eq. (N. Car.) 267.

It is not of itself a sufficient ground of demurrer, that a bill seeks the performance of a contract relating to personal property, as in many instances a court of equity compels a specific performance of such contracts. *Carpenter v. Mutual Safety Ins. Co.*, 4 Sandf. Ch. (N. Y.) 408.

A contract should be enforced in every case where its subject is something susceptible of substantial enjoyment; provided always that the circumstances surrounding and connected with the contract bring it within the equitable rules which entitle it to the relief sought, and where the remedy at law is uncertain and insufficient. *Johnson v. Rickett*, 5 Cal. 218.

It is not a fatal obstacle to the enforcement of a contract that it does not relate to lands. *Treasurer v. Commercial Coal Min. Co.*, 23 Cal. 393; *Parker v. Garrison*, 61 Ill. 253; *Clark v. Flint*, 22 Pick. (Mass.) 231; 33 Am. Dec. 733; *Deen v. Milne*, 112 N. Y. 303.

Whenever the loss by reason of a violation of the contract cannot be correctly estimated in damages, or wherever, from the nature of the contract, a specific performance is indispensable to justice, a court of equity will not be deterred from interfering because the contract relates to personal property. *Sullivan v. Tuck*, 1 Md. Ch. 59; *Hoy v. Hanaborough*, 1 Freem. Ch. (Miss.)

533; *Furman v. Clark*, 11 N. J. Eq. 306.

Where the relief prayed for is the delivery of written instruments to which plaintiff is entitled, and not the performance of an executory contract except as to minor details, equity has jurisdiction. *Doleret v. Rothschild*, 1 S. & S. 590; *Clarke v. White*, 12 Pet. (U. S.) 178; *Shockley v. Davis*, 17 Ga. 177; 63 Am. Dec. 233; *Henderson v. Johns*, 13 Colo. 280; *Williams v. Carpenter*, 14 Colo. 477.

Title Deeds.—*Hill v. Rockingham Bank*, 44 N. H. 567; *Snoddy v. Finch*, 9 Rich. Eq. (S. Car.) 355; 70 Am. Dec. 216.

And when it appears that for his contract, the plaintiff's remedy at law is doubtful in its nature, extent, operation or adequacy, equity will grant him a decree, even though the relief sought concerns only personalty. *Southern Express Co. v. Western N. Car. R. Co.*, 99 U. S. 191.

In *Clark v. Flint*, 22 Pick. (Mass.) 231; 33 Am. Dec. 733, the court, by Wilde, J., said: "It is objected that the court ought not to exercise jurisdiction in equity for a specific performance of agreements relating to personal property. And generally that rule has been observed in the English courts, but has been subject to numerous exceptions and has been uniformly limited to cases where a compensation in damages furnishes a clear and adequate remedy. If the party complaining has no such remedy, it is quite immaterial whether the contract relates to real or personal estate."

Trust.—Where there exists a trust in relation to personal property equity will compel its execution. *Cowles v. Whitman*, 10 Conn. 121; 25 Am. Dec. 60; *Peer v. Kean*, 14 Mich. 354; *Pooley v. Budd*, 14 Beav. 34; *Wood v. Rowcliffe*, 2 Phil. 382.

Equity will enforce the performance of a contract in relation to personalty merely, as for the use of furniture, not incident to a contract in relation to realty. *City Council v. Page*, Spears Eq. (S. Car.) 159.

*b. CONTRACTS OF SALE AND DELIVERY.*¹—The prime element in determining whether the breach could be adequately compensated in damages is found in the character of the property concerned. Where it is of peculiar interest or value, as where it possesses a *pretium affectionis*, the enforcement of the contract is decreed with the same freedom as though the property were land.² But goods possessing an easily ascer-

In *Bozon v. Farlow*, 1 Meriv. 459, the chancellor refused to decree specific performance of a contract to assign an attorney's business on the ground that the court was not able to carry its decree into execution.

Compare *Bryson v. Whitehead*, 1 S. & S. 74.

In suits to enforce contracts concerning chattels, "care should be taken that there be no unnecessary encroachment on the province of the courts of common law." *Smaltz's Appeal*, 99 Pa. St. 312.

1. In *Rothholz v. Schwartz*, 46 N. J. Eq. 477; 19 Am. St. Rep. 409, the court, by Pitney, V. C., said: "The jurisdiction of this court to decree specific performance of contracts for the sale of chattels is as well settled as it is for those of the sale of realty and is based upon the same grounds—namely, the inability of the courts at law to give such remedy. And so the question whether the court will in a particular case exercise its jurisdiction is to be determined upon the same considerations in both cases, the most important being the question whether there is a full, complete, and adequate remedy at law. And the reason why the jurisdiction is seldom exercised over sales of chattels is, that the remedy at law in such cases is usually adequate and satisfactory." *Citing Cutting v. Dana*, 25 N. J. Eq. 265.

2. Where the Article Has a *Pretium Affectionis*.—*Saville v. Tankred*, 1 Ves. 111; *Fells v. Reed*, 3 Ves. 70; *Lloyd v. Loaring*, 6 Ves. 773; *Lowther v. Lowther*, 13 Ves. 95; *Williams v. Howard*, 3 Murph. (N. Car.) 74.

Examples: An antique silver altar-piece. *Duke of Somerset v. Cookson*, 3 P. Wms. 389. An ancient horn, the symbol of tenure by which an estate is held. *Pusey v. Pusey*, 1 Vern. 273. Heirlooms. *Macclesfield v. Davis*, 3 Ves. & B. 18. A finely carved cherry stone. *Pearne v. Lisle*, Amb. 77. A silver tobacco box. *Fells v. Read*, 3 Ves. Jr. 70. Family portraits. *Lady Arundell v. Phipps*, 10 Ves. 148. Slaves,

if of peculiar personal value to the complainant. *Caldwell v. Myers*, Hard. (Ky.) 560; *Womack v. Smith*, 11 Humph. (Tenn.) 478; 54 Am. Dec. 51. See *Henderson v. Touchstone*, 22 Ga. 1; *Savery v. Spence*, 13 Ala. 561; *Dudley v. Mallery*, 4 Ga. 52; *Bryan v. Robert*, 1 Strobb. Eq. (S. Car.) 334. Maps, drawings, and documents of peculiar value to plaintiff. *McGowin v. Remington*, 12 Pa. St. 56; 51 Am. Dec. 584. Masonic insignia. *Lloyd v. Loaring*, 6 Ves. 773.

Contracts for the Sale and Delivery of Property Possessing Unusual Value or Under Circumstances Demanding Specific Performance.—For example, a contract calling for ship timber in large quantities, *Buxton v. Lister*, 3 Atk. 384.

A contract for the purchase of coal tar, which is obtainable in the city solely from defendant, and absolutely necessary to plaintiff's business, will be specifically enforced. *Equitable Gas Light Co. v. Baltimore Coal Tar & Mfg. Co.*, 63 Md. 285.

Two manufacturers of glue from fish-skins, under a supposed valid patent, made a contract with a view to avoid competition between themselves, and secure a reasonable profit. The fish-skins of which the glue was made were of limited production, and the agreement provided for a certain division of the available product between plaintiff and defendant. On discovering the invalidity of the patent, defendant contracted to take the whole supply of numerous producers for long terms, and then refused plaintiff its share of such supply under the terms of the agreement. Specific performance decreed. *Gloucester Isinglass, etc., Co. v. Russia Cement Co.*, 154 Mass. 92.

The plaintiff sold his horse and wagon, and the good-will of his business, which consisted of a list of his customers, to whom he was accustomed with regularity to supply an article dealt in by him. The defendant agreed to pay in installments; and if he failed

tainable market value, as cotton or wheat, or ordinary merchandise easily found in the market, cannot be made the basis of equitable consideration. The only relief for the breach of contracts of which they are the subject lies in damages.¹ Within this rule fall contracts for stocks and bonds, the value of which in the market is known, or easily determined.²

Other elements may be considered, such as the insolvency of the defendant, the existence of a trust which it would be the duty of the chancellor to execute, or the danger of fraud in case the contract is not specifically performed.³

to do so promptly to deliver back to the plaintiff the horse and wagon and the list of customers. He failed to make the payments as agreed, and returned the horse and wagon, but refused to furnish a list of the customers. *Held*, that a court of equity would enforce the specific performance of the contract. *Palmer v. Graham*, 1 Pars. Sel. Cas. (Pa.) 476.

In *Womack v. Smith*, 11 Humph. (Tenn.) 478; 54 Am. Dec. 51, the court, by Totten, J., said: "The remedial power of a court of equity to decree the delivery of a specific chattel is limited to a class of cases where the chattel has a special and peculiar value and where the remedy at law in damages would be entirely inadequate; as where the chattel is a family relic, or ornament, or heirloom, or other thing of kindred nature."

The sale of a dyer's receipt with the good will of the business was enforced in *Bryson v. Whitehead*, 1 S. & S. 74.

1. *Scott v. Billgerry*, 40 Miss. 119; *Ferguson v. Paschall*, 11 Mo. 267.

Specific performance of a contract for the sale of a certain number of bales of cotton at a fixed price, which was paid when the contract was made, cannot be granted, as the remedy at law for the breach of such a contract is adequate. *Scott v. Billgerry*, 40 Miss. 119.

A decree was refused in *Paddock v. Davenport*, 107 N. Car. 710, where plaintiff sought to enforce the sale of trees standing on defendant's land, no showing being made that damages would not be adequate relief. But compare *Buxton v. Lister*, 3 Atk. 384.

2. A court of equity will not compel specific performance of a contract to deliver government bonds, or marketable railroad shares. *Ross v. Union Pac. R. Co.*, 1 Woolw. (U. S.) 36; *Fallon v. Railroad Co.*, 1 Dill. (U. S.) 121; *Adams v. Messinger*, 147 Mass.

185; 9 Am. St. Rep. 679; *Cuddee v. Rutter*, 5 Vice. Abr. 538; *Shaw v. Fisher*, 5 De G. M. & G. 596. Nor shares of stock in private corporations, if damages would be an adequate recompense in the particular case. *Fallow v. Railroad Co.*, 1 Dill. (U. S.) 121; *Bissell v. Farmers', etc., Bank*, 5 McLean (U. S.) 495; *Cowles v. Whitman*, 10 Conn. 121; 25 Am. Dec. 60; *Barton v. DeWolf*, 108 Ill. 195; *Ferguson v. Paschall*, 11 Mo. 267; *Eastman v. Plumer*, 46 N. H. 464; *Eckstein v. Downing*, 64 N. H. 248; 10 Am. St. Rep. 404; *Strasburg R. Co. v. Echternacht*, 21 Pa. St. 220; 60 Am. Dec. 49; *Fall's Appeal*, 91 Pa. St. 434; 36 Am. Rep. 671.

Specific performance of a contract to deliver stock will be refused in case it appears that there is no fiduciary relation between the parties; that the value of the stock can be estimated in money, and that there are no allegations of defendant's insolvency. *Avery v. Ryan*, 74 Wis. 591.

3. *Avery v. Ryan*, 74 Wis. 591.

Insolvency.—See *Clark v. Flint*, 22 Pick. (Mass.) 231; 33 Am. Dec. 733.

Where a vendor received the entire consideration for personal property, but in fraud of the vendee's rights was about disposing of the same, and was insolvent, and the vendee would encounter difficulty in attempting to replevy the property, as it formed an undivided portion of a larger quantity, and had not been delivered, and was in the possession of several persons, it was held that equity should entertain jurisdiction of a bill for injunction in the nature of a specific performance of the agreement of sale. *Parker v. Garrison*, 61 Ill. 250.

Trust.—One who buys stock in behalf of another may be compelled to fulfill his trust by transferring it to him. *Cowles v. Whitman*, 10 Conn. 121; 25 Am. Dec. 60; *Draper v. Stone*,

c. AGREEMENTS TO TRANSFER CORPORATE STOCK.¹—If it appears that corporate stock contracted for is desired for a special and legitimate personal purpose,² or that its market value cannot be fixed with certainty because the stock is not upon the market, it is manifest that a judgment in damages would be inadequate and impracticable, and specific performance may be granted.³ But in *Pennsylvania*,

71 Me. 175; *Kimball v. Morton*, 5 N. J. Eq. 26; 43 Am. Dec. 621; *McGowin v. Remington*, 12 Pa. St. 56; 51 Am. Dec. 584; *Simes v. Everson*, 46 Pa. St. 309. See also *Forrest v. Elwes*, 4 Ves. 497; *Tyfe v. Swaby*, 16 Jur. 49; *Stanton v. Percival*, 5 H. L. Cas. 257.

Equity will decree the specific performance of a covenant to convey personal property contracted to a trustee in aid and enforcement of the provisions of a trust mortgage. *Chaffee v. Sprague* (R. I. 1888), 13 Atl. Rep. 121.

Specific performance will be granted to compel the delivery of promissory notes and other instruments in writing to the persons entitled to the possession thereof, when an express trust in reference to the same has been created by the terms of the contract. *Henderson v. Johns*, 13 Colo. 280.

It has even been held in *New Jersey*, that equity will entertain jurisdiction in favor of the vendor against his vendee for the payment of the consideration for the delivery of chattels sold. See *McKnight v. Robbins*, 5 N. J. Eq. 229; *Rothholz v. Schwartz*, 46 N. J. Eq. 477; 19 Am. St. Rep. 409.

1. See *Law Times*, vol. 73, p. 327. See, also, article by Adelbert Hamilton in 22 Am. Law Reg. 489; *Todd v. Taft*, 7 Allen (Mass.) 371; *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365; 32 Am. Rep. 315; *Goodwin Gas Stove, etc., Co's Appeal*, 117 Pa. St. 514; 2 Am. St. Rep. 696.

Compare *Sewall v. Eastern R. Co.*, 9 Cush. (Mass.) 5; *Moses v. Scott*, 84 Ala. 608; *Noyes v. Marsh*, 123 Mass. 286.

2. Equity will not grant a decree if the purpose of the purchase is to improperly control the management of the corporation. *Fremont v. Stone*, 42 Barb. (N. Y.) 169; *Fall's Appeal*, 91 Pa. St. 434; 36 Am. Rep. 671.

3. *Special Value to Promisee*.—The defendant subscribed for most of the stock of a corporation organized to buy and operate a steamboat, of which he

was to be the master. By agreeing to employ her husband on the boat, and that "in case of misunderstanding, or not being able to agree, or in case of the husband's death," the defendant would take her stock "at not exceeding cost; or, if boat depreciates in value, at a fair cash valuation," the defendant induced the plaintiff to take stock in the corporation. The plaintiff agreed to give the defendant the refusal over any other purchaser. The plaintiff assigned her stock as collateral, and her interest therein was attached. The pledgee and the attaching creditors were made parties to a suit by the plaintiff for specific performance, and they agreed to release their interest, and to look to the proceeds. Upon the foregoing facts the court held that the stock had a peculiar value to the defendant, and that the plaintiff was entitled to specific performance on the principle of mutuality of remedy, and also because the pledge of the stock and the attachment rendered her remedy at law inadequate. *Bumgardner v. Leavitt* (W. Va. 1891), 13 S. E. Rep. 67.

Stock Not on the Market, or of Uncertain Value.—Specific performance will be decreed where the shares are limited, having no fixed or marketable value, are not quoted in the commercial reports, nor selling upon the market. A judgment for damages at law may not afford adequate relief. *Frue v. Houghton*, 6 Colo. 318.

See *Goodwin Gas Stove, etc., Co's Appeal*, 117 Pa. St. 514; *Treasurer v. Commercial Coal Min. Co.*, 23 Cal. 390; *Leach v. Fobes*, 11 Gray (Mass.) 506; 71 Am. Dec. 732; *Adams v. Messinger*, 147 Mass. 185; 9 Am. St. Rep. 679; *Johnson v. Brooks*, 93 N. Y. 337; *Ashe v. Johnson*, 2 Jones Eq. (N. Car.) 149; *Doleret v. Rothschild*, 1 S. & S. 590; *Hawkins v. Maltby*, L. R., 3 Ch. 188; *Poole v. Middleton*, 29 Beav. 646; *Duncuft v. Albrecht*, 12 Sim. 189; *Parish v. Parish*, 32 Beav. 207; *Gardner v. Pullen*, 2 Vern. 393; *Paine v. Hutchinson*, L. R., 3 Ch. 388; *Shaw v. Fisher*, 2 DeG. & S. 11; 5 DeG., M. & G.

the power to enforce contracts to transfer stock is denied altogether.¹

d. AGREEMENTS TO SUBSCRIBE FOR CORPORATE STOCK.—Agreements to subscribe for capital stock have been enforced specifically, and so have other agreements in reference to capital stock; but not by all courts.²

e. AGREEMENTS TOUCHING PATENTED ARTICLES AND PATENTS.—These agreements afford the best illustration of the kind of personal contracts which are the subject of equitable cognizance. Even courts which have construed the powers of the chancellor with the greatest strictness, as those of *Pennsylvania*, have uniformly given to interests arising out of letters patent

596; *Cheale v. Kenward*, 3 DeGex & J. 27.

Specific performance of an agreement to transfer stock will be decreed, where the contract to convey is clear, and the uncertain value of the stock renders it difficult to do justice by an award of damages. *White v. Schuyler*, 1 Abb. Pr. N. S. (N. Y.) 300; 31 How. Pr. (N. Y.) 38; *Treasurer v. Commercial Coal Min. Co.*, 23 Cal. 390.

Trust.—Specific performance of a contract for the sale and delivery of shares of stock may be decreed where it appears that the stock has been purchased by defendant with money delivered to him by plaintiff for that purpose, and that the stock is not easily purchasable in open market, and that a judgment in damages would be inadequate; and the fact that the contract was made in Massachusetts, where it was void under the Statute of Frauds is not material, the contract having been performed by the plaintiff, and partly performed by the defendant, and defendant's relation to the plaintiff being a fiduciary one. *Johnson v. Brooks*, 93 N. Y. 337.

But, if it appears that there is no trust relation between the parties, that defendant is not alleged to be insolvent, and the value of the stock can be estimated in money, specific performance will be denied. *Avery v. Ryan*, 74 Wis. 591. See, also, *Blake v. Flatley*, 44 N. J. Eq. 228; *Gottschalk v. Stein*, 69 Md. 51.

Where the contract is for stock and real estate it may be enforced as to both. *Bissell v. Farmers', etc., Bank*, 5 McLean (U. S.) 505; *Leach v. Fobes*, 11 Gray (Mass.) 506; 71 Am. Dec. 732; *New Brunswick Land Co. v. Muggenridge*, 4 Drew. 686. Compare *Burton v. Shotwell*, 13 Bush (Ky.) 272.

1. *Fall's Appeal*, 91 Pa. St. 434; 36 Am. Rep. 671.

2. See *Diamond State Iron Co. v. Todd* (Del. 1888), 14 Atl. Rep. 27.

A with several others agreed to subscribe conditionally for a certain amount of stock of an incorporated railroad company. Subsequently B and C agreed with him in writing that, if he would subscribe unconditionally, they would each take one-fourth of such stock off his hands, by subscribing for it in their own names, and afterwards A subscribed absolutely. Held, that A was entitled to a decree for a specific performance of the latter agreement. *Austin v. Gillaspie*, 1 Jones Eq. (N. Car.) 261.

Other Agreements.—A sale of turn-pike stock belonging to the State, by commissioners of the sinking fund, under the *Kentucky* act of March 7, 1871, is valid and binding on the State, although the commissioners refuse to execute the contract of sale and the legislature afterwards repeals the act authorizing the sale to be made. And the court will compel the commissioners to execute the contract and transfer the stock, as if the act authorizing the sale had not been repealed. *Baldwin v. Com.*, 11 Bush (Ky.) 417.

Specific performance of a particular contract between stockholders involving interests of minority stockholders refused, as against public policy. See *Converse v. Hood*, 149 Miss. 471.

No Jurisdiction to Compel the Subscription of Capital Stock.—*Strasburg R. Co. v. Echternacht*, 21 Pa. St. 220; 60 Am. Dec. 49.

Or Issuance Thereof.—Where it appears from the bill in a suit to compel the issuance of stock by defendant that there can be no specific performance of the contract under which com-

the same consideration that they have to interests in real property; and the practice has been universal, to grant specific performance of such agreements, where the remedy at law was inadequate.¹

3. Contracts Calling for Personal Conduct—*a*. IN GENERAL.—These include two general classes of agreements, viz: first, those calling for some single and definite act, and, second, those which involve the exercise of skill or discretion or the performance of varying and continuing duties. As a general rule, the courts refuse to entertain jurisdiction to enforce contracts for the performance of specific acts and services. When a contract of this kind is enforced specifically, it is exceptional, and is enforced by reason of the presence in the case of some equitable feature which renders such enforcement proper.²

(1) *Compromises*.—Compromises are favored in equity. It sometimes happens that a compromise forms the basis of a contract, which, although involving the doing of some par-

plainants claim, and that the recovery, if any, must be limited to a money decree for damages for non-performance, the complainants have an adequate remedy at law, and specific performance will be denied. *Sumnerlin v. Fronteriza Silver Min., etc., Co.*, 41 Fed. Rep. 249.

While the issuance of stock will not be decreed the issuance of certificates of stock may be. *Burrall v. Bushwick R. Co.*, 75 N. Y. 211; *Purchase v. New York Exchange Bank*, 3 Robt. (N. Y.) 164; *Pollock v. National Bank*, 7 N. Y. 274; 57 Am. Dec. 520.

1. For construction of a contract concerning inventions, in suit for specific performance, see *Hopedale Mach. Co. v. Entwistle*, 133 Mass. 443.

Assignments of Patents and Patent Rights, Enforceable.—*Hapgood v. Rosenstock*, 23 Fed. Rep. 86; *Hull v. Pitrat*, 45 Fed. Rep. 94; *Blackmer v. Stone*, 51 Ark. 489; *Corbin v. Tracy*, 34 Conn. 325; *Satterthwait v. Marshall*, 4 Del. Ch. 337; *Whitney v. Burr*, 115 Ill. 289; *Binney v. Annan*, 107 Mass. 94; 9 Am. Rep. 10; *Reese's Appeal*, 122 Pa. St. 392. *Compare* *New York Paper-Bag Mach. Co. v. Union Paper-Bag Mach. Co.*, 32 Fed. Rep. 783; *Desper v. Continental Water Meter Co.*, 137 Mass. 252.

Renewal of license under patent may be enforced. *Domestic Telegraph Co. v. Metropolitan Telephone Co.*, 39 N. J. Eq. 160.

Specific performance granted to a capitalist to compel an inventor to assign an interest in a patent, according to

an oral agreement made before issuance of the letters, and to account, etc. *Somerby v. Buntin*, 118 Mass. 279; 19 Am. Rep. 459.

Equity will not aid an inventor to secure for himself a patent in direct violation of his agreement to assign it. *Runstetler v. Atkinson*, 4 McArthur (D. C.) 382.

Agreements to Furnish Patented Article.—*Adams v. Messinger*, 147 Mass. 185; 9 Am. St. Rep. 679.

Where a patentee licenses another to manufacture the patented article, and the licensee agrees to pay royalty, to make monthly reports of sales, to admit the validity of the patent, and co-operate in maintaining the patentee's business and the patent under which the license is issued, and the patentee reserves the power to revoke the license, the contract cannot be specifically enforced, the covenant as to co-operation being too vague, and the patentee's remedy, by revocation of the license or action at law, being ample. *Washburn, etc., Mfg. Co. v. Freeman Wire Co.*, 41 Fed. Rep. 410.

2. See *infra*, this title, *Contracts of Service*.

A bill in equity by one who claims to be the highest bidder at an auction sale of land, against the auctioneer and the person to whom the land was struck off, to compel the auctioneer to sign a memorandum declaring plaintiff purchaser, cannot be maintained. *Marcus v. Boston*, 136 Mass. 350.

ticular act or series of acts, is yet capable of a specific performance.¹

(2) *Agreements to Build or Repair*.—It was once considered properly within the jurisdiction of chancery to compel the specific performance of a contract to construct buildings and to make repairs therein, but this power is no longer generally recognized. It would be impracticable if not impossible for an officer of the court to carry out such a decree.²

1. An agreement between a creditor and a third person, founded on a valuable consideration, to compromise the claim of the former against his debtor, will be specifically enforced by a court of equity. *Phillips v. Berger*, 8 Barb. (N. Y.) 527.

Where the complainant has no adequate remedy at law, or where some other element of equity jurisdiction is mixed up in the transaction, as here, creditors of an insolvent firm agreeing to sell their claims to one of their number at 25 per cent., equity will interfere to decree specific performance of a contract for the sale of a debt. *Cutting v. Dana*, 25 N. J. Eq. 265.

But compare *Acker v. Phoenix*, 4 Paige (N. Y.) 305, where the chancellor refused to enforce specific performance of an agreement among creditors to receive a portion of their debts in satisfaction of the whole. And *Sutherland v. Straw*, 2 Fed. Rep. 277, where the decree was refused because enforcement involved a great number of details.

A compromise will be enforced regardless of the adequacy of the consideration. *Leach v. Fobes*, 11 Gray (Mass.) 506; 71 Am. Dec. 732; *Weed v. Terry*, Walk. (Mich.) 501; 2 Dougl. (Mich.) 344; 45 Am. Dec. 257; *Central Trust Co. v. Wabash, etc.*, R. Co., 29 Fed. Rep. 554; *Gaines v. Molen*, 30 Fed. Rep. 27.

The indorser of notes given in settlement of the debts of an insolvent firm, and the assignee, who has transferred to him the firm property as indemnity, are entitled to specific performance of an agreement by a creditor, whose claim is not included in the settlement to sell them such claim for less than its face value, and to an injunction against his suit on it, where the chattel bargained for is specified, and the damages which can be recovered for the breach of contract are uncertain. *Gottschalk v. Stein*, 69 Md. 51.

A promise to vacate a judgment and discontinue a pending action will be specifically enforced. *Deen v. Milne*, 113 N. Y. 303.

2. Thus it has been held that a decree will not be granted to compel a railroad to repair cattle guards, the plaintiff having an ample remedy at law. *Columbus, etc., R. Co. v. Watson*, 26 Ind. 50.

Nor to construct or repair a railway. *Oregonian R. Co. v. Oregon R., etc. Co.*, 11 Sawy. (U. S.) 33; *Port Clinton R. Co. v. Cleveland, etc., R. Co.*, 13 Ohio St. 544; *Kansas, etc., R. Constr. Co. v. Topeka R. Co.*, 135 Mass. 34; 16 Am. & Eng. R. Cas. 495; 46 Am. Rep. 439; *Ross v. Union Pac. R. Co.*, 1 Woolw. (U. S.) 36; *Fallon v. Railroad Co.*, 1 Dill. (U. S.) 121. Compare *Crane v. Chicago, etc., R. Co.*, 20 Fed. Rep. 402; 17 Am. & Eng. R. Cas. 174. Nor to make good a gravel pit. *Scholefield v. Whithead*, 2 Vern. 127. Nor to build a bridge. *Texas, etc., R. Co. v. Rust*, 17 Fed. Rep. 275. Nor to repair a building. *London v. Nash*, 3 Atk. 515; *Beck v. Allison*, 56 N. Y. 366; 15 Am. Rep. 430; *Raymer v. Stone*, 2 Eden 128.

On the other hand, the courts have enforced a contract to build a railway crossing. *Post v. West Shore, R. Co.*, 123 N. Y. 581. And to build stairways for the joint use of adjacent properties. *Gregory v. Ingwersen*, 32 N. J. Eq. 199. And see *Franklyn v. Tutton*, 5 Madd. 469; *Price v. Penzance*, 4 Hare 506. And to maintain a railway station at a stipulated location. *Minneapolis, etc., R. Co. v. Cox*, 76 Iowa 306.

It has been held that the court may compel the performance of an agreement to build fences. *Jones v. Seligman*, 81 N. Y. 191. *Contra*, *Cincinnati, etc., R. Co. v. Washburn*, 25 Ind. 259. And perhaps to rebuild tenements. *London v. Nash*, 3 Atk. 515.

The rule is almost universal that a covenant to build may not be enforced

(3) *Payment of Money*.—Equity will not compel the specific performance of a simple promise to pay or advance money, as the remedy at law is adequate.¹ But a promise to make payment in some specified medium, as in gold or silver, has been held to be capable of being specifically enforced on account of the fluctuations in the values of the medium agreed on,² although the contrary doctrine is also announced and seems to be sustained by the better reasoning.³

specifically, for the execution of such contract would be impracticable if not impossible for a court to supervise, whereas the remedy of damages would afford full redress. *South Wales R. Co. v. Whythes*, 5 DeG. M. & G. 880; *Lucas v. Commerford*, 3 Bro. C. C. 166; *Beck v. Allison*, 56 N. Y. 366; 15 Am. Rep. 430; *Mastin v. Halley*, 61 Mo. 196.

A court of equity will not compel the specific performance of a contract by the common council of a city, to erect a city hall on a lot conveyed to the city by the plaintiff, nor restrain the erection on another lot. *Kendall v. Frey*, 74 Wis. 26.

Still it has been decided that an agreement to build will be enforced where the consideration for the agreement was the conveyance of land on which the building was to be erected and the plaintiff had already executed his part of the contract by conveying the land. *Ross v. Union Pac. R. Co.*, 1 Woolw. (U. S.) 40.

And in an old Virginia case, a contract to build a tavern, at the joint risk and expense and for the joint benefit of the parties, was decreed to be specifically performed at the instance of one of them, who had furnished the land to be built upon, and performed his part of the contract, the others objecting, on the ground that a change of circumstances rendered the scheme unadvisable. *Birchett v. Bolling*, 5 Munf. (Va.) 442.

And it was held in *Stuyvesant v. Mayor*, etc., of N. Y., 11 Paige (N. Y.) 414, that equity will enforce the specific performance of covenants to make improvements on the covenantor's own land, where the covenantee cannot be compensated for the breach by damages.

In a *Minnesota* case, however, it was held that where by the permission of plaintiff a nuisance was created under an agreement that defendant would remove it within a period named, the

plaintiff's only remedy was by an action in damages. *Minneapolis Mill Co. v. Bassett*, 31 Minn. 390.

1. *Bradford, etc., R. Co. v. New York, etc., R. Co.*, 123 N. Y. 327. See also *Crampton v. Varna R. Co.*, L. R., 7 Ch. 562; *Sichel v. Mosenthal*, 30 Beav. 371; *Pierce v. Plumb*, 74 Ill. 330; *Carter v. United Ins. Co.*, 1 Johns. Ch. (N. Y.) 463; *Phyfe v. Wardell*, 2 Edw. Ch. (N. Y.) 47; 6 Paige (N. Y.) 268; 28 Am. Dec. 430.

2. Performance of an agreement to pay in gold or silver coin should be specifically enforced, as, since the legal-tender enactment, gold, silver, and legal-tender notes have different marketable values. *Hall v. Hiles*, 2 Bush (Ky.) 532.

A note given in 1863, in payment for land, expressly made payable in gold, the difference between the gold and currency being considered in valuing the land, will be specifically enforced in equity as a binding contract, irrespective of the question whether Treasury notes are a legal tender; and upon failure on the part of the maker to pay the gold, judgment will be rendered against him for the value of the gold in paper currency. *Hord v. Miller*, 2 Duv. (Ky.) 103.

Specific performance of a contract for the sale of lands for continental money may be decreed against the vendor. *Chapline v. Scott*, 4 Har. & M. (Md.) 91. But see *Hopkins v. Stump*, 2 Har. & J. (Md.) 301.

The court of chancery in *Maryland*, has never directed anything to be done in consequence of an agreement for the purchase of property with continental paper money, as against the vendor, unless he has expressed, in writing, his willingness to convey on the receipt of such sum as the chancellor should think right, or unless the circumstances of the case rendered what was decreed essential to justice. *Lawrence v. Dorsey*, 4 Har. & M. (Md.) 205.

3. Such a contract can only be enforced, if at all, by a decree for the pay-

(4) *Fulfillment of a Trust in Relation to Money*.—Agreements to fulfill a trust with reference to the payment of money, are enforceable.¹

(5) *Agreements to Insure*.—Equity will enforce a valid oral contract to insure. This is done, where the loss has occurred, not by actually requiring that a policy issue, but by a decree for the payment of the loss as if a policy had issued.² The courts have not uniformly enforced contracts to issue policies of insurance.³ They have required the strictest proof of the terms of

ment of the sum of money without any allowance for the difference in value. *Howe v. Nickerson*, 14 Allen (Mass.) 400.

A contract to pay money in gold and silver cannot be specifically enforced, nor can any other damages be recovered, upon its breach, except interest. *Wilson v. Morgan*, 1 Abb. Pr. N. S. (N. Y.) 174; 30 How. Pr. (N. Y.) 386.

Where the consideration for the conveyance of land was a sum in Confederate money, which became worthless before the contract was completed and the money paid—held, that specific performance would not be decreed, although the plaintiff offered to pay what the Confederate notes were worth at the time of the contract. *Love v. Cobb*, 63 N. Car. 324.

1. See *Buck v. Swazey*, 35 Me. 41; 56 Am. Dec. 681; *Boyd v. Soule*, 8 Gray (Mass.) 554.

Thus, where one has placed the means for paying a debt in the hands of another, upon his covenant to pay the same, he may maintain an action in equity to compel a performance of the covenant, without first paying the debt; he is not limited to his action on the covenant. *Woodruff v. Erie R. Co.*, 93 N. Y. 609; 16 Am. & Eng. R. Cas. 501.

Plaintiff for a nominal consideration, conveyed to defendant certain lands, in which they were jointly interested. Defendant agreed verbally to hold the lands in trust, and that on a sale certain advances made by the parties, respectively, should be repaid out of the proceeds, and the balance equally divided between them. The court decided that although no trust in the land could be established by parol, the plaintiff could, after a sale by the defendant, enforce the agreement for a division of the proceeds. *Sprague v. Bond*, 108 N. Car. 382.

2. *Baile v. St. Joseph, etc., Ins. Co.*,

73 Mo. 371, in which case the court, by Sherwood, C. J., said: "This method of enforcement proceeds on the ground of avoiding circuity of action, and doubtless upon the further ground that equity, once possessed of a cause, will, before releasing its grasp on the *res*, avoid a multiplicity of suits by doing full, adequate, and complete justice between the parties, by entering that judgment to which the party will be ultimately entitled." *Citing* *Real Estate Sav. Inst. v. Collonious*, 63 Mo. 290. And see *Covenant Mut. Ben. Assoc. v. Sears*, 114 Ill. 108; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96; *Hughes v. Piedmont, etc., L. Ins. Co.*, 55 Ga. 111; *Carpenter v. Mutual Safety Ins. Co.*, 4 Sandf. Ch. (N. Y.) 408.

Where an insurance company, having made a contract of insurance, refuses to issue a policy to the assured, a court of equity, even after the loss, will compel the delivery of the policy. And having obtained jurisdiction of the case for that purpose, will proceed to give such final relief as the circumstances of the case demand. *Taylor v. Merchants' F. Ins. Co.*, 9 How. (U. S.) 390.

Where a contract to insure a building has been made with the agent of an insurance company who has authority to issue policies, and the premium has been paid, but before the policy is issued the building is consumed by fire, a court of equity has jurisdiction to enforce the payment of the policy, at the suit of the assured, against the company. *Woody v. Old Dominion Ins. Co.*, 31 Gratt. (Va.) 362; 31 Am. Rep. 732. See *Haden v. Farmers', etc., F. Assoc.*, 80 Va. 683. So a life insurance contract may be enforced where loss has occurred before the policy was issued. *Hebert v. Mutual L. Ins. Co.*, 12 Fed. Rep. 807.

3. See *Knott v. Shepherdstown Mfg. Co.*, 30 W. Va. 790.

the agreement.¹ And it has been held that such contracts had no standing in a court of equity.²

(6) *Agreements to Indemnify and to Give Security*.—These have generally been enforced, although the authorities are not harmonious.³

(7) *Penal Bonds*.—The fact that a contract in the form of a bond contains a liquidated penalty for non-performance does not necessarily limit one who has suffered from its breach to his legal remedy upon the penal condition. He may still have specific performance if that would afford him a more satisfactory redress than the assessment of the penalty in his favor.⁴

1. A court of chancery will not compel an insurance company to issue a policy of insurance, in pursuance of an alleged contract, unless the proof is clear that such contract has been consummated. *Neville v. Merchants', etc. Mut. Ins. Co.*, 19 Ohio 452.

2. Equity will not compel the delivery of insurance policies in pursuance of a contract, an adequate remedy at law existing. *Nestel v. Knickerbocker L. Ins. Co.*, 12 Phila. (Pa.) 477.

3. Compare *INDEMNITY CONTRACTS*, vol. 10, p. 402.

Contracts of Indemnity Enforceable.—See *Chamberlain v. Blue*, 6 Blackf. (Ind.) 491; *Shockley v. Davis*, 17 Ga. 177; 63 Am. Dec. 233; *Michigan State Bank v. Hastings*, 1 Dougl. (Mich.) 225; 41 Am. Dec. 549, 570; *Champion v. Brown*, 6 Johns. Ch. (N. Y.) 398; 10 Am. Dec. 343; *Ranelagh v. Hayes*, 1 Vern. 189.

In a proper case, specific performance of a general covenant of indemnity, may be decreed notwithstanding it sounds only in damages. The grantor in a deed, conveying a lot of land to R, executed a bond of indemnity to R, against a mortgage of the same lot to T; also against certain paramount liens affecting the land. The indemnity bond was accompanied by a mortgage to R of other lands, also covered by the mortgage to T. *Held*, that R was entitled in equity to be indemnified for the loss of the lot out of the proceeds of the other lands mortgaged to him for an indemnity; that he had not, under the indemnity bond accompanying the mortgage a sufficient remedy at law to bar relief in equity. *Reybold v. Herdman*, 2 Del. Ch. 34.

To the Contrary.—On a dissolution of partnership, one partner gave to the other a bond of indemnity against the debts of the concern. The principal obligor died insolvent, without legal

representatives, leaving the debts unpaid. The obligee in the bond filed a bill against the sureties for a specific performance of their contract. *Held*, on demurrer, that the court could not decree specific performance of such a contract. *Foote v. Garland*, 1 Smed. & M. Ch. (Miss.) 95.

Agreements to Furnish Security May be Enforced Specifically.—*Robinson v. Cathcart*, 2 Cranch (C. C.) 590.

To the Contrary.—An executory contract for the transfer of stock as collateral security for a debt, where the debtor has died insolvent, will not be enforced by a court of equity to the injury of other creditors. *City Fire Ins. Co. v. Olmstead*, 33 Conn. 476.

A parol contract for a mortgage of personal property, based upon a valuable consideration, and not such as must be in writing by the Statute of Frauds, will be enforced in equity when there is no complete remedy at law. *Triebert v. Burgess*, 11 Md. 452.

Contra.—A promise to execute a mortgage for a purchase of chattels cannot be enforced. The only remedy is damages. *Johnson v. Hoover*, 73 Ind. 395.

Plaintiff sold a stock of goods to defendant, receiving a part of the purchase price therefor. Certain securities were to be executed for the balance of the purchase money; but, after being put in possession defendant refused to give such security. The latter had no property outside of the goods sold. *Held*, that plaintiff could maintain a bill for specific performance. *Rothholz v. Schwartz*, 46 N. J. Eq. 477; 19 Am. St. Rep. 409.

4. *Broadwell v. Broadwell*, 6 Ill. 599; *Daily v. Litchfield*, 10 Mich. 29; *Gordon v. Brown*, 4 Ired. Eq. (N. Car.) 399; *Telfair v. Telfair*, 2 Desaus. Eq. (S. Car.) 271; *Gillis v. Hall*, 7 Phila. (Pa.) 422.

(8) *Relating to Promissory Notes and Transfer of Debts*.—Contracts for the delivery, execution, assignment, or cancellation of promissory notes, and for the transfer of debts and claims may be enforceable specifically;¹ and so may agreements to transfer debts.²

(9) *Agreements to Arbitrate*.³—Agreements to submit controversies to arbitration, or to refer unsettled questions of price and value to arbitrators, are, if executory, incapable of equitable enforcement.⁴ Nor can the courts compel arbitrators to whom questions have been referred to render an award.⁵ But where the agreement has been acted upon by the parties, and partially executed by them, or where the fixing of the price or value is not of the essence of the agreement, the court will enforce the

To the Contrary.—A contract which binds defendant in a penal sum for the performance of certain work, and plaintiff to pay for such work when completed, does not entitle plaintiff to a decree for specific performance. Breach of such a contract may be compensated in damages. *McCarter v. Armstrong*, 32 S. Car. 203; *aff'd* 11 S. E. Rep. 634.

The court cannot enforce specific performance of a condition, the non-performance of which forfeits the estate. The grantor has fixed his remedy, and must avail himself of it. *Woodruff v. Water Power Co.*, 10 N. J. Eq. 489.

1. An agreement for the transfer and delivery of certain promissory notes may be enforced in a court of equity. *Gottschalk v. Stein*, 69 Md. 51; *Shockley v. Davis*, 17 Ga. 177; 63 Am. Dec. 233.

A promise by a holder of notes to deliver them up to the maker to be canceled, may be specifically enforced. The maker should not be compelled to await an opportunity to defend an action on the notes. *Tuttle v. Moore*, 16 Minn. 123.

See *Clarke v. White*, 12 Pet. (U. S.) 178; *Henderson v. Johns*, 13 Colo. 280.

The maker of a promissory note who obtains possession of it from the holder under a promise to return it or execute a new one of the same tenor and effect, for the same amount, and destroys the same, and refuses to give a new one, a court of equity will have jurisdiction to compel him to make the new note notwithstanding there may be a remedy at law. *McMullen v. Vanzant*, 73 Ill. 190.

Compare *Callier v. Vivian*, 8 Ala. 903.

To the Contrary.—Plaintiff had promised to give defendant the note in suit, at his death, if defendant would board and lodge him during his life, and that if defendant failed to do so he should pay the note, and plaintiff should pay for the board. *Held*, that as defendant had full indemnity by the payment for the board, the contract would not be specifically enforced. *Simon v. Wildt*, 84 Ky. 157.

2. *Adderley v. Dixon*, 1 S. & S. 607; *Wright v. Bell*, 5 Price 325; *Ball v. Coggs*, 1 Bro. P. C. 140.

See *Gottschalk v. Stein*, 69 Md. 51; *Cutting v. Danna*, 25 N. J. Eq. 265; *Brown v. Runals*, 14 Wis. 693.

3. See article by J. C. Harper, in 19 Weekly Law Bulletin, p. 300.

4. *Contee v. Dawson*, 2 Bland (Md.) 277; *Pearl v. Harris*, 121 Mass. 390; *Noyes v. Marsh*, 123 Mass. 286; *Smith v. Boston*, etc., R. Co., 36 N. H. 487; *March v. Eastern R. Co.*, 40 N. H. 548; 77 Am. Dec. 732; *Greason v. Keteltas*, 17 N. Y. 491; *Conner v. Drake*, 1 Ohio St. 166; *Lowe v. Brown*, 22 Ohio St. 463; *Hopkins v. Gilman*, 22 Wis. 476; *Gourlay v. Duke of Somerset*, 19 Ves. 431; *Agar v. Macklelew*, 2 S. & S. 418.

Where the parties to a contract for the sale of lands stipulated that in case they could not agree on the price, it should be left to two disinterested men to fix the same, and although the price was to be paid in the year following, no price had been fixed by the parties or by arbitrators some ten years after. *Held*, that, in the absence of peculiar equitable circumstances, a specific performance could not be decreed. *Griffith v. Frederick Co. Bank*, 6 Gill & J. (Md.) 424.

5. *Conner v. Drake*, 1 Ohio St. 166.

contract and ascertain for itself what the price or value should be.¹

(10) *Awards*.—When the matter in dispute has been submitted to arbitrators and an award made, equity will require the parties to execute the award, which is treated as the formal contract of the parties.²

1. *Coles v. Peck*, 96 Ind. 333; 49 Am. Rep. 161; *Arnot v. Alexander*, 44 Mo. 25; 100 Am. Dec. 252; *Hug v. Van Burkleeo*, 58 Mo. 202; *Strohmaier v. Zeppenfeld*, 3 Mo. App. 429; *Kelso v. Kelley*, 1 Daly (N. Y.) 419; *Viany v. Farran*, 5 Abb. Pr., N. S. (N. Y.) 110; *Dunnell v. Keteltas*, 16 Abb. Pr. (N. Y.) 205; *Dike v. Greene*, 4 R. I. 285.

2. *Kirksey v. Fike*, 27 Ala. 383; 62 Am. Dec. 768; *Story v. Norwich*, etc., R. Co., 24 Conn. 94; *Jones v. Boston Mill Corp.*, 4 Pick. (Mass.) 507; 16 Am. Dec. 358; *Jones v. Boston Mill Corp.*, 6 Pick. (Mass.) 148; *Hodges v. Saunders*, 17 Pick. (Mass.) 470; *Penniman v. Rodman*, 13 Met. (Mass.) 382; *Cook v. Vick*, 2 How. (Miss.) 882; *Bouck v. Wilber*, 4 Johns. Ch. (N. Y.) 405; *Wood v. Griffith*, 1 Swanst. 54; *Norton v. Mascall*, 2 Vern. 24; *Blundell v. Brettargh*, 17 Ves. 232; *Hall v. Hardy*, 3 P. Wms. 186. But compare *Jones v. Blalock*, 31 Ala. 180; *Bubier v. Bubier*, 24 Me. 42; *Backus's Appeal*, 58 Pa. St. 186.

The practice in *Georgia*, of compelling the performance of award, by bill in equity—explained. *Overby v. Thrasher*, 47 Ga. 10.

As to awards of church councils, generally, see *Stearns v. First Parish*, 21 Pick. (Mass.) 114.

Courts of equity have jurisdiction to enforce a specific performance of awards, on the ground that such performance is an execution of the agreement of parties as fixed by the arbitrators. *McNeil v. Magee*, 5 Mason (U. S.) 244.

A court of equity will decree the specific performance of an award, although the agreement for arbitration fixed a penalty for failure to comply with the award, and the losing party is ready to pay the penalty. *Whitney v. Stone*, 23 Cal. 275.

Where a dispute existed between the owners of contiguous lands, as to their dividing line, and it was agreed in writing to submit the matter to arbitration, and to stand to and abide by such lines as should be made and

laid down by the referees, and an award was made designating dividing lines between the parties, which the recusant party failed to show were erroneous—held, that it was a proper case for a decree of specific performance. *Thompson v. Deans*, 6 Jones Eq. (N. Car.) 22.

Specific performance of an award, legally void by reason of an apparent non-compliance with the terms of submission, caused by a mere clerical error, will yet be decreed in equity, unless its performance would work injustice. *Buys v. Eberhardt*, 3 Mich. 524.

An agreement binding defendant to sell to plaintiff a certain defined right of way over defendant's land, at a price to be fixed by arbitrators, will, when the award is duly made, be specifically enforced, as the arbitrators' award is equivalent to a liquidation of the consideration by the landowners. *Maury v. Post*, 55 Hun (N. Y.) 454.

A bill in equity lies to compel the execution of a deed of land, ascertained by an award of arbitrators agreed upon by the parties to settle the boundary line between their adjoining lands, to belong to the plaintiff. *Caldwell v. Dickinson*, 13 Gray (Mass.) 365.

Awarding costs, which it is beyond the power of the arbitrators to do, is no ground for refusing specific performance of the residue of the award. *Caldwell v. Dickinson*, 13 Gray (Mass.) 365.

Award Calling for the Payment of Money.—Equity will enforce an award of arbitrators which provides a specific remedy, or prescribes the execution of a specific act, other than the payment of money. *Story v. Norwich*, etc., R. Co., 24 Conn. 94.

A court of equity has jurisdiction to enforce specific execution of an award concerning land, or of an agreement for the sale and purchase of land, which involves the enforcement of an award for the payment of money, if the payment of the money is but a part of the award. *Wood v. Shep-*

b. CONTRACTS OF SERVICE.—The specific performance of a contract of personal service will not be enforced, for there is no practicable means of executing the decree. Contracts to be performed in the remote future, or the execution of which involves the performance of a continuous and protracted series of acts, or the doing of some act or thing which demands the exercise of the individual skill, discretion, taste, or talent of the promisor, are, of necessity, incapable of judicial supervision or control. For the breach of such agreements, the party injured must be left to his remedy in a court of law.¹

herd, 2 Patt. & H. (Va.) 442; Memphis, etc., R. Co. v. Scruggs, 50 Miss. 284.

And it seems to enforce the decision of an ecclesiastical council to which matters in controversy had been referred, where the decision directed a dissolution of pastoral relations and the payment of money. *Stearns v. First Parish*, 21 Pick. (Mass.) 114.

Specific performance of an award to pay a certain number of dollars in gold, cannot be decreed by a court of equity. *Howe v. Nickerson*, 14 Allen (Mass.) 400.

A bill in chancery will not lie to compel the specific performance of an award for the payment of a sum of money. *Turpin v. Banton*, Hard. (Ky.) 320.

1. *Compare MASTER AND SERVANT* vol. 14, p. 787.

An agreement requiring personal service will not be specifically enforced. *Willingham v. Hooven*, 74 Ga. 233; 58 Am. Dec. 435.

Equity will not enforce specific performance if the execution of the contract would require the supervision of the court. *Cooper v. Pena*, 21 Cal. 403; *Danforth v. Philadelphia*, etc., R. Co., 30 N. J. Eq. 12; *Buck v. Smith*, 29 Mich. 166; 18 Am. Rep. 84; *Blanchard v. Detroit*, etc., R. Co., 31 Mich. 43; 18 Am. Rep. 142; *Port Clinton R. Co. v. Cleveland*, etc., R. Co., 13 Ohio St. 544; *McCarter v. Armstrong*, 32 S. Car. 203; *Johnson v. Shrewsbury*, etc., R. W. Co., 3 De G. M. & G. 914; *Blackett v. Bates*, L. R., 1 Ch. 117.

But a contract for the lease of mines to be worked in a specified manner does not come within this doctrine. *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266. *Compare Starnes v. Newsom*, 1 Tenn. Ch. 239, where it was held that chancery cannot enforce the specific performance of a contract to cultivate a particular crop in a designated way, and to cut, cure and deliver it in a cer-

tain prescribed manner, nor to estimate damages for its breach.

In *Blanchard v. Detroit*, etc., R. Co., 31 Mich. 43; 18 Am. Rep. 142, the contract by the railroad company was to build, erect and maintain a depot suitable for the convenience of the public, and that at least one train per day should stop when trains run on the road, and that freight and passengers should be regularly taken at such station. This was held incapable of enforcement.

Equity will not compel the specific performance of a contract with a city to maintain land as a public park and permit no nuisances thereon, etc., as it contains covenants of continuous service, the enforcement of which might require the constant supervision of a court; and, further, because every alleged violation of it would require the consideration and determination of questions of fact. *Kidd v. McGinniss* (N. Dak. 1891), 48 N. W. Rep. 221.

Continuous Services Cannot be Specifically Compelled.—*Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498; *Danforth v. Philadelphia*, etc., R. Co., 30 N. J. Eq. 12; *McCann v. South*, etc., R. Co., 2 Tenn. Ch. 773; *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 339; *Case of Mary Clark*, 1 Blackf. (Ind.) 122; 12 Am. Dec. 213; *Ikerd v. Beavers*, 106 Ind. 483; *Lindsay v. Glass*, 119 Ind. 301; *Atlanta*, etc., R. Co. v. *Speer*, 32 Ga. 550; 79 Am. Dec. 305; *Western Union Tel. Co. v. Union Pac. R. Co.*, 1 McCrary (U. S.) 558; *Blackett v. Bates*, L. R., 1 Ch. 117.

But the violation of such a contract may be enjoined. *Western Union Tel. Co. v. Union Pac. R. Co.*, 1 McCrary (U. S.) 558; *Western Union Tel. Co. v. St. Joseph*, etc., R. Co., 1 McCrary (U. S.) 565.

An agreement to take care of one and provide for her "in case of her general debility or sickness" not enforce-

Contracts Calling for SPECIFIC PERFORMANCE. Personal Conduct.

able. *Mowers v. Fogg*, 45 N. J. Eq. 120. See *Bourget v. Monroe*, 58 Mich. 563.

A logging contract between A on one side and a firm composed of A and B on the other, cannot be specifically enforced on behalf of A's personal representatives after his death, because a court of equity has no means of seeing to its execution, and the judgment and business faculty of the deceased partner cannot be supplied. *Roberts v. Kelsey*, 38 Mich. 602.

By a contract in writing the defendant agreed to repair the plaintiff's steam sawmill; build fences, etc., and the plaintiff to sell to the defendant, as soon as the repairs were finished, one undivided half of the premises on which the mill was situated, plaintiff and defendant then to form a partnership to work the mill for one year, at the end of which time, if the plaintiff wished to retire, defendant was to pay him for the premises a fixed sum; but if plaintiff did not choose to retire, the partnership was to continue for five years. *Held*, that this was not a proper case for specific performance, and the plaintiff's bill for that purpose was dismissed. *Reed v. Vidal*, 5 Rich. Eq. (S. Car.) 289.

In the case of *Mary Clark*, 1 Blackf. (Ind.) 122; 12 Am. Dec. 213, the court, by Holman, J., said: "A covenant for service, if performed at all, must be personally performed under the eye of the master; and might, as in the case before us, require a number of years. Such performance, if enforced by law, would produce a state of servitude as degrading and demoralizing in its consequences as a state of absolute slavery."

A contract by a railroad company with a city to locate its terminus, principal offices and machine shops therein, and to continue them there, even though its own interests and those of the public might subsequently demand their removal, is not enforceable in equity, and the city's only remedy for its breach is in damages. *Texas, etc., R. Co. v. Marshall*, 136 U. S. 393; 42 Am. & Eng. R. Cas. 637.

Equity will not enforce the performance of a contract to keep in repair a railway within a period of many years. *Oregonian R. Co. v. Oregon R., etc., Co.*, 37 Fed. Rep. 733.

But it was held in *Chubb v. Peckham*, 13 N. J. Eq. 207, that a father, having conveyed his entire estate to his

children, on their stipulation to support and maintain comfortably their parents suitably to their condition, and wherever they might choose to reside, had a decree for specific performance in his favor, though the conveyed property was wholly inadequate to such support.

Nor Contracts to be Performed in the Remote Future.—See *Alworth v. Seymour*, 42 Minn. 526.

Specific performance of a verbal contract, which is executory, and depends on a future event which may never happen, will not be decreed. *Bradley v. Morgan*, 2 A. K. Marsh. (Ky.) 369.

A railroad corporation, in consideration of a grant of a right of way through the premises of S, contracted to place beside their road, on said premises, a platform convenient for lading and unlading cars, and to take from that platform all produce to be shipped by S, and to bring and place on it all freight shipped by or for him to that place from any other point on their road, provided the railroad had three days' notice of any such freight to be transported. *Held*, that a bill in equity would not lie in favor of S against the railroad, to compel a specific performance of the contract. *Atlanta, etc., R. Co. v. Speer*, 32 Ga. 550; 79 Am. Dec. 305.

Nor Those Which Run for an Uncertain Period.—See *Morris v. Peckham*, 51 Conn. 128.

A judgment creditor agreed with one of three defendants, who was the principal in the debt upon which the judgment was recovered, the others being sureties, that so long as the principal would pay the interest on the judgment, and if he would pay the costs, the matter might stand as though no judgment had been obtained, which agreement was for an indefinite length of time. *Held*, that such an agreement could not be enforced in a court of equity. *Gardner v. Watson*, 13 Ill. 347.

But specific performance was decreed in *Cornwall, etc., R. Co.'s Appeal*, 125 Pa. St. 232; 42 Am. & Eng. R. Cas. 233, where the suit was to enforce an agreement between two railroad companies in reference to a crossing of their tracks at grade, the agreement providing that "in the use or working of the railroads of the parties hereto at or near the point of crossing, all trains, engines or cars of the party of the second part shall come to a full stop at a distance of at least 200 feet from the point of crossing, and shall

not proceed until the proper signal shall have been given by the watchman in charge. All engines and trains of the party of the first part shall have priority of passage over the trains and engines of the party of the second part."

And in *Joy v. St. Louis*, 138 U. S. 1, a contract of a railroad company which permitted other railway companies to use its right of way was enforced, although such duties would be continuous.

So, as against the successors of the contracting parties, specific performance was decreed of a contract between two railroad companies, whereby one granted to the other and its successors the right to cross the tracks of the former, upon certain conditions, including payment of \$800 a year on account of the expense of keeping a flagman at such crossing, and the latter agreed to comply. And this, in a proceeding under the Law of 1850, ch. 140, § 28, subd. 6. *Rome, etc., R. Co. v. Ontario Southern R. Co.*, 16 Hun (N. Y.) 445.

Nor Contracts Calling for the Exercise of Peculiar Skill, Judgment, Care and Attention, Talents, or Peculiar Confidence and Esteem.—*Iron Age Publishing Co. v. Western Union Tel. Co.*, 83 Ala. 498; *Ikerd v. Beavers*, 106 Ind. 483; *Bickford v. Davis*, 11 Fed. Rep. 549; *Western Union Tel. Co. v. Union Pac. R. Co.*, 3 Fed. Rep. 423; *Campbell v. Rust*, 85 Va. 653. Compare *Josline v. Stokes*, 38 N. J. 31.

Where the duties to be fulfilled are continuous, and involve the exercise of skill, personal labor, and cultivated judgment, as to deliver marble of certain kinds, and in blocks of such a kind that the court is incapable of determining whether they accord with the contract or not, the contract will not be enforced in a court of equity. *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 339.

Equity will not require the specific performance of continuous duties which involve personal labor and care; as, for example, the running of the cars of a street railroad along a particular street, daily, "at such regular intervals as may be right and proper," whether the obligation of the railroad company be rested on contract or the provisions of its charter. *McCann v. South, etc., R. Co.*, 2 Tenn. Ch. 773. See *Lattin v. Hazard* (Cal. 1891), 27 Pac. Rep. 515.

An agreement to employ one on an annual salary if he will take a certain interest in the corporation, and on fail-

ure to so employ him to repurchase his stock at a fair price to be determined by arbitration, not enforceable. *Noyes v. Marsh*, 123 Mass. 286.

Courts of chancery will refuse to decree specific performance of a contract under which the defendant, who is a mechanical expert and inventor, agrees to produce and construct by his labor, skill, and inventive genius, for the plaintiff, who is a manufacturer, certain improved machinery for manufacturing speaking tubes, no details of specifications being given in the contract as to the form, material, structure, principle or mode of operation of the proposed machines, but all those matters being left wholly to the judgment and discretion of the defendant. *Wollensak v. Briggs*, 119 Ill. 453.

Equity will not enforce the specific performance of a contract to sing at concerts, etc., but the party will be left to his legal remedy. *Sanquirico v. Benedetti*, 1 Barb. (N. Y.) 315; *DeRivafinoli v. Corsetti*, 4 Paige (N. Y.) 265; 25 Am. Dec. 532; *Mapleson v. DePuente*, 13 Abb. N. Cas. (N. Y.) 146; *Fredricks v. Mayer*, 13 How. Pr. (N. Y.) 568; 1 Bosw. (N. Y.) 231; *Kemble v. Kean*, 6 Sim. 333; *Kimberley v. Jennings*, 6 Sim. 340.

Nor to play base-ball. *Allegheny Base-Ball Club v. Bennett*, 14 Fed. Rep. 257; *Metropolitan Exhibition Co. v. Ward*, 24 Abb. N. Cas. (N. Y.) 393; *Metropolitan Exhibition Co. v. Ewing*, 24 Abb. N. Cas. (N. Y.) 419. See *Metropolitan Exhibition Co. v. Ewing*, 24 Fed. Rep. 198. And see note 30 Cent. L. J. 310.

De Rivafinoli v. Corsetti, 4 Paige (N. Y.) 265, was a suit for injunction and specific performance brought by a manager of an Italian opera to compel the performance of a contract to sing. The court, by Walworth, Ch., said: "Upon the merits of the case. I suppose it must be conceded that the complainant is entitled to a specific performance of this contract, as the law appears to have been long since settled that a bird that can sing and will not sing must be made to sing. . . . Although the authority before cited" [old adage] "shows the law to be in favor of the complainant, so far at least as to entitle him to a decree for the singing, I am not aware that any officer of this court has that perfect knowledge of the Italian language or possesses that exquisite sensibility of the auricular nerve, which is nec-

c. PARTNERSHIP AGREEMENTS.—Agreements to form and carry on a partnership are incapable of equitable enforcement.¹

essary to understand and enjoy with a proper zest the peculiar beauties of the Italian opera, so fascinating to the fashionable world. There might be some difficulty, therefore, if the defendant was compelled to sing under the direction and in the presence of the master in chancery, in ascertaining whether he performed his engagement according to its spirit and intent. It would also be very difficult to determine what effect coercion might produce upon the defendant's singing, especially in the livelier airs; although the fear of imprisonment would deepen his seriousness in the graver parts of the drama. But one thing, at least, is certain: his songs will be neither comic nor even semi-serious, while he remains confined in that dismal cage, the debtor's prison of New York." In accordance with the opinion, as above, specific performance was refused.

Equity will restrain the breach of negative covenants in such contracts by injunction, as where the defendant has agreed to sing or act, or work for no one else but plaintiff, and is proposing to contract with others. *INJUNCTION*, vol. 10, p. 948. See also *Lumley v. Wagner*, 1 DeG. M. & G. 604; 13 E. L. & E. 252 (*overruling* *Kemble v. Kean*, 6 Sim. 333); *Bradley v. Bosley*, 1 Barb. Ch. (N. Y.) 125; *Montague v. Flockton*, L. R., 16 Eq. 189; *Daly v. Smith*, 49 How. Pr. (N. Y.) 150; *Dupre v. Thompson*, 4 Barb. (N. Y.) 279; *Hahn v. Concordia Soc.*, 42 Md. 460; *McCaull v. Braham*, 16 Fed. Rep. 37; *Fredericks v. Mayer*, 13 How. Pr. (N. Y.) 567; *Butler v. Galletti*, 21 How. Pr. (N. Y.) 466. Compare *Cort v. Lassard*, 18 Oregon 221.

This was not the early American practice, however, for some of the leading cases follow *Kemble v. Kean*, 6 Sim. 333, and hold that inasmuch as such covenants cannot be affirmatively enforced their breach cannot be enjoined. See *Sanquirico v. Benedetti*, 1 Barb. (N. Y.) 315; *Hamblin v. Dinneford*, 2 Edw. Ch. (N. Y.) 529; *Burton v. Marshall*, 4 Gill (Md.) 487; 45 Am. Dec. 171; *Hayes v. Willio*, 11 Abb. Pr. N. S. (N. Y.) 167.

Cort v. Lassard, 18 Oregon 221; 30 Cent. L. J. 226, was a suit to enforce a contract made by certain acrobats to perform exclusively for plaintiff for a

period of six weeks, by enjoining the making of similar engagements with others in violation of the agreement with plaintiff who was a theatrical manager. Injunction was refused because the services involved no peculiar talent, the court, by Lord, J., saying: "If the services contracted for by the plaintiff to be rendered by the defendant were unique and extraordinary, involving such special merit or qualifications in them as to make such services distinctly personal and peculiar, so that in case of default by them the same or like services could not be easily procured, nor be compensated in damages, the court would be warranted in applying its preventive jurisdiction and granting relief, but otherwise, or denied, if such services were ordinary and without special merit, and such as could be readily supplied or obtained from others without much difficulty or expense.

1. An agreement to execute articles of partnership will be enforced in equity, but not to compel the parties to act under them after execution. *Satterthwait v. Marshall*, 4 Del. Ch. 337.

A mere agreement to form a partnership does not, of itself, create a partnership; nor does the relation of partners exist between the parties thereto, until they enter on the execution of the agreement. While it remains executory, if one of them refuses to carry it into effect, the only remedy of the other is by an action at law for the violation of the agreement or by a bill in equity to enforce specifically its performance. *Wilson v. Campbell*, 10 Ill. 383.

And see *Rust v. Conrad*, 47 Mich. 449; 41 Am. Rep. 720; *Hercy v. Birch*, 9 Ves. 357; *Scott v. Rayment*, L. R., 7 Eq. Cas. 112; *Roberts v. Kelsey*, 38 Mich. 602; *Meason v. Kaine*, 63 Pa. St. 335; *New Brunswick, etc., Co. v. Muggeridge*, 4 Drew. 686; *Sheffield Gas Consumers' Co. v. Harrison*, 17 Beav. 294.

Courts of equity cannot specifically enforce an agreement to enter partnership, and as a member of the firm to use and exercise personal skill and judgment according to the shifting needs of property and business from time to time, in the control and

VII. ESSENTIALS TO AN ENFORCEABLE CONTRACT.—There are certain requirements which a contract must possess before a court of equity will render a decree compelling a specific performance of it.

1. Certainty.—The contract must be definite and certain in its terms and limitations.¹

management of the partnership affairs. *Buck v. Smith*, 29 Mich. 166; 18 Am. Rep. 84.

Equity will not enforce an agreement to enter into partnership which is silent as to the duration of such partnership, since such a partnership may be dissolved at the will of either partner as soon as it is formed. *Buck v. Smith*, 29 Mich. 166; 18 Am. Rep. 84.

But it was held in *Whitworth v. Harris*, 40 Miss. 483, that although a partnership is of indefinite limitation, a court of equity will decree specific performance of the articles where it is necessary, in order to invest the complainant with the legal rights for which he contracted.

And see, generally, *PARTNERSHIP*, vol. 17, p. 824.

1. See note to *Atwood v. Cobb*, 26 Am. Dec. 661.

In *Lloyd v. Collett*, 4 Bro. C. C. 469, the court by Lord Loughborough, said: "There is nothing of more importance than that the ordinary contracts between man and man should be fixed and certain, and that it should be certainly known when a man is bound and when not."

The contract which is sought to be specifically executed must not only be proved, but its terms must be so precise that neither party could reasonably misunderstand them. If the contract is vague or uncertain, or the evidence to establish it is insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it, but will leave the party to his legal remedy. *Colson v. Thompson*, 2 Wheat. (U. S.) 336; *Carr v. Duval*, 14 Pet. (U. S.) 77; *Kendall v. Almy*, 2 Sumn. (U. S.) 278; *Bowen v. Waters*, 2 Paine (U. S.) 1; *Preston v. Preston*, 95 U. S. 200; *Zeringue v. Texas, etc.*, R. Co., 34 Fed. Rep. 239; *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498; *Angel v. Simpson*, 85 Ala. 53; *Jordan v. Deaton*, 23 Ark. 704; *Magee v. McManus*, 70 Cal. 553; *Morrison v. Rossignol*, 5 Cal. 64; *Minturn v. Baylis*, 33 Cal. 129; *Agard v. Valencia*, 39 Cal. 292; *Los Angeles Immi-*

gration, etc., *Assoc. v. Phillips*, 56 Cal. 539; *Dodd v. Seymour*, 21 Conn. 476; *Hollenbeck v. Prior*, 5 Dak. 298; *Miller v. Cotten*, 5 Ga. 341; *Fitzpatrick v. Beatty*, 6 Ill. 545; *Allen v. Webb*, 64 Ill. 342; *Bowman v. Cunningham*, 78 Ill. 48; *Day v. Griffith*, 15 Iowa 104; *Water v. Brown*, 7 J. J. Marsh. (Ky.) 123; *Burke v. His Creditors*, 9 La. Ann. 56; *Higgins v. Butler*, 78 Me. 520; *Geiston v. Sigmund*, 27 Md. 334; *Reese v. Reese*, 41 Md. 554; *O'Brien v. Pentz*, 48 Md. 562; *Hopkins v. Roberts*, 54 Md. 312; *Boston, etc., R. v. Babcock*, 3 Cush. (Mass.) 228; *Grace v. Denison*, 114 Mass. 16; *McMurtrie v. Bennette*, Harr. Ch. (Mich.) 124; *Miller v. Ramsdell*, Harr. (Mich.) 373; *Munsell v. Loree*, 21 Mich. 491; *McClintock v. Laing*, 22 Mich. 212; *Bumpus v. Bumpus*, 53 Mich. 346; *Wright v. Wright*, 31 Mich. 380; *Blanchard v. Detroit, etc., R. Co.*, 31 Mich. 44; 18 Am. Rep. 142; *Nippolt v. Kammon*, 39 Minn. 372; *Montgomery v. Norris*, 1 How. (Miss.) 499; *Aston v. Robinson*, 49 Miss. 348; *Roberson v. Hornbaker*, 3 N. J. Eq. 60; *Rockwell v. Lawrence*, 6 N. J. Eq. 190; *Lockerson v. Stillwell*, 13 N. J. Eq. 357; *Nichols v. Williams*, 22 N. J. Eq. 63; *Brown v. Brown*, 33 N. J. Eq. 650; *Rutan v. Crawford*, 45 N. J. Eq. 99; *Mehle v. Von DerWulbeke*, 2 Lans. (N. Y.) 267; *Foot v. Webb*, 59 Barb. (N. Y.) 38; *Port Jervis, etc., R. Co. v. New York, etc., R. Co.*, 56 Hun (N. Y.) 647; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Buckmaster v. Thompson*, 36 N. Y. 558; *Stanton v. Miller*, 58 N. Y. 192; *Maud v. Maud*, 33 Ohio St. 147; *Hammer v. McEldowney*, 46 Pa. St. 334; *Ballou's Appeal*, 133 Pa. St. 64; *May v. Cavender*, 29 S. Car. 598; *Spears v. Long*, 32 S. Car. 528; *Morrison v. Searight*, 4 Baxt. (Tenn.) 476; *Pierce v. Catron*, 23 Gratt. (Va.) 588; *Pigg v. Corder*, 12 Leigh (Va.) 69; *Shenandoah Valley R. Co. v. Lewis*, 76 Va. 833; 12 Am. & Eng. R. Cas. 305; *Litterall v. Jackson*, 80 Va. 604; *Patrick v. Horton*, 3 W. Va. 23; *Blanchard v. McDougall*, 6 Wis. 167; 70 Am. Dec. 458; *Tiernan v. Gibney*, 24 Wis. 190;

Stout v. Weaver, 72 Wis. 148; *Harnett v. Yielding*, 2 S. & L. 549; *Paris Chocolate Co. v. Crystal Palace Co.*, 3 S. & G. 119; *Tatham v. Platt*, 9 Hare 660; *Franks v. Martin*, 1 Eden 309; *Repetti v. Maisak*, 6 Mackey (D. C.) 366.

A court of equity will enforce specific performance of a contract, provided that, though inartificially drawn, the meaning of the contract is, upon consideration of the whole, intelligible to the court. *Bull v. Bell*, 4 Wis. 54.

Specific performance of a contract for the sale of lands will not be enforced, unless the parties have described and identified the particular tract, or the contract furnishes the means of identifying with certainty the land to be conveyed. *Parrish v. Koons*, 1 Pars. Sel. Cas. (Pa.) 79; *Jordan v. Deaton*, 23 Ark. 704; *Ferris v. Irving*, 28 Cal. 645; *Millard v. Ramsdell*, Harr. (Mich.) 373; *Shelton v. Church*, 10 Mo. 774; *Camden, etc., R. Co. v. Stewart*, 18 N. J. Eq. 489; *Prater v. Miller*, 3 Hawks (N. Car.) 628; *Capps v. Holt*, 5 Jones Eq. (N. Car.) 153; *Patrick v. Horton*, 3 W. Va. 23; *Maud v. Maud*, 33 Ohio St. 147.

This is the rule whether the contract relate to real estate or to chattels. *Preston v. Preston*, 95 U. S. 200; *Brix v. Ott*, 101 Ill. 70; *Borden v. Croak*, 131 Ill. 68; 19 Am. St. Rep. 23; *McMurtrie v. Bennette*, Harr. Ch. (Mich.) 126; *Welsh v. Bayaud*, 21 N. J. Eq. 186; *Taylor v. Ashley*, 15 Tex. 50; *Olmstead v. Abbott*, 61 Vt. 281; *Graham v. Hendren*, 5 Munf. (Va.) 185.

A contract, the consideration whereof was to give one who was to organize a new railroad corporation "securities thereof and a contract for the construction of a part of said road" was held too vague in that particular to justify specific performance. *Ballou's Appeal*, 133 Pa. St. 64.

Where, by the terms of an agreement to convey real estate, the deed was to be delivered "upon receipt of balance of cash payments, and the securities for deferred payments, herein stipulated," there being no other reference to securities, or statement of what they were to be, specific performance is impossible by reason of the indefiniteness in that particular. *Holliday v. Hubbard*, 45 Minn. 333.

An action will not lie for the specific performance of a contract to convey land, where the consideration named is that the purchaser shall erect thereon "a certain building," without any fur-

ther description. By reason of its uncertainty the contract cannot be performed. *Mastin v. Halley*, 61 Mo. 196.

A contract that one may erect and occupy as long as he desires, an office on the land of another, is too uncertain to be enforced. *Nelson v. Kelly*, 91 Ala. 569.

A resolution of the board of directors of a corporation "that two acres be sold," is too uncertain to authorize a court to decree the specific performance of a sale. *Carr v. Passaic Land, etc., Co.*, 22 N. J. Eq. 85.

A promise to convey 160 acres "in any one of the following counties," naming them, is incapable of enforcement. *Newman v. Perrill*, 73 Ind. 153. See *Shelton v. Church*, 10 Mo. 774; *Reed v. Hornback*, 4 J. J. Marsh. (Ky.) 375.

Where the agreement gives a defective and uncertain description of the land to be conveyed, it cannot be specifically enforced, in the absence of an allegation of a mistake and a prayer for its reformation. *Gigos v. Cochran*, 54 Ind. 593.

A bill in equity will not lie to enforce the specific performance of a bill of sale of 500 head of cattle, to be selected out of a large herd, of which they form a part. *McLaughlin v. Piatti*, 27 Cal. 451.

A deed of sale and compromise contained the stipulation that the vendee or his assigns "shall build and keep in repair such bridges as may be necessary over the land herein acquired." *Held*, too indefinite for specific performance. *Zeringue v. Texas, etc., R. Co.*, 34 Fed. Rep. 239.

The complaint prayed the specific performance of a contract for the right to make and sell certain knit goods, and averred that its terms were expressed in a written instrument, which was prepared for execution but never signed. The instrument failed to give the weight of the goods per yard, to which plaintiff's right to manufacture was obviously to be restricted. *Held*, that, in the absence of any evidence showing what weight was agreed upon, there was no sufficiently definite contract. *Kayser v. Arnold* (Supreme Ct.), 1 N. Y. Supp. 412; 124 N. Y. 674.

A bill for the specific performance of a contract to make certain speaking tubes, which did not stipulate as to their form, material, or principal of

operation, was held not maintainable; and this though praying discovery of the structure of those already built. *Wollensak v. Briggs*, 20 Ill. App. 50.

Specific performance of a contract will not be decreed, where there is a strong doubt whether the parties understood the contract alike. *Coles v. Bowne*, 10 Paige (N. Y.) 526.

A specific execution of general promises by one to establish a passway over his land, where no specific contract was made by him with any person, cannot be had. *Hall v. McLeod*, 2 Metc. (Ky.) 98; 74 Am. Dec. 400. See *Stanton v. Miller*, 58 N. Y. 192.

Where the uncertainty was in reference to the location of a footpath which the purchaser was to lay out, it was held sufficient to defeat a decree for specific performance. *Taylor v. Gilbertson*, 2 Drew. 391.

Doubt as to Terms.—The principle, that, where doubt exists, a court of chancery will not decree, does not refer to a particular fact in a cause, but to the terms of a contract. When those are doubtful, chancery cannot aid; but, after ascertaining the facts of a cause, the decision will be given according to the preponderance of testimony. *Walton v. Coulson*, 1 McLean (U. S.) 120.

If the evidence leaves any uncertainty as to the existence of the contract, or as to its terms, a decree ought to be withheld. *Cutsinger v. Ballard*, 115 Ind. 93; *Baldwin v. Kerlin*, 46 Ind. 426; *Miller v. Campbell*, 52 Ind. 125; *Gigos v. Cochran*, 54 Ind. 593; *Newman v. Perrill*, 73 Ind. 153.

A executed to B several notes for the payment of money due at subsequent periods. B executed to A a bond for the conveyance of real estate, and agreed if A could not pay the notes when due, he would not sue or harass him for their payment until he could make payment out of the proceeds of the real estate. One note was transferred, and suit was brought thereon. *Held*, that the agreement not to sue was too vague and indefinite to warrant the interference of a court of chancery to enforce a specific performance or to rescind the contract. *Knuckolls v. Lea*, 10 Humph. (Tenn.) 577.

Equity will not compel the specific performance of an agreement to care for complainant and provide for her in case of her "general debility or sickness." *Mowers v. Fogg*, 45 N. J. Eq. 120.

The rule that a specific performance

will be refused where the contract is vitiated by uncertainty is applied with much greater strictness against assignees and representatives of the contracting parties. *Odell v. Morin*, 5 Oregon 96.

Certainty as to Terms, Price, and Time.—See *South Wales, etc.*, R. Co. v. Wythes, 5 DeG. M. & G. 880; *Taylor v. Portington*, 7 DeG. M. & G. 328; *Cooper v. Hood*, 26 Beav. 293; *Bromley v. Jeffries*, 2 Vern. 415; *Blagden v. Bradbear*, 12 Ves. 466; *Carlisle v. Carlisle*, 77 Ala. 339; *Goodwin v. Lyon*, 4 Port. (Ala.) 297; *Morrison v. Rossignol*, 5 Cal. 64; *Agard v. Valencia*, 39 Cal. 292; *Morris v. Peckham*, 51 Conn. 128; *Miller v. Cotten*, 5 Ga. 341; *Atwood v. Cobb*, 16 Pick. (Mass.) 227; 26 Am. Dec. 657; *Triebert v. Burgess*, 11 Md. 452; *Olson v. Erickson*, 42 Minn. 440; *Wright v. Wright*, 31 Mich. 380; *James v. Muir*, 33 Mich. 223; *Munsell v. Loree*, 21 Mich. 491; *Rockwell v. Lawrence*, 6 N. J. Eq. 190; *Potts v. Whitehead*, 20 N. J. Eq. 55; *Nichols v. Williams*, 22 N. J. Eq. 63; *McKibbin v. Brown*, 14 N. J. Eq. 13; *Reed v. Lowe* (Utah), 29 Pac. Rep. 740. Compare *Green v. Richards*, 23 N. J. Eq. 32; *Triebert v. Burgess*, 11 Md. 452.

An agreement calling for "satisfactory security" cannot be specifically enforced, this not being sufficiently specific. *Ladd v. Stevenson*, 43 Hun (N. Y.) 541.

So with a promise to "secure" a creditor. *Cole v. Dealham*, 13 Iowa 551; *Day v. Griffith*, 15 Iowa 104.

An agreement to renew a lease for as much as any one else would pay, with option on the part of the lessee to accept or refuse the lease, is wanting in certainty and mutuality, and therefore does not merit the interposition of a court of equity to enforce it. *Gelston v. Sigmund*, 27 Md. 334.

Specific performance of a lease of land for the lessor's life, in consideration of support by the lessee, will not be enforced, though partly executed by the lessee if there be uncertainty as to what the understanding was as to the nature or extent of the tenancy or as to the consideration to be rendered by the tenant, but the lessee will be allowed instead the present value of the improvements during the lifetime of the lessor. *Rutan v. Crawford*, 45 N. J. Eq. 99.

A contract for the sale of land evidenced by a receipt, running to a real-

estate exchange, of "\$100, as earnest on purchase of my residence," describing it, "for the sum of \$20,500 cash; possession given May 15, 1888," cannot be enforced by the vendor, though the purchaser afterwards made a payment thereon, and wrote the vendor that he wished to close "that deal up," and asked for a deed, and promised to give a check for the same, as no purchaser is named in the memorandum, and the terms as to payment and security are vague. *Shipman v. Campbell*, 79 Mich. 82.

A receipt for part of the purchase money of land, defining the lot but not stating the price or other terms of sale, is not sufficient to entitle the vendee to a specific performance of the agreement of sale. *Sole v. Hickman*, 20 Pa. St. 180.

Where there was a written offer to convey land within a time fixed, at a price named, of which a small part was to be paid upon the execution of the deed, and the balance to be secured by a mortgage on the land, with interest at six per cent.—held that the failure to designate any time when the unpaid balance of purchase money was to be paid, left a material part of the contract undetermined; and hence, even if such offer had been accepted, a decree for specific performance would not be made. *Potts v. Whitehead*, 20 N. J. Eq. 55.

A wrote B in reference to the purchase of land, saying that he had offered \$40 per acre, but that he then thought \$35 per acre would be a big price for it, and that "to buy the land now and pay cash down and not get possession until next spring, and have the taxes to pay on it this fall, I would not want to pay over \$2,000 for the sixty acres. And, counting taxes and interest on the money, that would make it a little over \$35 per acre.

... If that will buy the land I will take it and pay all the money down." This offer was accepted. *Held*, that this contract was incapable of specific performance, as it was not apparent how much was offered. *Burkhalter v. Jones*, 32 Kan. 5.

A mere understanding between husband and wife that land bought by the husband in the wife's name should in certain contingencies revert to him, is not enforceable in equity. There should be a definite agreement to convey. *Johnson v. Johnson*, 16 Minn. 512.

A memorandum authorized a sale of land "at \$1,800 net. Incumbrance, \$1,100," and the agreement for the sale stated the terms as, "Price of property, \$1,900. Terms of sale, cash; balance,——; incumbrance to be assumed by the purchaser." *Held*, so uncertain as to preclude specific performance. *Repetti v. Maisak*, 6 Mackey (D. C.) 366.

Specific performance will not be decreed upon a contract to convey land to a wife and such of her's and her husband's children as he and she shall designate, while both parents are alive, until such a designation has been made. *Watkins v. Turner*, 34 Ark. 663.

It is not possible to enforce a written contract which does not specify the time it is to continue, where it appears that the parties made a contemporaneous agreement that the contract should continue in force, "only so long as both parties should desire," and that defendant has terminated it. *Real Estate Title Ins., etc., Co's Appeal*, 25 Pa. St. 549.

Specific performance will be denied of an agreement to convey, when the agreement fails to show whether the conveyance was to be before or after payment. *Roberts v. Campbell*, 59 Iowa 675.

A court of equity will not enforce a contract for the conveyance of real estate, which stipulates that credit is to be given for part of the price, but does not show the time of credit. *Williams v. Stewart*, 25 Minn. 516; *Schmeling v. Kriesel*, 45 Wis. 325.

The term or duration of a lease is an essential part of it, and a court of equity cannot decree a specific performance of a contract to give a lease which does not specify the term for which it is to be given. *Myers v. Forbes*, 24 Md. 598.

Specific performance will be refused where the contract fixes no time for performance. *Gates v. Gamble*, 53 Mich. 181.

When a mode of ascertaining the price is fixed by the contract, that mode must be pursued. The limit to which the court will go in fixing a price is to ascertain it, when the contract simply provides that it shall be fair. *Woodruff v. Woodruff*, 44 N. J. Eq. 349.

Where the price is not given and no mode of determining it is agreed upon the contract cannot be enforced.

Pray v. Clark, 113 Mass. 283. See *infra*, this title, *Incompleteness*.

Defendant promised complainant and others who went onto land in defendant's possession under a desert-land entry and erected buildings thereon, that as soon as he should acquire title he would, at a nominal price, convey to each resident who should have improvements on the land, the portion occupied by such improvements. It was held that the promise was too uncertain as to the value of improvements to be made, the exact amount of land to be deeded, and the price to be paid, and specific performance was refused. *Metcalf v. Hart* (Wyoming, 1891), 27 Pac. Rep. 900.

Arbitrating the Price.—Where the contract provided for determining the price by arbitration it was held that in the absence of an award the contract was too uncertain to be enforced; *Blundell v. Brettargh*, 17 Ves. 232; *Vickers v. Vickers*, L. R., 4 Eq. 529; *Graham v. Call*, 5 Munf. (Va.) 396; *Baker v. Glass*, 6 Munf. (Va.) 212; *Hopkins v. Gilman*, 22 Wis. 476; unless the fixing of the price is not essential. *Dinham v. Bradford*, L. R., 5 Ch. 519; *Milnes v. Gery*, 14 Ves. 400.

But where equity demands the enforcement of the contract the court will fix the value itself and decree specific performance. *Arnot v. Alexander*, 44 Mo. 25; 100 Am. Dec. 252. See *supra*, this title, *Agreements to Arbitrate*.

Particular Instances—Contracts Held Too Uncertain to be Enforced.—Specific performance of a contract for conveyance of land, in the form of a receipt, running to a real-estate exchange, of \$100 as earnest on purchase of my residence, and describing it, "for the sum of \$20,500 cash; possession given May 15, 1888," was refused to the seller, though the purchaser had afterwards made a payment thereon, and written the seller that he wished to close "that deal up," and asked for a deed, and promised to give a check for the same. The memorandum does not specify any purchaser or times of payment, or the agreement that the property was to be taken subject to a mortgage, which was to be deducted from the price named. *Shipman v. Campbell*, 79 Mich. 82.

A contract in the following terms: "Received of L G B the sum of \$100, being a deposit of the one-quarter interest of the C tract of forty-three and one-half acres. . . . The terms of this

transaction are \$4,000 for said interest in said tract; \$1,500 cash within sixteen days from date, as soon as L G B is satisfied as to the title of said tract; and \$2,500 on mortgage as per deed, and agreement from Callis (Tom) to K & W. It is hereby agreed that B shall pay the interest on a certain promissory note for \$1,700, at ten per cent. interest from April 5th." *Held*, too uncertain to justify a decree for specific performance. *Burnett v. Kullak*, 76 Cal. 535.

A contract which provided for the sale of stock for \$10,500—\$3,000 cash, and the balance to be paid to suit the vendee, within five years; interest at five per cent., and contained no agreement as to the time of any of the payments of principal or interest; no statement as to the time when the stock is to be transferred; with no security for the deferred payments, is too uncertain and ambiguous to be enforced. *Diamond State Iron Co. v. Todd* (Del. 1888), 14 Atl. Rep. 27.

A promise to take, maintain, and educate an orphan girl, eleven years old, and for her services until she becomes eighteen to leave her at the promisor's death a "child's part of his estate," cannot be specifically enforced, the amount being uncertain. *Woods v. Evans*, 113 Ill. 186; 55 Am. Rep. 409.

The contract sought to be enforced was an agreement to convey land at a specified price and provided that the vendees should prospect the land for coal, and, if they found enough in their opinion to warrant them, should organize a company, and issue to the vendor a certain amount of unassessable stock, but if not, the vendees might abandon the contract on notice in writing. Specific performance refused. *Sturgis v. Galindo*, 59 Cal. 28; 43 Am. Rep. 239.

Plaintiff's testator and defendant owned a mill in partnership, which was erected upon defendant's land with the oral agreement that the land was to be partnership land, one-half to be deeded to testator on payment of half its value. No price was agreed on, and no deed executed, nor were any such facts admitted by the answer, though it failed to set up the Statute of Frauds. *Held*, that plaintiff was not entitled to a specific performance of the agreement to convey. *Pitt v. Moore*, 99 N. Car. 85.

A parol agreement between a married woman and her accommodation in-

dorser, to the effect that, in consideration of his indorsing another note for her, she would make a note and mortgage in his favor in such amount as to secure him against loss, this note to be payable at the same time as the accommodation note, and to bear the same rate of interest, is not such a contract as can be specifically enforced; the agreement not being final, and being indefinite and uncertain in its terms. *Magee v. McManus*, 70 Cal. 553.

A clause in a lease which read thus: "The party of the first part agrees, in case said parties of the second part shall then be tenants of said premises, to first offer the said property so demised, for sale to and purchase by them, for the sum of \$20,000," does not mean that the lessor agrees, so long as the lessees shall be tenants of the premises, to offer them for sale to them at that price. The proviso is imperfect and incomplete. *Buckmaster v. Thompson*, 36 N. Y. 558.

An agreement in a lease that, "if the premises are for sale at any time, the lessee shall have the refusal of them," is too uncertain to be enforced specifically. *Fogg v. Price*, 145 Mass. 513.

A contract wherein A agrees, that if B will take care of and support the promisor during life, he will assure to B and his family a house and lot after death, and to secure the title, by placing a deed in escrow, the title to be given to such members of the family of B as A might choose, cannot be specifically enforced, because of uncertainty as to the persons to whom the conveyance or devise was to be made. *Stanton v. Miller*, 58 N. Y. 192.

Contracts Which Have Been Deemed Sufficiently Definite.—In many courts, contracts equally uncertain have been specifically enforced. See *Fleming v. Carter*, 87 Ill. 565; *Wilbourn v. Bishop*, 62 Miss. 341; *Marsh v. Milligan*, 3 Jur. N. S. 979.

Following are instances:

An agreement to sell land for an amount aggregating "about \$700" and a sum sufficient to reimburse to the vendor all expenses incurred in a suit then pending as to said land, was held sufficiently definite as to consideration to be specifically enforced. *Wilbourn v. Bishop*, 62 Miss. 341.

Uncertainty as to the term and character of service is not necessarily such uncertainty as will defeat the enforcement of a contract of which such

service is the consideration. *Lafollett v. Kyle*, 51 Ind. 446.

Where by such contract the purchase money is made payable "in the fall," this is sufficiently definite to support a decree, as in such case the money falls due on the last day of the "fall." *Dark v. Bagley*, 3 Murph. (N. Car.) 33.

An agreement by a corporation to assign part of its accounts as collateral security to a bank of which it had borrowed money, recited that whereas the corporation was indebted to the bank and had on its books not less than \$300,000 in good accounts, therefore the corporation set aside and assigned to the bank "\$150,000 of such good and collectible accounts now existing or that shall hereafter accrue or be acquired in the conduct of the business of" the corporation. This was held to be sufficiently definite and certain to authorize the specific performance, the majority of the court holding that it gave the bank the right to select \$150,000 of the best accounts of the corporation. *Preston Nat. Bank v. George T. Smith Middlings Purifier Co.*, 84 Mich. 364.

In *Dieter v. Fallon*, 58 Hun (N. Y.) 605, the court held the plaintiff entitled to specific performance of the following writings which it considered sufficiently definite. The facts, as they appeared to exist, were as follows: Fallon, who owned a hotel and farm known as the "Lake View Hotel Property," and adjoining property known as the "Au Sable Chasm," negotiated to convey the hotel property, and lease the other property, in exchange for land of Dieter. After both parties had examined the other's property, Fallon made the following proposition: "I will exchange the Lake View property, meaning thereby in good faith all, without further detail, of real and personal property now in use or existing, and so called heretofore, when negotiating for the Fifth avenue, Gates avenue, and Patchen avenue properties, as heretofore spoken of, all properties to be mortgaged as spoken of, i. e., 25,000, 10,000, and 12,000, respectively, for the New York properties, and said hotel property to be given with \$10,000 in all only upon it, including what is now thereon or given up to make up \$30,000, by Mr. D P S. Of course it is included in the above that, as to the Chasm, all is, as already supposed, assented to—lease five years, at

2. Completeness.—There must be a complete contract established, or performance cannot be decreed.¹

\$3,000 and 500 additional yearly," etc. Dieter wrote under such proposal: "I hereby accept. D." On the same day Fallon wrote Dieter that he had not attempted to go into formal detail, but meant it merely to be "what, in effect, I already stated to you." After all the necessary papers had been prepared, Fallon refused to perform.

A railroad company having taken possession of land, agreeing to build a neat and good bridge, and a neat and tasteful railroad station, cannot contend that this agreement is too indefinite for its specific performance to be compelled. *Lawrence v. Saratoga Lake R. Co.*, 36 Hun (N. Y.) 467.

A contract to convey so much of a designated tract as was necessary for the purpose named, has been held sufficiently certain to be enforced. *Rumble v. Heygate*, 18 W. R. 749; *Sanderson v. Cockermouth, etc.*, R. Co., 11 Beav. 497; *Prater v. Miller*, 3 Hawks (N. Car.) 628; *State v. Baum*, 6 Ohio 383; *Stuart v. London, etc.*, R. Co., 1 De G. M. & G. 721; *Pearce v. Watts*, 20 L. R. Eq. 492.

Where a written instrument contains all the facts of a contract, except such as may be legitimately proved by parol, it is sufficiently certain to be enforced. *Colerick v. Hooper*, 3 Ind. 316; 56 Am. Dec. 505.

Specific performance of a contract to convey land will not necessarily be refused because the memorandum describes the purchaser as "Mr. Lee." This is but a latent ambiguity. *Lee v. Cherry*, 85 Tenn. 707.

Parol evidence is admissible to cure uncertainty in the contract of which specific performance is asked, when it appears that, in framing the agreement, the parties intended to rely in part on parol proof. *Fowler v. Redican*, 52 Ill. 405. But compare *Hyde v. Cooper*, 13 Rich. Eq. (S. Car.) 250.

Specific performance of a contract to convey lands, decreed, in a case where the vendor claimed that the agreement to convey was intended as a mere memorandum upon which to base a future contract. *Losee v. Morey*, 57 Barb. (N. Y.) 561.

Slaves described as "the stuff or truck which her father gave her" held to be a sufficient description, the parties being shown to be ignorant and uneducated. *Andrews v. Andrews*, 28 Ala. 432.

A promise by a railroad company, on receiving a grant of a right of way, to permit other roads to use the right of way on such terms as might "be agreed upon by such companies," is sufficiently definite to be capable of enforcement in equity. *Joy v. St. Louis*, 138 U. S. 1.

A contract to give a mortgage is not so indefinite as to be incapable of specific enforcement because no time is limited for the payment of the mortgage. *Triebert v. Burgess*, 11 Md. 452.

A son agreed with his father to remove with his family to the latter's house, take care of the father, and turn over to him annually a certain proportion of the crops, in consideration of which the father was to convey to the son a certain parcel of land. The only uncertainty related to the time at which the deed was to be given. *Held*, sufficient to sustain a bill for specific performance against the administrator and heirs-at-law of the father. *Lamb v. Hinman*, 46 Mich. 112.

Defendant agreed that, if the orator would buy a certain mill site and erect thereon a mill and dam, he should have the right to flow defendant's land if it was necessary to do so. Subsequently it was agreed that the orator should have the right to flow defendant's land by a dam five feet in height. *Held*, that the agreement was not so indefinite as to the extent of flowage that it could not be specifically enforced. *Olmstead v. Abbott*, 61 Vt. 281.

If the owner of land makes a verbal agreement with another to lease him the same for one year, with the privilege of two years more, at an annual rent of \$600, and a lease is to be executed containing the usual covenants, and the lessee takes possession and pays the rent for the first year, the agreement is sufficiently certain to support a decree against the lessor for specific performance. *Clark v. Clark*, 49 Cal. 586.

Where a substantial portion of the contract is sufficiently certain to enable a court of equity to enforce it, a decree will be granted compelling the performance of that part. *Sarter v. Gordon*, 2 Hill Eq. (S. Car.) 121.

1. *Carlisle v. Carlisle*, 77 Ala. 339; *Los Angeles Immigration, etc., Assoc. v. Phillips*, 56 Cal. 539; *Southern L. Ins., etc., Co. v. Cole*, 4 Fla. 359; *Ikerd v. Beavers*, 106 Ind. 483; *Johnson v.*

3. Reasonableness.—The contract must be reasonable, to justify a decree for its specific performance.¹

Pontious, 118 Ind. 270; Maddox v. McQueen, 3 A. K. Marsh. (Ky.) 400; Gates v. Gamble, 53 Mich. 181; Hall v. Loomis, 63 Mich. 709; Taylor v. Van Schroeder (Mo. 1891), 16 S. W. Rep. 675; McKibbin v. Brown, 14 N. J. Eq. 13; Potts v. Whitehead, 20 N. J. Eq. 55; Kayser v. Arnold, 124 N. Y. 674; State v. Baum, 6 Ohio, 383; Hammer v. McEldowney, 46 Pa. St. 334; Wistar's Appeal, 80 Pa. St. 484; Holthouse's Appeal (Pa. 1888), 12 Atl. Rep. 340. Compare Munro v. Edwards, 86 Mich. 91.

Preliminary Negotiations.—Arrangements and understandings between the parties which are no more than the preliminary negotiations for a contract will not be enforced. Duff v. Hopkins, 53 Fed. Rep. 599; Carr v. Duval, 14 Pet. (U. S.) 77; Wristen v. Bowles, 82 Cal. 84; Los Angeles Immigration, etc., Assoc. v. Phillips, 56 Cal. 539; Pacific Rolling Mill Co. v. Riverside, etc., R. Co. (Cal. 1891), 27 Pac. Rep. 525; Domestic Tel. Co. v. Metropolitan Teleph. Co., 39 N. J. Eq. 160; Canton Co. v. Northern Cent. R. Co., 21 Md. 383; Wardell v. Williams, 62 Mich. 50; Nims v. Vaughn, 40 Mich. 356; Huddleston v. Briscoe, 11 Ves. 591.

Enforcement of Part.—The courts will not decree the specific performance of particular stipulations, to be separated and dealt with apart from the rest of the contract, if they do not clearly appear by the contract to stand by themselves wholly unaffected by any others. Baldwin v. Fletcher, 48 Mich. 604.

In Ross v. Purse (Colo. 1891), 28 Pac. Rep. 473, the court, by Elliott, J., said: "The four things that must appear in such contracts as essential prerequisites to suits for specific performance are, first, the names of the parties; second, the terms and conditions; third, the interest or property, and, fourth, the consideration." Eppich v. Clifford, 6 Colo. 493.

Unfinished Negotiations.—It is not every loose conversation that is to be turned into a contract, although the parties may seem to agree. The question of assent to a proposition alleged to have been made and accepted without any expectation of contracting, should be carefully weighed with all the circumstances. Accordingly, the

following instruction was held to be proper upon an issue of fact material to the specific performance: "If the jury believe that all the terms of the contract were not finally arranged the first day, but that the entire contract was to be arranged and reduced to writing the next day, there was no binding contract between the parties, unless a contract was approved to have been made on the next day or some subsequent day." Brown v. Finney, 53 Pa. St. 373.

A contract for the sale of land by which the vendor agrees to take, in part payment, a house and lot of the vendee at its cash value to be fixed by two persons, where the parties agreed to appoint such persons, but not within any specified time, and never have done so, is too incomplete to be enforced in equity. Baker v. Glass, 6 Munf. (Va.) 212.

Where, by an agreement for the sale of land, the price was to be afterwards ascertained and fixed by the parties, and one of them died before the price had been fixed by them, held, that the agreement was too incomplete and uncertain to be enforced specifically in equity. Graham v. Call, 5 Munf. (Va.) 396.

Nor will specific performance be decreed of a stipulation in a contract for the sale of real estate, that the purchase money shall be paid "on such terms as may be agreed on between said parties." Huff v. Shepard, 58 Mo. 242; Mayer v. McCreery, 119 N. Y. 434.

The specific performance of a covenant to renew a lease, in which the rent is not fixed, will not be decreed in equity. Robinson v. Kettletas, 4 Edw. Ch. (N. Y.) 67.

An agreement for conveyance which fails to name the purchase price and times of payment is not enforceable. Webster v. Brown, 67 Mich. 328; Woodruff v. Woodruff, 44 N. J. Eq. 349; Edichal Bullion Co. v. Columbia Gold Min. Co., 87 Va. 641.

1. Cathcart v. Robinson, 5 Pet. (U. S.) 264; Andrews v. Andrews, 28 Ala. 432; Webb v. Alton M. & F. Ins. Co., 10 Ill. 223; Lear v. Chouteau, 23 Ill. 39; Taylor v. Merrill, 55 Ill. 52; Modisett v. Johnson, 2 Blackf. (Ind.) 431; Ash v. Daggy, 6 Ind. 259; Kirkman v. Kenyon, 17 Ind. 607; Low v. Treadwell, 12 Me. 441; Higgins v. Butler, 78

4. Legality; Public Policy.¹—Equity will not assume jurisdiction to compel the specific performance of a contract that is illegal in any of its features. If the nature of the contract is such that its enforcement would be in violation of public policy, specific performance will not be granted. The least taint of illegality or want of equity will preclude a decree.²

Me. 520; Perkins v. Wright, 3 Har. & M. (Md.) 324; Gough v. Crane, 3 Md. Ch. 119; Reese v. Reese, 41 Md. 554; Hopkins v. Roberts, 54 Md. 312; Chambers v. Livermore, 15 Mich. 381; Rust v. Conrad, 47 Mich. 449; 41 Am. Rep. 720; Cabeen v. Gordon, 1 Hill Eq. (S. Car.) 51.

In Clitherall v. Ogilvie, 1 Desaus. Eq. (S. Car.) 250, a young man just of age sold certain land for one-fourth its value, and the court refused to compel him to execute the contract and left the other party to his legal remedy. The chancellor said: "That being an unreasonable contract and a very hard bargain, it would be both unreasonable and unjustifiable to decree a specific performance of the agreement."

1. See *supra*, this title, *Equitable Maxims*. See also *ILLEGAL CONTRACTS*, vol. 9, p. 882.

2. See Smith v. Johnson, 1 Ala. Sel. Cas. 562; Evans v. Kittrell, 33 Ala. 449; Smith v. Johnson, 37 Ala. 633; Swint v. Carr, 76 Ga. 322; 2 Am. St. Rep. 44; Bowman v. Cunningham, 78 Ill. 48; Dumont v. Dufore, 27 Ind. 263; Platt v. Maples, 19 La. Ann. 459; Quirk v. Thomas, 6 Mich. 76; Louthan v. Stillwell, 73 Mo. 492; Parks v. McKamy, 3 Head (Tenn.) 297; Dobson v. Swan, 2 W. Va. 511.

Partly Invalid.—A contract which is void as to a part will not be enforced. Hall v. Loomis, 63 Mich. 709.

Usurious Agreements.—Where an agreement cannot be enforced as made, on account of usury, the court will not reduce the rate of interest to that allowed by law and then enforce it. Farwell v. Meyer, 35 Ill. 40.

Void Contract.—Equity will not enforce specific performance of a void contract. Bagan v. Kamp, 30 Ala. 276; Moses v. McClain, 82 Ala. 370.

Where an attorney in fact sells land of his principal, taking a note for the purchase money, and giving a bond for title, the principal being at the time dead, which fact was unknown to both parties, the contract of sale is void, and the attorney, having afterwards obtained the title to

the land himself, cannot enforce a specific execution of the contract by the vendee. Jenkins v. Atkins, 1 Humph. (Tenn.) 294; 34 Am. Dec. 648.

Ultra Vires.—See Wilks v. Georgia Pac. R. Co., 79 Ala. 180.

But a corporation which has suffered a plaintiff to perform his part of a contract which was not regular or legitimate as to it will not be permitted to take advantage of such irregularity by refusing to perform if such refusal would injure plaintiff. Union Pac. R. Co. v. McAlpine, 129 U. S. 305.

Where a bank had power, under its charter, to take and hold lands for the convenient transaction of its business, and to secure debts, but for no other purpose—held, it had no right to purchase lands for the purpose of selling them again; and the court refused to assist it in enforcing a contract made with that intent. Bank of Michigan v. Niles, Walk. (Mich.) 99.

A purchase after the contract was made, in part performance of it, will not change the case. Bank of Michigan v. Niles, Walk. (Mich.) 99.

In general no contract which deprives a person of his liberty can be specifically enforced. *In re Baker*, 29 How. Pr. (N. Y.) 485. See Case of Mary Clark, 1 Blackf. (Ind.) 122; 13 Am. Dec. 213.

Champertous Agreements.—A champertous agreement will not be enforced. Bowman v. Cunningham, 78 Ill. 48. See Miller v. Newell, 20 S. Car. 137; 47 Am. Rep. 833.

A court of equity will not, any more than a court of law, enforce a contract which it sees to be tainted with the crime of maintenance; but it is not maintenance in a creditor to purchase *bona fide* a chose in action for the purpose of securing or recovering payment of an antecedent debt, especially if he is already beneficially interested in the claim purchased; nor is an assignment to one of the *cestuis*, of a balance due from a trustee who has neglected to account, a purchase by a stranger, of a claim for the damages

of an ordinary tort. *Sayles v. Tibbits*, 5 R. I. 79.

Public Policy.—To decree the specific performance of a parol agreement made with a married woman, to mortgage her leasehold property, without the knowledge of her husband, induced by professions of a brother, that it was to secure to her a provision in the event of her becoming a widow, would violate the principles of both law and equity. *Berry v. Cox*, 8 Gill (Md.) 466.

Public Policy—Evasion of Law.—A contract that is against the spirit and policy of the law, or that is an attempted evasion of the law, will not be enforced. As, an invasion of the pre-emption laws. *Dial v. Hair*, 18 Ala. 798; 54 Am. Dec. 179; *Kremer v. Earl* (Cal. 1891), 27 Pac. Rep. 735; *Brake v. Ballou*, 19 Kan. 397; *Gaines v. Molen*, 30 Fed. Rep. 27; *McDermid v. McCastland*, Hard. (Ky.) 21.

But it was held in *Carkins v. Anderson*, 21 Neb. 364, that, where certain acts are prohibited by statute merely, and the parties concerned in them are not *in pari delicto*, the party upon whom no penalty is imposed is entitled to a decree enforcing the contract, for example, in the case of the sale of a timber claim on the public domain, the buyer agreeing to enter it under the homestead laws and then convey part of it to the seller, who has expended money on it. And compare *Gaines v. Molen*, 30 Fed. Rep. 27; *Southerland v. Whittington*, 46 Ark. 285; *Lamb v. Davenport*, 18 Wall. (U. S.) 314.

A contract to combine and prevent free bidding at a judicial sale cannot be enforced. *Baggot v. Sawyer*, 25 S. Car. 405.

Restraint of Trade.—The courts will not enforce rights founded on a contract to "corner" lard. *Leonard v. Poole*, 55 N. Y. Super. Ct. 213.

A court of equity will not enforce the specific performance of an agreement by which a party stipulates with another that on payment by him of a sum of money for railroad stock, new directors to be nominated by the vendee shall be substituted in place of all the present directors, except two, such an agreement being an attempt to interfere improperly with the rights of others, and contrary to public policy. *Fremont v. Stone*, 42 Barb. (N. Y.) 169.

And even if such an agreement is

unobjectionable in all respects a court of equity will not compel its specific performance where the vendee of the stock has paid for and received it without requiring any change in the board of directors. *Fremont v. Stone*, 42 Barb. (N. Y.) 169.

Contracts in restraint of trade, to be good at law, must be founded on a valuable consideration, be reasonable, and impose no general restraint on trade and industry. The presumption of equity is that such contracts are bad; and although good at law, wherever the terms be at all hard or even complex, equity will not enforce them. *Keeler v. Taylor*, 53 Pa. St. 467; 91 Am. Dec. 221.

Certain shareholders in a private corporation agreed to put their stock for three years in the hands of trustees, with power to vote it at all stockholders' meetings, during such time, the stock only to be sold subject to the agreement, and further that they would sell to one another in preference to any third person, provided they could obtain the price offered for it by outsiders. The contract being a restraint on the alienation of property was held to be incapable of enforcement in equity. *Moses v. Scott*, 84 Ala. 608.

The case of *Gray v. Oxnard Brothers Co.*, 59 Hun (N. Y.) 387, is a recent and interesting decision upon the specific enforceability of a contract creating and maintaining a sugar trust. The facts of the case were as follows: The North River Sugar Refining Company combined with other sugar manufacturers, to control the sale of sugar in the United States. The several parties to this combination executed a contract among themselves which provided, among other things, that the capital stock of each corporation becoming a party thereto should be transferred to certain trustees, and the subscribing parties to receive in lieu thereof certificates of stock in the combination in proportion to the value of the stock surrendered; and that the profits of each corporation should be paid over to the trustees, to be distributed as dividends on the capital stock. After the execution of this agreement, the North River Sugar Refining Company assigned all of its capital stock to third parties, who surrendered the same to the trustees, and received certificates in lieu thereof. Thereafter the North River Sugar Refining Company was

5. Assent.—Equity requires a clear mutual understanding and a positive assent on the part of each party.¹

dissolved, and its franchises forfeited by law, on account of its having become a party to an illegal combination, and plaintiff was appointed a receiver, and brought suit, alleging a partnership between the parties to said combination and an accruing of profits, seeking to recover the ratable share of his defunct corporation therein. The court held that the plaintiff could only recover by the enforcement of an illegal agreement and refused the decree.

Where it appeared in a suit to compel the delivery of stock in a national bank that the purpose of the purchase was to gain control of the bank, it was held to be in violation of public policy, and a decree was refused. *Foll's Appeal*, 91 Pa. St. 434; 36 Am. Rep. 671. Compare *Moffatt v. Farquhar*, L. R., 7 Ch. Div. 591; *Wilson v. Keating*, 4 De G. & J. 588.

Breach of Trust.—A trustee's purchase of trust property for his personal gain cannot be enforced in his favor whether the purchase be made directly or otherwise. *Saltmarsh v. Beene*, 4 Port. (Ala.) 293; 30 Am. Dec. 525.

It has been held by a *Georgia* court that a contract executed in parol by two children for the division of the estate of their father who was still living, whereby the children sought to avoid the effect of the anticipated disinheritance of one of them by the father was not a proper contract to be specifically enforced, such a contract being against public policy. *Mercier v. Mercier*, 50 Ga. 546, 15 Am. Rep. 694.

Where the sons-in-law and the only son of a very aged man, without the participation of the wives of the former and without the knowledge of the father, entered into a written agreement that they would divide all the property of the father equally among them, held that on the father's afterwards surrendering the personal property to the sons-in-law, and conveying the land to the son, a specific performance of the agreement against the son would not be decreed. *Brewer v. Church*, 4 Jones' Eq. (N. Car.) 418.

The cases where contracts which attempt to control the division of an estate have been sustained have rested on special grounds, such as a purpose to avoid or settle controversies; to adjust doubtful rights on the

payment of a valuable consideration. They do not warrant sustaining a secret agreement made to enable legatees to thwart the purpose of a testator, by encouraging one of them to do what the testator, by his control over his property, is desirous of preventing. *Mercier v. Mercier*, 50 Ga. 546; 15 Am. Rep. 694.

In Consideration of Marriage.—Contracts made in contemplation of marriage may be enforced in equity, although incapable of enforcement at law. *Haymer v. Haymer*, 2 Vent. 343; *Holtham v. Ryand*, Nels. Ch. 205; *Acton v. Acton*, 2 Vern. 480; *Cannel v. Buckle*, 2 P. Wms. 243; *Miller v. Goodwin*, 8 Gray (Mass.) 542.

Unlawful Contracts.—Equity will not enforce a contract that is unlawful unless public interest and public policy demand it. *Carrington v. Callar*, 2 Stew. (Ala.) 175; *Holder v. Meggison*, 2 Stew. (Ala.) 175; *Saltmarsh v. Beene*, 4 Port. (Ala.) 283; 30 Am. Dec. 525; *Pratt v. Adams*, 7 Paige (N. Y.) 615.

A agreed to sell to B for a gross sum a lot and building and a quantity of liquor. The sale of the liquor would have been illegal. The contract being indivisible, a prayer for specific performance was denied. *Gerlach v. Skinner*, 34 Kan. 86; 55 Am. Rep. 240.

Specific performance will not be granted where the contract would apply the individual assets of a deceased member of an insolvent firm, whose individual estate was insolvent, to the payment of firm debts. *Bagwell v. Bagwell*, 72 Ga. 92.

Where a house is rented for use as a brothel, and, to evade the statutes, a contract in writing is entered into for the sale of the house on monthly payments until a certain sum shall have been paid, when the landlord agrees to execute a conveyance and to take a deed of trust for the balance of the purchase money, the agreement is illegal, and will not be specifically enforced after the stipulated monthly payments have been made. *Sprague v. Rooney*, 104 Mo. 349, *overruling* *Sprague v. Rooney*, 82 Mo. 493; 53 Am. Rep. 383.

1. *Rushton v. Thompson*, 35 Fed. Rep. 635; *Musgrove v. Hodges* (Kan. 1891), 27 Pac. Rep. 121. See *Varick v. Edwards*, Hoffm. (N. Y.) 382.

But one who signs a contract without reading it may be bound by its terms

nevertheless. *Minneapolis, etc., R. Co. v. Cox*, 76 Iowa 306.

Where it is evident that owing to the haste with which a contract was signed, and to the inadvertence of both parties, it does not express the intent of the parties interested, a court of equity will not enforce its specific performance. *Morganthau v. White*, 1 Sweeny (N. Y.) 395.

Specific performance of an agreement to assent to any division of lands held in common, which "the majority of interests shall decide just and equitable," will not be enforced if the agreement is construed to authorize the majority to set off to any owner a certain portion of land without his assent. *Harkness v. Remington*, 7 R. I. 154.

When equity assists a party in obtaining his right under a contract, it does so on the principle that the very contract, as assented to by the party alleged to be in default, is alone to be enforced. *Railey v. Bacon*, 26 Miss. 455.

Equity will not enforce a contract to convey real estate proved solely by a deed, when there has never been a legal delivery of the deed. *Overman v. Kerr*, 17 Iowa 485.

Defendant's ancestor signed and delivered to plaintiff's agent the following memorandum: "I am willing to sell my land, . . . containing 500 acres, more or less, for the price of six dollars and twenty-five cents per acre, cash; and the parties for whom F P H are negotiating for said land shall have the privilege of buying said property at said price, and on said terms, for sixty days from this June 7, 1883." In the following July plaintiff's agent R told the owner that plaintiffs would take the property at the price agreed on. Not later than July 15, 1883, another agent of plaintiffs, M, wrote to the owner that plaintiffs had elected to take the tract at the price and on the terms mentioned, and that they were prepared to pay according to said terms, so soon as he should convey the same to them by proper deed. The owner never executed to plaintiffs any deed, and, in consequence, plaintiffs never paid or tendered the price. On suit against the owner's heirs, for the specific performance, the court held that this proposal to sell did not of itself constitute a valid contract with the plaintiffs for the sale of said land within the time, at the price, and upon the terms therein mentioned. *Weaver v. Burr*, 31 W. Va. 736.

It is no objection to enforcing specific performance, that the contract was made with an agent of plaintiff in the agent's own name, if defendants have subsequently recognized the plaintiff as principal, and have accepted performance on his part, and partly performed on their own part. *St. John v. Griffith*, 2 Abb. Pr. (N. Y.) 198; 13 How. Pr. (N. Y.) 59.

Where it appears that a real-estate dealer and the husband of the owner made the contract with plaintiff, and there is no evidence that the owner authorized or ratified the bargain, and the trial court finds as a fact that she did not do so, specific performance will not be granted. *Hadfield v. Skelton*, 69 Wis. 460. See *Carr v. Callaghan*, 3 Litt. (Ky.) 365.

So, where a coparcener signs his cotenant's name to a contract to convey, and such cotenant repudiates the act, specific performance will be denied. *Jackson v. Torrence*, 83 Cal. 521; *Olsen v. Lovell* (Cal. 1891), 27 Pac. Rep. 765.

Specific performance of a contract to convey lands will not be decreed where the lands purport to have been sold absolutely by an agent of the defendant, who, in fact, had only authority to sell such lands for a highway. *Lawler v. Sloan*, 40 N. J. Eq. 489.

Unaccepted Proposition.—A naked proposition to relinquish land to a certain extent, not accepted by the other party, though in writing, cannot be considered as the subject of specific execution. *Parker v. Stephens*, 3 A. K. Marsh. (Ky.) 197. See *Barker v. Critzer*, 35 Kan. 459; *Dresel v. Jordan*, 104 Mass. 407.

An offer must be accepted in the precise form submitted or there is no valid assent, such as will create a contract. Thus, plaintiff's adoption of the defendant's written offer to sell lands to which plaintiff attaches conditions and qualifications which essentially alter and materially vary the effect thereof, is not such an acceptance as will create a contract that will be specifically enforced. *Bentz v. Eubanks*, 41 Kan. 28. See *Erickson v. Wallace*, 45 Kan. 430; *Schields v. Horbach*, 30 Neb. 536.

Thus an acceptance after the time named in the offer is of no avail. *Childs v. Gillespie* (Pa. 1892), 23 Atl. Rep. 312.

A contract embodied in a letter, will not be enforced against another per-

6. Enforcement Must be Possible.—That is to say, the situation of the parties and the nature of the contract must be such that the agreement may be executed, at least substantially, according to the original design. Equity will not undertake to do a vain thing. A substantial compliance must be practicable as well as possible.¹

son than the signer, without clear proof that the letter was in fact intended as the letter of defendant. Proof that defendant knew of its being written, and assented to it, as the letter of the signer, and not as his own, is not enough. *Bickett v. White*, 27 Ohio St. 405.

Complainant's agent made an offer to defendant for an exchange of land with complainant. Defendant refused to do so except on terms that the agent had no authority to accept. The latter thereupon telegraphed to complainant for further instructions, and defendant gave a third party written authority to close the contract for him, on the terms he had named. After receiving an answer to his telegram, complainant's agent did not see defendant again, but agreed orally with defendant's agent that they would meet later, and arrange the exchange. Before they did so, defendant revoked his agent's authority and refused to make the exchange. Specific performance denied on the ground that the minds of the parties had never met. *Lasher v. Gardner*, 124 Ill. 441.

Where the terms of a power of attorney are departed from under circumstances that justify the belief that the departure was made pursuant to the parol assent of the principal, the contract will be enforced, if in other respects there are no obstacles. *Webster v. Harris*, 16 Ohio 490.

Where the evidence of certain facts constituting an element in the contract is conflicting, and it appears that, after some negotiation, the papers, without being examined or approved by the creditor, were sent to him by mail, and he did not assent to them, specific performance will not be enforced. *Spears v. Long*, 32 S. Car. 528.

A court of equity will decree specific performance of a contract for the sale of land, although the price be inadequate, where the vendor has refused to rescind the contract, with a full knowledge of the facts. *Galloway v. Barr*, 12 Ohio 354.

Or when the vendor has, after the contract, declared himself satisfied. *Woodruff v. Hargrave*, Wright (Ohio) 555.

1. *Irwin v. Bailey*, 72 Ala. 467; *Ikerd v. Beavers*, 106 Ind. 485; *Shriver v. Seiss*, 49 Md. 384; *Blanchard v. Detroit, etc., R. Co.*, 31 Mich. 43; 18 Am. Rep. 142; *Bourget v. Monroe*, 58 Mich. 563; *Rust v. Conrad*, 47 Mich. 449; 41 Am. Rep. 720; *Buck v. Smith*, 29 Mich. 166; 18 Am. Rep. 84; *Angus v. Robinson*, 62 Vt. 60.

As where under a contract to convey land the vendor has since parted with his title or incumbered it or a flaw in it is developed. *Kennedy v. Hazelton*, 128 U. S. 667; *Snell v. Mitchell*, 65 Me. 48; *Swepton v. Johnston*, 84 N. Car. 449; *Pack v. Gaither*, 73 N. Car. 95; *Woodward v. Harris*, 2 Barb. (N. Y.) 439; *Stevenson v. Buxton*, 37 Barb. (N. Y.) 13; *Smith v. Kelley*, 56 Me. 64; *Gaither v. O'Doherty* (Ky. 1889), 12 S. W. Rep. 306.

Specific performance of a contract for the sale of land will not be decreed at the instance of the vendee, where the contract is made in disregard of a prior parol sale by the vendor, though the vendee was ignorant of such prior sale, but he will be left to his action for damages. *Patterson v. Martz*, 8 Watts (Pa.) 374; 34 Am. Dec. 474. See *supra*, this title, p. 947, n. 1.

A contract to sell a certain number of patented machines each year until the expiration of the patent will not be specifically enforced after fifteen years has elapsed, the patent having only two more to run, as its literal performance would be impossible. *Werden v. Graham*, 107 Ill. 169.

Under the *Alabama* statute, if the husband attempts to convey the homestead, without the wife joining, his deed is a nullity. A husband agreed to convey to A a tract of land which embraced the homestead, being worth more than the amount allowed, but not in extent exceeding the statutory limit. The husband refused to convey on the ground that his wife would not join, whereupon A offered to accept

7. Mutuality.—The obligation must be mutual. In general terms it may be said that unless the contract binds all the parties it will be enforced against none of them.¹

the husband's deed of the tract, and brought suit for specific performance. *Held*, that A could not compel the husband to execute a deed. *Moses v. McClain*, 82 Ala. 370.

The courts will not compel the issuance of corporate stock where by reason of the shares' having been all issued, enforcement would not be possible. *Ferguson v. Wilson*, L. R. 2 Ch. 77; *Danforth v. Philadelphia*, etc., R. Co., 30 N. J. Eq. 12.

Specific performance of an exchange of lands will not be granted where defendant was ready at the time named, but plaintiff was not ready, and never offered to perform, his laches having rendered performance on his part impossible. *Alexander v. Wunderlich*, 118 Pa. St. 610.

Where the specific performance of a contract to convey a reversionary interest in land was sought after the lapse of nearly ten years, and after the reversion of dower, as it existed at the date of the contract, had been converted, by the untimely death of the widow, into a present estate in fee, and there was no satisfactory explanation of the causes of the delay, relief was refused, and the bill was dismissed. *Pickering v. Pickering*, 38 N. H. 400.

1. *Lawrenson v. Butler*, 1 S. & L. 13; *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 339; *Duff v. Hopkins*, 33 Fed. Rep. 599; *Tufts v. Tufts*, 3 Woodb. & M. (U. S.) 472; *Bronson v. Cahill*, 4 McLean (U. S.) 21; *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498; 3 Am. St. Rep. 758; *Anson v. Townsend*, 73 Cal. 415; *Smith v. Smith*, 36 Ga. 184; 91 Am. Dec. 761; *Peacock v. Deweese*, 73 Ga. 570; *Lasher v. Gardner*, 124 Ill. 441; *Ikerd v. Beavers*, 106 Ind. 485; *Olive v. Dougherty*, 3 Greene (Iowa) 371; *Maynard v. Brown*, 41 Mich. 298; *Boucher v. Vanbuskirk*, 2 A. K. Marsh. (Ky.) 345; *Simon v. Wildt*, 84 Ky. 157; *Stembridge v. Stembridge*, 87 Ky. 91; *Duval v. Meyers*, 2 Md. Ch. 401; *Gelston v. Sigmond*, 27 Md. 334; *O'Brien v. Pentz*, 48 Md. 562; *Hopkins v. Roberts*, 54 Md. 312; *Reese v. Reese*, 41 Md. 554; *Butman v. Porter*, 100 Mass. 337; *Blanchard v. Detroit*, etc., R. Co., 31 Mich. 43; 18 Am. Rep. 142; *Chapman v. Morgan*, 55 Mich. 124; *Voor-*

hies v. Frisbie, 25 Mich. 476; 12 Am. Rep. 291; *Alworth v. Seymour*, 42 Minn. 526; *Aston v. Robinson*, 49 Miss. 348; *Glass v. Rowe*, 103 Mo. 513; *Ducie v. Ford*, 8 Mont. 233; *Ewins v. Gordon*, 49 N. H. 444; *Schroeder v. Gemeinder*, 10 Nev. 355; *Woodruff v. Woodruff*, 44 N. J. Eq. 349; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. (N. Y.) 273; *Benedict v. Lynch*, 1 Johns. Ch. (N. Y.) 370; 7 Am. Dec. 484; *German v. Machin*, 6 Paige (N. Y.) 288; *Snyder v. Neefus*, 53 Barb. (N. Y.) 63; *Justice v. Lang*, 42 N. Y. 493; 1 Am. Rep. 576; *Tarr v. Scott*, 4 Brewst. (Pa.) 49; *Meason v. Kaine*, 63 Pa. St. 335; *Bradford v. Foster*, 87 Tenn. 4; *Chilhowie Iron Co. v. Gardiner*, 79 Va. 305; *Ballou's Appeal*, 133 Pa. St. 64; *De Cordova v. Smith*, 9 Tex. 144; 58 Am. Dec. 139; *Moore v. Fitz Randolph*, 6 Leigh (Va.) 175; 29 Am. Dec. 208; *Cox v. Cox*, 26 Gratt. (Va.) 311; *Ford v. Euker*, 86 Va. 75.

Where the contract is one creating separate mutual obligations it may be enforced, even though the mutual obligations are not absolutely co-ordinate in time, and it be impossible to enforce the whole contract on both sides at once. *Sterling v. Klepsattle*, 24 Ind. 94; 87 Am. Dec. 319.

A contract which one party is at liberty to revoke at any time cannot be enforced against the other party. *Alworth v. Seymour*, 42 Minn. 526.

The rule that equity refuses to enforce the specific execution of contracts where the remedy is not mutual, applies to cases in which there is not such mutuality of remedy at the time the contract is made, not to cases in which the mutuality of remedy is taken away by a subsequent contingent event. *Moore v. Fitz Randolph*, 6 Leigh (Va.) 175; 29 Am. Dec. 208.

It is a universal rule of equity, that he who asks for a specific performance must be in a condition to perform himself. Therefore, in a contract for the mutual sale of land, a vendor, who cannot give title to his own land, cannot have a decree of specific performance against the vendee. *Morgan v. Morgan*, 2 Wheat. (U. S.) 290.

Specific performance will not be granted to compel the defendants to allow plaintiff to share in the benefits

One modification of this rule is, that where the obligation is not a distinct and separate contract, but a part of another, and the principal obligation of which it is a part is enforceable, the lesser covenant will be enforceable also.¹ And another, that the rule governs only such contracts as are executory; for where the

of a purchase made by them, unless there was sufficient mutuality between the parties to enable the defendants to have brought in the plaintiff to bear part of their losses, if any had resulted from the transaction. *Porter v. Kinsey*, 14 Phila. (Pa.) 233.

In a recent Connecticut case specific performance was refused on the following facts: G and H entered into a written contract by which, for a certain consideration then received by G, they agreed to exchange properties. If G failed to convey to H, he was to forfeit \$1,800. If H failed to convey, he was to forfeit certain property described. *Held*, that there was here no contract of H to convey that could be enforced against him in equity. The provision for a forfeiture if H did not convey had reference only to his refusal to convey after accepting a conveyance from G. It was not in itself sufficient to make an obligation which a court of equity could enforce. *Goodale v. Hill*, 42 Conn. 311.

A person owning land wrote to his mother, requesting her to make use of the land and sell it for the best advantage to support herself. *Held*, that this could not be enforced in equity as a conveyance, although it would be supported as an authority to enjoy the profits. *Craig v. Craig*, 1 Bailey's Eq. (S. Car.) 102.

To the Contrary. — See *White v. Schuyler*, 1 Abb. Pr. N. S. (N. Y.) 300; 31 How. Pr. (N. Y.) 38; *Muller v. Vettel*, 25 How. Pr. (N. Y.) 350.

A written agreement concerning lands may be enforced in equity, although binding only on the party to be charged. *Rogers v. Saunders*, 16 Me. 92; 33 Am. Dec. 635; *Miller v. Cameron*, 45 N. J. Eq. 95; *Ives v. Hazard*, 4 R. I. 14; 67 Am. Dec. 500; *Garretson v. Vanloon*, 3 Greene (Iowa) 128; 54 Am. Dec. 492.

Where A granted to B the privilege of digging ore on his land at 25 cents per ton, held, that B was not entitled in equity to a specific performance, the contract not being mutually binding, and there being no obligation on B to dig ore. *Geiger v. Green*, 4 Gill (Md.) 472; *Tyson v. Watts*, 1 Md. Ch. 13.

Where plaintiff contracted to procure a deed to be made to defendant of certain land owned by a third person, in consideration whereof defendant agreed to convey to plaintiff certain other land, the agreement was held to be not mutual so far as the remedy for its enforcement is concerned, and to be incapable of specific enforcement since plaintiff's agreement to convey land of another cannot be compelled, but only subjects plaintiff to an action for breach thereof. *Norris v. Fox*, 45 Fed. Rep. 406.

A contract not binding on plaintiff because of her coverture cannot be specifically enforced at her instance. *Tarr v. Scott*, 4 Brewst. (Pa.) 49. Even though the disability extend to but a part of the obligation. *Ridley v. Ennis*, 70 Ala. 463.

A contract to convey a right of way across contiguous tracts of land owned by a husband and wife, respectively, cannot be enforced as against the wife, and hence lacks mutuality, and cannot be enforced at the suit of the husband and wife. *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346.

The boundary between two tracts of land being in dispute, the owners agreed that a certain east and west line was the true one, believing it to be such; but with a proviso that if by subsequent survey it was found to be too far north, then either the southern owner was to buy the part between the temporary and the true line at its value in its then uncleared state, or the northern owner was to pay for the clearing of the strip, at the election of the latter; and if the line was too far south these conditions were to be reversed. *Held*, that there was no such want of mutuality as would render it incapable of enforcement. *Calanchini v. Branstetter*, 84 Cal. 249.

1. As where a lease or deed contains covenants binding the grantor alone. *Kerr v. Day*, 14 Pa. St. 112; 53 Am. Dec. 526; *Corson v. Mulvany*, 49 Pa. St. 100; 88 Am. Dec. 485; *Shollenberger v. Brinton*, 52 Pa. St. 99.

A one-sided or unilateral contract, by which one party binds himself to convey lands, and the other party is not

party who is not bound has performed his part under the contract, even though not legally bound to such performance, the plea of want of mutuality cannot be made.¹ The familiar application of this principle is to contracts in the nature of options and proposals which, ordinarily, do not bind the promisee but are nevertheless to be enforced at his instance, if he has fulfilled his part by accepting the offer or option and acting upon it.² And a contract, the execution of a part of which it would be

bound to purchase, is not favored in equity, and will not be enforced if without consideration. But if such contract is a part of a lease, or made at the same time with the lease, and in consideration thereof, it will be enforced. *Hawralty v. Warren*, 18 N. J. Eq. 124; 90 Am. Dec. 613; *In re Hunter*, 1 Edw. Ch. (N. Y.) 1.

B took from A a lease of land for a year, with an option therein to buy the land at any time within the year for a certain sum. He erected valuable improvements, and within the year tendered the price named in the lease and demanded a conveyance. *Held*, that equity would compel a conveyance. (Sharswood, C. J., dissenting.) *Newell's Appeal*, 100 Pa. St. 513.

1. *Grove v. Hodges*, 55 Pa. St. 504; *Freeman v. Stokes*, 12 Phila. (Pa.) 219; 34 Leg. Int. 248.

Defendant sold land to plaintiff on condition that if plaintiff constructed a proposed railroad and had trains running thereon within a year, then defendant should deed said property to plaintiff, at which time the consideration should become due and payable, and plaintiff then agreed to pay said sum. For the purpose of constructing the road plaintiff was authorized to enter and take immediate possession. This plaintiff did, and the road was completed and trains running thereon within a year. *Held*, that it thereby became a mutual contract, executed in part by plaintiff. *Byers v. Denver Circle R. Co.*, 13 Colo. 552.

2. **Options.**—See *Wilks v. Georgia Pac. R. Co.*, 79 Ala. 180; *Frue v. Houghton*, 6 Colo. 318; *Miller v. Cameron*, 45 N. J. Eq. 95; *Clark v. Gordon* (W. Va. 1892), 14 S. E. Rep. 255.

An option on land may be specifically enforced at the suit of the proposed vendee, for his election to treat the agreement as binding satisfies the rule requiring mutuality. *Moses v. McClain*, 82 Ala. 370; *Ross v. Parks* (Ala. 1890), 8 So. Rep. 368. See *Johns-*

ton v. Trippe, 33 Fed. Rep. 530; *Chambers v. Alabama Iron Co.*, 67 Ala. 353; *Woodruff v. Woodruff*, 44 N. J. Eq. 349; *Dickinson v. Dodds*, 34 L. T. Rep., N. S., 19, 607; 14 Alb. L. J. 72. Compare *Atkinson v. Whitney*, 67 Miss. 655.

But the acceptance must be strictly according to the terms of the offer and within the time named. *Schields v. Horbach*, 30 Neb. 536.

A proposition in writing to sell land at a certain price, if taken within thirty days, is a continuing offer, which may be retracted at any time; but if, not being retracted, it is accepted within the time, such offer and acceptance constitute a valid contract, the specific performance of which may be enforced by a bill in equity. *Boston, etc., R. Co. v. Bartlett*, 3 Cush. (Mass.) 224.

An agreement by which plaintiffs agreed to relieve defendants from furnishing sureties on notes given for land sold at public sale under a decree, and defendants offered plaintiffs the option of buying the land from them at the price bid at any time within two years is not void, on the ground that complainants cannot be compelled to purchase the land, and therefore the vendors ought not to be compelled to sell it. The contract is an offer to sell, standing for a given time, and supported by a consideration. *Bradford v. Foster*, 3 Pickle (Tenn.) 4.

To the Contrary.—*Barker v. Critzer*, 35 Kan. 459; *Barker v. Cross*, 35 Kan. 463; *Maynard v. Brown*, 41 Mich. 298; *Rust v. Conrad*, 47 Mich. 449; 41 Am. Rep. 720.

Optional contracts where there is no other consideration are not enforceable specifically. *Woodward v. Harris*, 2 Barb. (N. Y.) 442; *Sullings v. Sullings*, 9 Allen (Mass.) 234; *Butman v. Porter*, 100 Mass. 337.

A contract in terms: "I will sell W W, at any time within three months from April 1, 1857, the premises (describing them), for the sum of sixty-

difficult or impracticable to compel, may be enforced as to the residue if the difficult portion has been already actually executed, but not otherwise.¹

Unilateral contracts in the form of bonds and like obligations are constantly enforced.²

8. Fairness—*a.* FRAUD.³—The contract must be fair. Any trace of unfairness or fraud will render specific performance impossible.⁴

five hundred dollars, upon the terms specified," though in writing, does not bind the owner of the land, and will not be enforced in equity by a decree for its specific performance; and parol evidence to show the consideration is not admissible. *Wright v. Weeks*, 3 Bosw. (N. Y.) 37.

A lease of land reserved to the party of the first part the right of selling the land at any time; but no such sale shall be made without giving the second party the privilege of purchasing upon such terms and at the same price as any other person might have offered therefor. This clause was held not to constitute such a contract for the sale of the land to the lessee as equity would enforce, being neither certain nor mutual. *Hayes v. O'Brien* (Ill. 1891), 26 N. E. Rep. 601.

A woman with power to act as *feme sole* contracted in writing that if her husband would pay a certain sum on a mortgage on her land by the time it became due, she would convey to him a part of the land. The agreement was signed by the wife only, and the husband failed to pay the money at the time specified, and died without paying any part thereof. *Held*, that his administrator was not entitled to specific performance of the agreement against the wife, as the contract was not mutual, and left it optional with the husband to pay the money. *Stembridge v. Stembridge*, 87 Ky. 91. See also, *supra*, this title, *Options*.

1. *Welch v. Whelpley*, 62 Mich. 15; *Lattin v. Hazzard* (Cal. 1891), 27 Pac. Rep. 515.

The *California Civil Code*, § 3386, provides that "neither party to an obligation can be compelled specifically to perform it unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation."

2. *Chamberlain v. Blue*, 6 Blackf. (Ind.) 491; *Jones v. Robbins*, 29 Me. 351; 50 Am. Dec. 593; *Barnard v. Lee*,

97 Mass. 92; *Ewins v. Gordon*, 49 N. H. 444; *In re Hunter*, 1 Edw. Ch. (N. Y.) 1.

This rule is that unilateral contracts may be enforced if upon proper consideration. If the contract is binding in law it will be enforced. *Hawralty v. Warren*, 18 N. J. Eq. 124; 90 Am. Dec. 613; *Rogers v. Saunders*, 16 Me. 92; 33 Am. Dec. 635; *Seton v. Slade*, 7 Ves. 265; *Fowle v. Freeman*, 9 Ves. 351; *Getchell v. Jewett*, 4 Me. 350; *Flight v. Bolland*, 4 Russ. 298.

3. See *DECEIT*, vol. 5, p. 318; *FRAUD*, vol. 8, p. 635; *MISTAKE*, vol. 15, p. 635.

4. It is an unquestioned doctrine of equity that only those contracts which are fair, just, and reasonable, will be specifically enforced. *Burton v. Le Roy*, 5 Sawy. (U. S.) 510; *Andrews v. Andrews*, 28 Ala. 432; *Thompson v. Tod*, Pet. (C. C.) 380; *Gould v. Womack*, 2 Ala. 83; *Ellis v. Burden*, 1 Ala. 458; *Mississippi, etc., R. Co. v. Cromwell*, 91 U. S. 643; *Conrad v. Lindley*, 2 Cal. 173; *Webb v. Alton*, M. & F. Ins. Co., 10 Ill. 223; *Frisby v. Ballance*, 5 Ill. 287; 39 Am. Dec. 409; *Lear v. Chouteau*, 23 Ill. 39; *Lucas v. Barrett*, 1 Greene (Iowa) 510; *Edwards v. Handley*, Hard. (Ky.) 11; 3 Am. Dec. 745; *Eastland v. Vanardsdel*, 3 Bibb (Ky.) 274; *Fugate v. Robinson*, 18 B. Mon. (Ky.) 680; *Carberry v. Tannehill*, 1 Har. & J. (Md.) 224; *Griffith v. Frederick Co. Bank*, 6 Gill & J. (Md.) 424; *Waters v. Howard*, 1 Md. Ch. 112; *Smith v. Crandall*, 20 Md. 482; *Rust v. Conrad*, 47 Mich. 449; 41 Am. Rep. 720; *Daniel v. Frazer*, 40 Miss. 507; *Rodman v. Zilley*, 1 N. J. Eq. 320; *Lloyd v. Wheatley*, 2 Jones Eq. (N. Car.) 267; *Hall v. Ross*, 3 Hayw. (N. Car.) 200; *Stoutenburgh v. Tompkins*, 9 N. J. Eq. 332; *McWhorter v. McMahan*, 1 Clarke Ch. (N. Y.) 400; *Leigh v. Crump*, 1 Ired. Eq. (N. Car.) 299; *Connaday v. Shepard*, 2 Jones Eq. (N. Car.) 224; *Wingart v. Fry*, Wright (Ohio) 105; *Farr v. Glading*, 1 Phila. (Pa.) 372; *Cabeen v. Gordon*, 1 Hill Eq. (S. Car.) 51; *Rice v. Rawlings*, Meigs (Tenn.) 496; *McCarty v. Kyle*,

4 Coldw. (Tenn.) 348; *Smith v. Wood*, 12 Wis. 382. Fraud will defeat a decree. *Mechanics' Bank v. Lynn*, 1 Pet. (U. S.) 376; *King v. Hamilton*, 4 Pet. (U. S.) 311; *Hepburn v. Dunlop*, 1 Wheat. (U. S.) 206; *Swint v. Carr*, 76 Ga. 322; 2 Am. St. Rep. 44; *Fish v. Leser*, 69 Ill. 394; *Kelly v. Kendall*, 118 Ill. 650; *Reed v. Rudman*, 5 Ind. 400; *Fry v. Platt*, 32 Kan. 62; *Ford v. Lewis*, 10 B. Mon. (Ky.) 127; *Bradbury v. White*, 4 Me. 391; *Snell v. Mitchell*, 65 Me. 48; *Lee v. Kirby*, 104 Mass. 420; *Whitworth v. Harris*, 40 Miss. 483; *McElroy v. Maxwell*, 101 Mo. 294; *Cuff v. Dorland*, 55 Barb. (N. Y.) 481; *Margraf v. Muir*, 57 N. Y. 155; *Brown v. Haff*, 5 Paige (N. Y.) 235; 28 Am. Dec. 425; *Walker v. Hill*, 21 N. J. Eq. 191; *Merritt v. Brown*, 21 N. J. Eq. 401; *Crane v. Decamp*, 21 N. J. Eq. 414; *Plummer v. Keppler*, 26 N. J. Eq. 481; *Wistar's Appeal*, 80 Pa. St. 484; *Orne v. Kittanning Coal Co.*, 114 Pa. St. 172; *Mitchell v. Nicholson*, 8 Yerg. (Tenn.) 194; *Booten v. Sheffer*, 21 Gratt. (Va.) 474; *Horn v. Star Foundry Co.*, 23 W. Va. 522; *Core v. Wigner*, 32 W. Va. 277; *Mississippi, etc., R. Co. v. Cromwell*, 91 U. S. 643. *Compare Songer v. Partridge*, 107 Ill. 529.

Unfairness.—The fact that a contract has been entered into hastily and without due consideration of its terms and effect will justify a refusal to decree its enforcement in equity. *Godwin v. Collins*, 4 Houst. (Del.) 28.

But a contract was enforced though improvident in *Lee v. Kirby*, 104 Mass. 420.

The power of a court of equity to enforce the specific performance of a contract should be exercised under the sound discretion of the court, with an eye to the substantial justice of the case; and where a contract is hard, and destitute of all equity, the court will leave the parties to their remedy at law, and if such remedy has been lost by negligence, they must abide the consequences. *King v. Hamilton*, 4 Pet. (U. S.) 311.

Equity will not decree specific performance of a contract, where it appears not to have been entered into with perfect fairness, though the fraud may not be such as to authorize the court to cancel the agreement. *Frisby v. Ballance*, 5 Ill. 287; 39 Am. Dec. 409.

Where a contract is fairly made and without mistake, by competent parties,

upon good consideration, and unattended with any circumstances which make its enforcement inequitable, a mere naked hardness of bargain is no valid objection to its enforcement in equity. *Morrison v. Peay*, 21 Ark. 110.

Specific performance was refused for unfairness and inequality in a suit upon a contract for the purchase of land under which half the purchase price was to be paid in cash, and the balance in semi-annual payments extending over several years, no provision being made for securing such deferred payments. *Godwin v. Collins*, 3 Del. Ch. 189. And the mere equitable vendor's lien would not be an adequate security. *Godwin v. Collins*, 3 Del. Ch. 189.

A purchaser, at a sale under a decree of court will not be compelled to complete his purchase, if it would be unjust for a private person to insist upon a specific performance in such case. *Laight v. Pell*, 1 Edw. Ch. (N. Y.) 577.

Complainant purchased an interest in certain patents at auction, with full notice of certain claims and incumbrances. The incumbrancer's title was, under the patent laws, invalid. On a bill for specific performance, claiming an absolute assignment of entire interest, held, the complainant could not thus demand unconscientious advantages, beyond those he had a right to expect when the sale was made. *Eames v. Eames*, 16 Mich. 348.

Defendant, who needed \$2,000 to complete a purchase made by him, agreed that if plaintiff, his wife, would join him in a mortgage for that amount of his farm of 52 acres, which she had refused to do, he would convey to her 10 acres of the land, including the buildings, which part was worth \$7,000. Held, that the agreement was inequitable and would not be enforced. *Carpenter v. Carpenter*, 56 Hun (N. Y.) 647.

Where the conversation of a vendor justifies the belief of the vendee that she will not demand specie for the purchase-money of the land sold, and she refuses, on the day the money is to be paid, to receive bank bills and to give reasonable time to the vendee to obtain the specie, the vendee will not thereby lose his right to claim a specific performance of the contract; especially where the vendee is in possession, and has made improvements. *Pickle v. Auble*, 4 N. J. Eq. 315.

A promise by the vendee, after such refusal, and under the impression that he had thereby lost the benefit of his contract, to accept a lease of the premises, will not estop him from afterwards enforcing the contract of sale. *Pickle v. Auble*, 4 N. J. Eq. 315.

An innocent purchaser who has paid the full price of the land according to the terms of his purchase will be allowed to compel the owner to convey title where such owner stood by and permitted the sale to him without claiming any interest. *Stone v. Tyree*, 30 W. Va. 687.

The decree must operate fairly upon all parties. *Ikerd v. Beavers*, 106 Ind. 483.

In *Cathcart v. Robinson*, 5 Pet. (U. S.) 269, the court by Marshall, C. J., said: "The difference between that degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract and that which will induce a court to withhold its aid, is well settled. It is said that the plaintiff must come into the court with clean hands, and that the defendant may resist a bill for specific performance by showing that under the circumstances the plaintiff is not entitled to the relief he asks. Omission or mistake in the agreement; or that it is unconscientious or unreasonable; or that there has been concealment, misrepresentation, or any unfairness are enumerated among the causes which will induce a court to refuse its aid. If to any unfairness a great inequality between price and value be added, a court of chancery will not afford its aid."

Misrepresentations as to a material fact will prevent specific performance. See *Mansfield v. Watson*, 2 Iowa 111; *Best v. Stow*, 2 Sandf. Ch. (N. Y.) 298; *Jones v. Booth*, 38 Ohio St. 405; *Race v. Weston*, 86 Ill. 91; *Wells v. Millet*, 23 Wis. 64; *Davis v. Read*, 37 Fed. Rep. 418; *Chandler v. Pomeroy*, 46 Fed. Rep. 533.

In an action by the vendor for specific performance of a contract for sale of land, the vendee may defeat a decree by showing that the vendor falsely represented that the property was clear of tax liens, although the contract calls only for a quitclaim deed. *Isaacs v. Skrainka*, 95 Mo. 517.

Misrepresentations by the vendor, as to size of buildings, or qualities of land, although without fraud, have

been held ground for refusing specific performance. *Fisher v. Worrall*, 5 W. & S. (Pa.) 478.

If a vendee fraudulently misrepresents to the vendor the value of wild lands which the vendor, as the vendee well knows, has not seen for many years, the contract so induced is void, and specific performance will not be decreed. *Kelley v. Sheldon*, 8 Wis. 258.

A contract to purchase property will not be specifically enforced, where the vendor represented that certain store fixtures went with the property, whereas, in fact, such fixtures belonged to another and it was not in the power of the vendor to deliver them. *Smith v. Sturgess*, 65 How. Pr. (N. Y.) 360.

When a purchaser of lands induces the vendor to sell, by misrepresenting his means of payment, and is guilty of gross negligence, in failing to perform his part of the contract, a court of equity will not decree specific performance in his favor. *Fuller v. Perkins*, 7 Ohio 196.

Specific performance of a contract for the purchase of land and personally will not be decreed where defendants entered into such contract in reliance on the representations of plaintiffs' agent, many of which were untrue, and the value of the property is much less than defendants represented. *Hicks v. Turck*, 72 Mich. 311.

In a suit to compel the specific performance of a contract of sale, if the defendant rely on a false representation made to him, he must prove in addition, that he will be damaged by performance. *Morrison v. Lods*, 39 Cal. 381; *Scott v. Shiner*, 27 N. J. Eq. 185. But compare *Kelly v. Central Pac. R. Co.*, 74 Cal. 557.

Instances — Misrepresentation Sufficient to Preclude Specific Enforcement.— Defendant who was the owner of vacant land, published a circular inviting settlement, and stating that settlers who in good faith improved the land, would be given the preference in purchasing. To obtain a contract for conveyance, plaintiff falsely represented to defendant that he had settled thereon, and induced him to make the contract. *Held*, that plaintiff's fraud, without regard to damage resulting from it, was a bar to an action for specific performance. *Kelly v. Central Pac. R. Co.*, 74 Cal. 557.

One who induces another to agree to convey land by fraudulently representing that the parties for whom he acts are very rich and will make large expenditures, cannot compel the enforcement of the contract, even though when reduced to writing it required expenditures much less in amount. *Carskaddon v. Kennedy*, 40 N. J. Eq. 259.

On a bill by a vendor to enforce specific performance of a contract for the sale of a certain tract of land, although the quantity of the tract is not stated in the contract, the defendant may show by parol evidence that the complainant, before sale, represented to the defendant that the tract contained nine acres when in fact it contained only about six; and in such case specific execution of the contract will not be enforced. *Miller v. Chetwood*, 2 N. J. Eq. 199.

And it makes no difference, in such case, that the sale was made by the tract, and not by the acre, and that the vendee lived in the neighborhood of the land, subject daily to his observation; this constitutes no excuse for the misrepresentations of the vendor. *Miller v. Chetwood*, 2 N. J. Eq. 199.

The defendant entered into and partly executed a contract to convey certain lands to the plaintiff in exchange for certain tenements belonging to the plaintiff, upon the understanding that such tenements rented at certain rates; but upon discovering that the rates were misstated, he refused to complete the execution of the contract. *Held*, that a bill for specific performance could not be maintained against him, although it appeared that such misrepresentation was not fraudulent, and that the plaintiff had offered compensation for the deficiency in the rent. *Boynton v. Hazelboom*, 14 Allen (Mass.) 107; 92 Am. Dec. 738.

Fraudulent Concealment.—The concealment by plaintiff of a material fact will defeat his claim for specific performance. *Byars v. Stubbs*, 85 Ala. 256; *Hetfield v. Willey*, 105 Ill. 286; *King v. Knapp*, 59 N. Y. 462.

Where, before receipt of a letter from his principal withdrawing the lands from sale, an agent for the sale of land had sold it, and on his representations that he was acting solely for his principal's interest, and by the withdrawal would be placed in an embarrassing position, the principal con-

sented to affirm the sale and received part of the purchase price, which, however, he at once returned, disaffirming the sale, on discovering that the purchaser was his agent's step-daughter. It was held that there was at least such *suppressio veri* on the part of the agent that the contract would not be specifically enforced. *Morgan v. Hardy*, 16 Neb. 427.

The case of *Margrave v. Muir*, 57 N. Y. 155, was one by the vendor to enforce a contract to convey land. The contract was to sell for \$800, whereas the lot was worth \$2,000, on account of its rise in value. The plaintiff lived near the lot and knew its value. The defendant lived at a distance and did not know its value. While the plaintiff did not make any misrepresentation, he concealed his knowledge of the recent rise in value of the lot, and took advantage of the defendant's ignorance, and thus got from her a contract to convey to him the lot for but little more than one-third of its value. "Such a contract, it is believed, has never yet been enforced in a court of equity in this country. When a contract for the sale of land is fair and just and free from legal objection, it is a matter of course for courts of equity to specifically enforce it; but they will not decree specific performance in cases of fraud or mistake, or of hard and unconscionable bargains, or when the decree would produce injustice, or would be inequitable under all the circumstances." *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1; 7 Am. Dec. 513; *Seymour v. Delancy*, 6 Johns. Ch. (N. Y.) 222.

A vendor agreed to sell a certain lot and buildings which he pointed out to his purchaser, but a part of which he fraudulently omitted from his deed, taking advantage of the purchaser's ignorance as to the description. The purchaser was awarded a decree of specific performance to compel the conveyance of the entire lot. *Winans v. Huyck*, 71 Iowa 459.

If a defendant, at the time of the sale of his lands on execution, represents to the purchaser that certain land is included in the levy, which in fact is not, such land passes in equity by the sale, provided the purchaser acted innocently, and a conveyance will be decreed. *Buchanan v. Moore*, 13 S. & R. (Pa.) 304; 15 Am. Dec. 601.

And the purchaser will not be re-

quired to give up the sale on a tender of the whole of the purchase money by the defendant. *Buchanan v. Moore*, 13 S. & R. (Pa.) 304; 15 Am. Dec. 601.

He who sells property on a description given by himself is bound in equity to make good that description; and if it is untrue in a material point, although the variance is caused by a mistake, he is liable for that variance; and when he has sold that which he cannot convey, and cannot therefore execute his contract, he must answer in damages. *McFerran v. Taylor*, 3 Cranch (U. S.) 268.

Misrepresentation Insufficient to Preclude Specific Enforcement.—It has been held that a representation to the purchaser of land to the effect that an alley on the premises was only a private right of way in a few persons, when, in fact the alley was a public one, is not such a misrepresentation as will bar a specific performance, the rights in the property in either case being substantially the same. *Wuesthoff v. Seymour*, 22 N. J. Eq. 66.

A agreed in writing to purchase "a farm or tract of land, called Mother's Care, containing 173 acres, more or less." The vendor, when questioned as to the number of acres, told the vendee that he had heard his brother say the old plot called for 173; but he did not himself know the quantity, never having seen it surveyed. *Held*, that this could not, by any fair construction, be considered such a representation as would make it inequitable, though, on measurement, the farm contained only 145 acres, to compel the performance of the contract by the vendee. *Stull v. Hurtt*, 9 Gill (Md.) 446.

The contract must be considered a sale of land, not by the acre, but for a specified sum, and the words "more or less" as intended to negative any representation of quantity. *Stull v. Hurtt*, 9 Gill (Md.) 446.

Conveyance to Defraud Others.—The fact that a conveyance was originally made to defraud creditors cannot be set up by the grantee as a defense to a bill by his grantor seeking the specific performance of an agreement to purchase. *Lynn v. Lyerle*, 113 Ill. 128.

Where it appears that the property in question has been conveyed for the purpose of protecting it from the creditors of the grantor, no obligation to re-convey growing out of the transaction, or forming a part of it, can either be itself enforced, or form the consideration

of an enforceable promise or covenant, written or parol. *Ford v. Lewis*, 10 B. Mon. (Ky.) 127.

The circumstances of the case indicating that a conveyance was made for the purpose of defrauding the grantor's creditors, and such fraudulent intent appearing from the evidence, the witnesses testifying to an agreement that the property should be re-conveyed to the grantor, when he received a discharge in bankruptcy, such re-conveyance cannot be enforced in equity after the accomplishment of the fraud. *Dent v. Ferguson*, 132 U. S. 50.

Such conveyances are valid between the parties. But the promise to re-convey is not a proper subject of equitable enforcement. *Parrott v. Baker*, 82 Ga. 364; *Songer v. Partridge*, 107 Ill. 529.

The purchaser cannot avail himself of the defense to an action for specific performance of a contract to convey land that the sale was made to prevent the vendor's creditors from collecting a debt. *Gentry v. Gentry*, 87 Va. 478.

The owner of land lived on it with her married daughter, the plaintiff. The land was subject to a deed of trust to secure a debt to defendant. For the purpose of having the land transferred to plaintiff free from the claims of the mother's creditors, plaintiff's husband proposed to defendant that the latter should have the land sold under the deed of trust, bid it in, and then deed it to plaintiff on her paying interest and taxes and executing another deed of trust for the principal. The court held that the agreement being in fraud of the creditors of the plaintiff's mother, could not be enforced in a court of equity. *Taylor v. Von Schroeder* (Mo. 1891), 16 S. W. Rep. 675.

Where there is a conveyance of land, voluntary on its face, made by one who is defendant in a suit just before the rendition of a judgment in a large sum against him, which but for this conveyance would be a lien on the land, and strong proof is not adduced that the conveyance was made in good faith and for value, the specific performance against the vendor of an agreement for the sale of the land will not be enforced. *Tillotson v. Gesner*, 33 N. J. Eq. 313.

Undue Influence.—Undue influence is a sufficient defense to a petition for specific performance. *Brady's Appeal*, 66 Pa. St. 277; *Miller v. Miller*, 68 Pa. St. 486. *Compare* *Christian v. Ransome*,

46 Ga. 138. See also *UNDUE INFLUENCE*.

Duress.—Specific performance of a contract to re-convey to plaintiff land which he had conveyed to defendant as security for a debt will not be decreed where it appears that defendant took the note thus secured in compromise of a much larger indebtedness to him, though barred by the Statute of Limitations, and that this compromise was extorted by plaintiff's threat to prosecute defendant's son for a criminal offense unless the compromise was made. *Swint v. Carr*, 76 Ga. 322; 2 Am. St. Rep. 44.

A promise to pay the debts of an intended husband given in writing under threats of his imprisonment and the prevention of the marriage, will not be enforced in equity, even though the promisor afterwards pay part, thus appearing to ratify the promise, if it appear that such subsequent payment was made under the influence of fear. *Rau v. Von Zedlitz*, 132 Mass. 164. See also *DURESS*, vol. 6, p. 67.

Intoxication.—The intoxication of the purchaser at the time of the sale will not be ground for refusing to enforce specific performance of the contract against him, unless it appears that his intoxication was produced or procured by the vendor, or that undue advantage was taken of it. *Pittenger v. Pittinger*, 3 N. J. Eq. 156; *Rodman v. Zillee*, 1 N. J. Eq. 320; *Whitesides v. Greenlee*, 2 Dev. Eq. (N. Car.) 152.

Compare *Brown v. Wheelock*, 75 Tex. 385; *Watson v. Doyle*, 130 Ill. 415; *Byrne v. Long* (Ky. 1891), 15 S. W. Rep. 778.

The mere fact that the contracting party was in the habit of getting drunk will not relieve him from a contract entered into when not intoxicated. *Watson v. Doyle*, 130 Ill. 415.

And though entered into by one intoxicated if it has been subsequently ratified by him, it is enforceable without regard to the amount of the consideration. *Mettert v. Hagan*, 18 Gratt. (Va.) 231.

Imbecility.—A court of equity will not enforce a contract to convey land, where there is satisfactory evidence of the imbecility of the party making the contract sought to be enforced. *Reinicker v. Smith*, 2 Har. & J. (Md.) 421. See, also, *INTOXICATION AS A DEFENSE TO CONTRACTS*, vol. 11, p. 773.

Ignorance.—Where an ignorant woman is induced, without a clear

knowledge of what she is doing, to agree to convey the homestead, her promise will not be enforced specifically, although her husband may have bound himself by the contract. *Bird v. Logan*, 35 Kan. 228.

See *McElroy v. Maxwell*, 101 Mo. 294; *Winans v. Huyck*, 71 Iowa 459; *Chambers v. Livermore*, 15 Mich. 381.

Complainant, an assayer, received from S, an ignorant Mexican who reposed the utmost confidence in him, authority to sell a mine which S had discovered, and a quarter interest therein as commission. Complainant sold to defendants for the minimum price fixed by S, stipulating with them that they should convey to him a quarter interest. S paid him a quarter of the price received, but on learning of the agreement with defendants, which complainant had charged them not to tell S, demanded of them the quarter interest which complainant had bargained for, whose value they paid him. *Held*, that this gross fraud of the complainant's would defeat complainant's claim to a specific performance and prevent the recovery of even the fourth part last paid to defendant. *Barnes, J.*, dissenting. *Jacobs v. George* (Arizona, 1889), 20 Pac. Rep. 183.

Failure to Read Contract.—The fact that a vendor in giving a contract for sale, is negligent in not reading the contract, and knowing its contents, does not entitle vendee to a specific performance of it, where he himself is also in the wrong, as the relief within the discretion of the court depends more on the good faith of the party asking it than on the negligence of the party against whom it is sought. *Clark v. Maurer*, 77 Iowa 717. See also *Wickham v. Winchester*, 75 Iowa 327; *Byars v. Stubbs*, 85 Ala. 256.

In the absence of fraud, one who signs a contract without reading it is bound by its terms nevertheless. *Minneapolis, etc., R. Co. v. Cox*, 76 Iowa 306.

Fraud—Instances.—Where plaintiff fraudulently procures from defendant a contract to convey land, wherein another had acquired rights by performing labor and making improvements, the injury to the third person renders the fraud a bar to an action for specific performance. *Kelly v. Central Pac. R. Co.*, 74 Cal. 557.

Plaintiff made a contract with defendant, a widow in feeble health, residing at a distance, through her son-

*b. MISTAKE.—See MISTAKE.*¹

*c. HARDSHIP.—If to compel specific performance would work hardship or injustice, it will not be ordered.*²

in-law, to exchange two houses, belonging to him for income paying real estate. A real estate broker had informed the son-in-law that one of the houses was well rented, and had procured S, a pretended purchaser, for one of the houses. The broker had gone to the son-in-law in relation to the sale to S, at the suggestion of plaintiff. The houses were not rented but heavily mortgaged. Upon these facts specific performance of the contract was refused. *Lennon v. Stiles* (Supreme Ct.), 4 N. Y. Supp. 487.

Specific performance will not be decreed to compel a county to perform its contract to convey its swamp lands, where electors were induced to vote for the contract by the purchaser's promise to convey a part of the land to each of them, they to pay in work which never was given them. *Palo Alto Co. v. Harrison*, 68 Iowa 81.

Equity will not enforce a contract in the form of a letter written by defendant to one whom he believes to be acting as his agent, and without any knowledge that he is also acting as the agent of complainant, that he will purchase certain lands of complainant at a named price. *Potter v. Hollister*, 45 N. J. Eq. 508. See also *Goff v. Jones*, 70 Tex. 572; *Franco-Texan Land Co. v. Boussetlet*, 70 Tex. 422; *Marsh v. Buchan*, 46 N. J. Eq. 595.

The secretary of a company agreed with a stockholder to buy his stock, and, during the negotiations, represented to the vendor that the stock was not worth par, and that he did not know where he could place it, while in fact he wished it for himself, and from his official position knew the stock to be of much greater value, and when he had made no payment on the stock. The court refused to decree specific performance, leaving vendee to a suit at law to recover damages suffered from the breach of contract. *Diamond State Iron Co. v. Todd* (Del. 1888), 14 Atl. Rep. 27.*

A remainderman induced the life tenant and her trustee to convey to him, that he might sell a portion of the land to pay taxes thereon by fraudulently promising to then make a declaration of trust for a life-interest in the residue in her favor. This, how-

ever, he did not do. *Held*, that she was entitled to a conveyance of the residue, and that it might be made directly to her instead of in trust. *Brophy v. Lawler*, 107 Ill. 284.

Defendant sold to plaintiff by a parcel contract, a certain lot, and, with others interested in the title, executed a deed for it, which was subsequently returned to defendant for correction, but which defendant fraudulently retained and finally destroyed. The purchase money was paid on the delivery of the deed, and remained in defendant's hands. Plaintiff took and retained possession of the premises. *Held*, that plaintiff was entitled to a decree in equity directing the execution to him by defendant of as perfect a deed as defendant could give. *Graft v. Loucks*, 138 Pa. St. 453.

The *Illinois* act 1857, p. 1203, having limited the power given by that of 1841, p. 65, to the supervisor of Cahokia to lease certain village lots to the highest bidder, for educational purposes, to the average rent of the other lots leased — *held*, that a proposition voted for to lease to T a portion thereof for 99 years, at an annual ground-rent of 25 cents per acre, and a cash bonus of \$10,000, should not be specifically enforced, it appearing that there was a design to divide the bonus amongst the inhabitants and defraud the school fund, and that the average rent of other lots was 60 cents per acre. *Tamm v. Lavalle*, 92 Ill. 563.

A and others agreed to convey land to B, a part of which B was to reconvey to A. The deed was given to C, a real-estate agent, to record, with a reconveyance which had been executed by B, but instead of recording the deed of reconveyance which had been executed, he had B execute another deed of reconveyance, covering less land, and recorded that. *Held*, that the execution and delivery of the first deed of reconveyance would be decreed. *Leeds v. Penrose* (N. J. 1887), 8 Atl. Rep. 520.

A party cannot plead his own fraud in defense. *Cackler v. Ford*, 24 How. (U. S.) 322.

1. Vol. 15, p. 635.

2. See *supra*, this title, *Equitable Maxims*. *Rushton v. Thompson*, 35

d. CHANGE OF CIRCUMSTANCES.—The element of hardship or injustice sometimes comes about through a change in the circumstances not contemplated when the contract was entered into. Thus, if through any unfair delay or neglect of the promisor, the contract has not been executed until there has been a material rise or fall in the value of the property involved, it may become unconscionable to require a specific performance, and, in such case, equity will not do so; nor where, because of such a change in values, or in the situation of the parties, from whatever cause, equitable relief would work a hardship to either side.¹

Fed. Rep. 635; *Perkins v. Wright*, 3 Har. & M. (Md.) 324; *Veth v. Gierth*, 92 Mo. 97; *Eaton v. Eaton*, 64 N. H. 493; *Society, etc. v. Butler*, 12 N. J. Eq. 498; *Chubb v. Peckham*, 13 N. J. Eq. 207; *Tillotson v. Gesner*, 33 N. J. Eq. 313; *Cameron Coal Co. v. Emanuel*, 49 N. Y. Super. Ct. 77; *Day v. Hunt*, 112 N. Y. 191; *Conger v. New York, etc., R. Co.*, 120 N. Y. 29; *McCarty v. Kyle*, 4 Coldw. (Tenn.) 348; *Ramsden v. Hylton*, 2 Ves. 307; *Mortlock v. Buller*, 10 Ves. 301.

Where a purchaser of land has been for twenty years without title, through the fault of his vendor, and has for this reason been unable to make any beneficial disposition of the land, and the interest upon his debt has accumulated to a large sum, the court will not compel him to accept a confirmation of title, and pay the remainder of the purchase money, especially if suspicions of fraud on the part of the vendor attach to the transaction. *Williams v. Mattocks*, 3 Vt. 189.

1. See *infra*, this title, *Laches*. *Iglehart v. Vail*, 73 Ill. 63; *Rogers v. Saunders*, 16 Me. 92; 33 Am. Dec. 635; *Perkins v. Wright*, 3 Har. & M. (Md.) 324; *Conger v. New York, etc., R. Co.*, 45 Hun (N. Y.) 296; *Jackson v. Edwards*, 22 Wend. (N. Y.) 498; *Peters v. Delaplaine*, 49 N. Y. 362; *Patterson v. Martz*, 8 Watts (Pa.) 374; 34 Am. Dec. 474; *Andrews v. Bell*, 56 Pa. St. 343; *Buchanan v. Brown*, *Cooke* (Tenn.) 185; *Pillow v. Pillow*, 3 Humph. (Tenn.) 644; *Hudson v. King*, 2 Heisk. (Tenn.) 560; *McCarty v. Kyle*, 4 Coldw. (Tenn.) 348; *Bryan v. Lofftus*, 1 Rob. (Va.) 12; 39 Am. Dec. 242; *Pigg v. Corder*, 12 Leigh (Va.) 69; *Griffin v. Cunningham*, 19 Gratt. (Va.) 571; *Garnett v. Macon*, 6 Call (Va.) 308.

Where a deed or obligation is sought to be enforced in an event which is unexpected to both parties, and inconsistent with their original intention, a

court of equity will not sustain it. *Quick v. Stuyvesant*, 2 Paige (N. Y.) 84.

A, who owned certain land, agreed to convey for a fixed sum to B, but there being a claim to the land made by C, it was agreed to await the determination of a suit by him, and that if it was in A's favor she would immediately carry out her contract of conveyance. This litigation lasted fifteen years and was settled in A's favor. The land in the meantime had largely appreciated in value. *Held*, that it would be inequitable to enforce specific performance. *Fitzpatrick v. Dorland*, 27 Hun (N. Y.) 291.

If a party seeking a specific execution, has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part; or if, in the immediate period, there has arisen a material change of circumstances, affecting the rights, interests and obligations of the parties, a court of equity will refuse to decree a specific performance. *Callen v. Ferguson*, 29 Pa. St. 247; *Maddox v. McQueen*, 3 A. K. Marsh. (Ky.) 400; *Du Bois v. Baum*, 46 Pa. St. 537; *Miller v. Henlan*, 51 Pa. St. 265; *Childress v. Holland*, 3 Hayw. (Tenn.) 274.

Where a debt is presently payable in the stock of a corporation, and the payor delays the payment for a long time, and until the stock becomes valueless, it is such a change of the circumstances existing at the time of the contract as will in equity relieve the payee from accepting the stock in payment. *Demarest v. McKee*, 2 Grant's Cas. (Pa.) 248.

Where a part of the vendor's land has, since the contract was made, been carried away by the sea, he cannot compel the specific performance of the purchase. *Huguenin v. Courtenay*, 21 S. Car. 403; 53 Am. Rep. 688.

The purchaser will not be compelled

9. *Consideration.*—Equity will not decree specific performance of a contract if the consideration be lacking. A mere voluntary agreement is not to be enforced,¹ unless it be

to take a conveyance after the time specified in a contract of which time was not of the essence, where the vendor is at fault for the delay, and where the improvements on the land were burned, before the vendor was ready to convey. *Smith v. Cansler*, 83 Ky. 367.

Where one who has contracted to sell his land dies before the date at which the deed is to be executed and delivered by him, and his heir-at-law and widow refuse to join in the conveyance, a decree will not be made to compel specific performance by the purchasers at the instance of the administrator, for the benefit of the widow (creditors not being interested in the litigation), after the land has depreciated in value. *Reddish v. Miller*, 27 N. J. Eq. 514.

After a married woman has for two years repudiated and refused to perform a contract for the sale of land made in her behalf by her husband, she cannot, the property during the meantime having depreciated in value, maintain a bill for a specific performance. *Holgate v. Eaton*, 116 U. S. 33.

Where a defendant resisted specific performance of a contract to purchase land on the ground of a defect in the title, and subsequently by the act of March 14, 1861, the defect of title was cured, and conveyance was again tendered and refused—held, that after the time for delivery of the deed has passed, the defendant would not be compelled, against his will, to accept a deed which he was ready and willing to accept at the time fixed for the performance of the contract, especially as the value of the real estate was depressed. *Young v. Rathbone*, 16 N. J. Eq. 224; 84 Am. Dec. 151.

Exceptions.—Though the court will not enforce a hard, unreasonable, or unequal contract, the fluctuations in the value of property, caused by events subsequent to the making of the contract, will not be regarded by the court, if the contract is fairly entered into at the time. *Low v. Treadwell*, 12 Me. 441; *Young v. Wright*, 4 Wis. 144; 65 Am. Dec. 303; *Falls v. Carpenter*, 1 Dev. & B. Eq. (N. Car.) 237; 28 Am. Dec. 613.

Nor will specific performance be

refused as inequitable because of the fluctuation of values, if the court has no means of knowing what bearing the terms of the contract had on the negotiations of the parties. *Nims v. Vaughn*, 40 Mich. 356.

Ordinarily the parties will be deemed to have taken the risk of fluctuations in value. *Nims v. Vaughn*, 40 Mich. 356.

"It is by no means clear," says Justice Strong, in *Rutland Marble Co. v. Ripley*, 10 Wall. (U. S.) 339, "that a court of equity will refuse to decree the specific performance of a contract fair when it was made, but which has become a hard one by the force of subsequent circumstances and changing events."

And in *Willard v. Tayloe*, 8 Wall. (U. S.) 557, the court, by Field, J., said: "The question in such cases always is, Was the contract at the time it was made a reasonable and fair one? If such was the fact, the parties are considered as having taken upon themselves the risk of subsequent fluctuations in value, and such fluctuations are not allowed to prevent its specific enforcement. See *Hale v. Wilkinson*, 21 Gratt. (Va.) 75.

1. *Andrews v. Andrews*, 28 Ala. 432; *Holland v. Hensley*, 4 Iowa 222; *Burford v. McKee*, 1 Dana (Ky.) 107; *Ormsby v. Hunton*, 3 Bibb (Ky.) 298; *Webb v. Alton M. & F. Ins. Co.*, 10 Ill. 223; *Stone v. Pratt*, 25 Ill. 25; *Wyatt v. Mayfield*, 91 Ill. 577; *Shepherd v. Shepherd*, 1 Md. Ch. 244; *Tiernan v. Poor*, 1 Gill & J. (Md.) 216; 19 Am. Dec. 225; *Snyder v. Jones*, 38 Md. 542; *Coleman v. Applegarth*, 68 Md. 21; *Stone v. Hackett*, 12 Gray (Mass.) 227; *Mercer v. Stark*, Walk. (Miss.) 451; 12 Am. Dec. 583; *Vasser v. Vasser*, 23 Miss. 378; *Taylor v. Van Schroeder* (Mo. 1891), 16 S. W. Rep. 675; *Burling v. King*, 66 Barb. (N. Y.) 633; *Acker v. Phoenix*, 4 Paige (N. Y.) 305; *Minturn v. Seymour*, 4 Johns. Ch. (N. Y.) 497; *Ca-been v. Gordon*, 1 Hill Eq. (S. Car.) 51; *McC Campbell v. Farnsworth*, 3 Coldw. (Tenn.) 317; *Darlington v. McCooile*, 1 Leigh (Va.) 36; *Hanson v. Michelson*, 19 Wis. 498; *Pulvertoft v. Pulvertoft*, 18 Ves. 84.

A voluntary agreement by a man to

already executed.¹ Nor will a decree issue if the consideration be illegal.²

The authorities have always given adequacy of consideration a place among the prime requisites of an enforceable contract, the difference between the decisions arising out of the question as to what constitutes adequacy of consideration.³ But, as a general rule, mere inadequacy of price unaccompanied by unfairness of some kind is no defense to a bill for equitable enforcement, and will not stand in the way of a decree,⁴ unless the

provide for a relative will not be enforced by a court of equity. *Cotton v. Graham*, 84 Ky. 672.

A mortgage to secure a specified debt will not be specifically enforced if there was in fact no debt. *Roney v. Moss*, 74 Ala. 390.

The courts of equity will do nothing towards perfecting a voluntary contract for the creation of a trust, nor regard it as binding, so long as it remains executory. *Estate of Webb*, 49 Cal. 542.

Failure of Consideration.—Where the principal inducement to a sale of land was a stipulation, by the purchaser, to pay a certain debt which was pressing the vendor, and the vendor was obliged to pay such debt in consequence of the failure of the purchaser to perform his agreement, a bill, subsequently filed by such purchaser for specific performance was dismissed. *Deaver v. Parker*, 2 Ired. Eq. (N. Car.) 40.

An agreement to release a judgment for \$200 at a future day, in consideration of the payment of \$100 and the surrender of all claim to certain land, will not be enforced where the consideration fails, except that of the payment of \$100, but the court will credit the judgment with such payment. *Davis v. Bowker*, 1 Nev. 487.

Where a vendor bound himself to make title to land to the vendee on payment of three notes for \$120 each, given in purchase of the land—held, that the vendee was not entitled to demand specific performance, because a third party in whose hands the notes had been placed as collateral security, delivered them as fully satisfied, to the vendee on payment by him of \$150. *Daniel v. Hill*, 23 Tex. 571.

Where land was purchased at a very high price, on the faith of representations by the vendor that permanent improvements were to be made in the immediate vicinity, and a map was shown at the time of the sale, on which such proposed improvements were

located—held, that, upon the failure of the vendor to make the promised improvements, he could not be allowed to enforce the payment of the residue of the purchase-money, more than the value of the land, without the improvements, having been already paid; though the vendor, at the time of sale, intended to make the promised improvements. *Rogers v. Salmon*, 8 Paige (N. Y.) 559; 35 Am. Dec. 725.

To the Contrary.—A suit for specific performance may be brought by a vendor of land against the vendee on a memorandum of the purchase signed by the latter, when the land is described with sufficient accuracy and the amount to be paid and the manner and time of making the payments appear, though no consideration moving from the vendor is expressed in it, and although the latter is not bound by it. *Ivory v. Murphy*, 36 Mo. 534.

1. *Wyche v. Greene*, 16 Ga. 49.

2. *Kennedy v. Hazleton*, 33 Fed. Rep. 293; *Baton v. Stewart*, 78 Ill. 481.

3. Compare *INADEQUATE CONSIDERATION*, vol. 10, p. 333.

The consideration must be adequate. *Day v. Newman*, 2 Cox 77; *Keekwick v. Manning*, 1 DeG. M. & G. 188; *Hervey v. Audland*, 14 Sim. 531; *Kirkman v. Kenyon*, 17 Ind. 607; *Eaton v. Eaton*, 64 N. H. 493; *Varick v. Edwards*, Hoffm. (N. Y.) 382; *Woodcock v. Bennett*, 1 Cow. (N. Y.) 711; 13 Am. Dec. 568; *Short v. Price*, 17 Tex. 403; *Smith v. Wood*, 12 Wis. 383.

In *California*, this principle is embodied in the statute. *California Civil Code*, § 3391. See *Morrill v. Everson*, 77 Cal. 117, where, under this provision of the code, a lease with the privilege of purchase at \$1,300 was held to stand upon an inadequate consideration, the property being worth \$1,600.

4. *Burrows v. Lock*, 10 Ves. 470; *Adams v. Weare*, 1 Bro. C. C. 567; *Collier v. Brown*, 1 Cox 428. See also

inadequacy be so gross as to amount to conclusive evidence of fraud,¹ or unless the party whom it is sought to bind has so far

Coles v. Trecothick, 9 Ves. 246; *Emery v. Wase*, 8 Ves. 518; *Garnett v. Macon*, 2 Brock. (U. S.) 185; *Waterman v. Waterman*, 27 Fed. Rep. 827; *Goodlett v. Hansell*, 66 Ala. 151; *Watson v. Doyle*, 130 Ill. 415; *Casady v. Scallen*, 15 Iowa 93; *January v. Martin*, 1 Bibb (Ky.) 586; *Beard v. Campbell*, 2 A. K. Marsh. (Ky.) 125; 12 Am. Dec. 362; *Shepherd v. Bevin*, 9 Gill (Md.) 32; *Park v. Johnson*, 4 Allen (Mass.) 259; *Lee v. Kirby*, 104 Mass. 420; *Burtch v. Hogge*, Harr. Ch. (Mich.) 31; *Hunt v. Thorn*, 2 Mich. 213; *Chambers v. Livermore*, 15 Mich. 381; *Bean v. Valle*, 2 Mo. 126; *Harrison v. Town*, 17 Mo. 237; *Rodman v. Zilley*, 1 N. J. Eq. 320; *Chubb v. Peckham*, 13 N. J. Eq. 207; *Ready v. Noakes*, 29 N. J. Eq. 497; *Shaddle v. Disborough*, 30 N. J. Eq. 370; *Seymour v. Delancy*, 6 Johns. Ch. (N. Y.) 222; 3 Cow. (N. Y.) 445; 15 Am. Dec. 270; *Viele v. Troy*, etc., C. R. Co., 21 Barb. (N. Y.) 381; *Northrup v. Gibbs* (Supreme Ct.), 1 N. Y. Supp. 465; *White v. Thompson*, 1 Dev. & B. Eq. (N. Car.) 493; *Bunch v. Hurst*, 3 Desaus. (S. Car.) 273; 5 Am. Dec. 551; *Butler v. Haskell*, 4 Desaus. (S. Car.) 651; *Fripp v. Fripp*, Rice Eq. (S. Car.) 84; *White v. Flora*, 2 Tenn. 430; *Russell v. Stinson*, 3 Hayw. (Tenn.) 1; *Curlin v. Hendricks*, 35 Tex. 225.

Inadequacy — What Constitutes. — "The inadequacy must not be measured by grains." *Gasque v. Small*, 2 Strobb. Eq. (S. Car.) 72.

In the following cases the difference in value was deemed insufficient to create a presumption of fraud and defeat specific performance: A difference of 7 or 8 per cent. *Bower v. Cooper*, 2 Hare 408. 275 pounds where 400 pounds was afterwards offered. *Collier v. Brown*, 1 Cox 428.

Agreement to pay £5,000 where real value was shown to be £3,500. *Abbott v. Sworder*, 4 De G. & S. 448.

\$44,000 and \$60,000. *Lee v. Kirby*, 104 Mass. 420.

£20,000 and £25,000. *Coles v. Trecothick*, 9 Ves. 246.

\$29,000 and \$3,500. *Westervelt v. Matheson*, Hoffm. Ch. (N. Y.) 37.

\$1,800 and \$4,000. *Sarter v. Gordon*, 2 Hill Eq. (S. Car.) 121.

A sheriff's sale of land valued at \$1800 for \$400. *Brown v. Budd*, 2 Ind. 442.

A sale of land worth \$1,300 for \$900. *Conrad v. Schwamb*, 53 Wis. 372.

A difference of one-half. *White v. McGannon*, 29 Gratt. (Va.) 511; *Conaway v. Sweeney*, 24 W. Va. 643.

Actual rental value of \$600 and agreed price, \$800. *Buford v. Collins*, 41 La. Ann. 642.

Specific performance of an agreement to convey land will not be refused as inequitable, because the rents and profits and proceeds of timber sold by the grantor amounted in six years to more than the stipulated purchase-money. *Gentry v. Rogers*, 40 Ala. 442.

A bill in equity, setting forth a purchase by the complainant for the sum of \$600, at a sheriff's sale, made in due form of law, of certain promissory notes to the amount of \$260,000, secured by mortgage, and praying for a specific performance of the contract of sale, will not be dismissed on demurrer, on the ground of inadequacy of price. *Erwin v. Parham*, 12 How. (U. S.) 197.

1. In *Coles v. Trecothick*, 9 Ves. 246, the court by Lord Eldon, said: "Unless the inadequacy of price is such as shocks the conscience and amounts in itself to conclusive evidence of fraud in the transaction, it is not sufficient ground for refusing a specific performance."

And see *Watson v. Doyle*, 130 Ill. 415; *Viele v. Troy*, etc., R. Co., 21 Barb. (N. Y.) 381; *Gasque v. Small*, 2 Strobb. Eq. (S. Car.) 72.

It is only upon clear and satisfactory evidence that specific performance of an oral contract will be decreed where the consideration was greatly inadequate. *Cole v. Cole*, 106 Ill. 482.

In *Emery v. Wase*, 8 Ves. 518, the court by Lord Eldon, said: "I do not deny that mere difference in value, though considerable, is not of itself a sufficient ground for refusing a specific performance of a contract; but very considerable difference in value is not inconsiderable evidence that it was not made with great care and attention."

Excess of price over value, though considerable, if the contract is free from imposition, is not in itself sufficient to prevent a decree for specific performance; but it is an ingredient which, associated with other circumstances, will contribute to prevent the interference of a court of equity. *Cathcart v. Robinson*, 5 Pet. (U. S.) 264.

committed himself to the contract that his refusal to perform it is fraudulent in its effect.¹

The rule that a voluntary agreement will not be enforced is subject to the qualification that if the contract has been already executed equity will enforce all rights growing out of it.²

The following circumstances have been held sufficient, when attended with inadequacy of consideration, to justify the refusal of a decree: Mental weakness,³ mental weakness superinduced by drink,⁴ mental weakness from old age, with urgency and haste,⁵ mental weakness accompanied by ignorance of business and of the language,⁶ youth with ignorance and inexperience.⁷

Specific performance of an agreement to convey land will be decreed where a meritorious consideration sustains the agreement.⁸

If specific performance is refused on the ground of inadequacy it is because that element is almost invariably accompanied by other circumstances evincing fraud. *Seymour v. Delancy*, 6 Johns. Ch. (N. Y.) 222; *Hale v. Wilkinson*, 21 Gratt. (Va.) 75. See *Clement v. Reid*, 9 Smed. & M. (Miss.) 535.

Where the plaintiff knew the value of the land, by reason of his living near it, and induced defendant to sell for \$800 land worth \$2,000, he was refused a decree enforcing the purchase. *Margraf v. Muir*, 57 N. Y. 155.

Although mere inadequacy of price, independent of other circumstances, is not, of itself, sufficient to set aside a transaction, yet it may induce the court to stay the exercise of its power to enforce the specific performance of a contract to sell and convey land; and if, in connection with such inadequacy, there has been any misrepresentation on the part of the purchaser, as to the condition and value of the land, with which the seller was unacquainted, a bill for specific performance will be dismissed. *Powers v. Hale*, 25 N. H. 145.

In *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1; 7 Am. Dec. 513, the court by Kent., Ch., said: "Though inadequacy of price is not a ground for decreeing a rescission, yet it may be sufficient for the court to refuse to enforce performance. It is not an uncommon case for the court to refuse to enforce for inadequacy and at the same time refuse to rescind." See *Mortlock v. Buller*, 10 Ves. 292.

In the following cases the difference between value and price was held to be too great to justify a decree:

A sheriff's sale for one twenty-fourth

the value. *Benton v. Shreeve*, 4 Ind. 66.

A sheriff's sale of property worth \$105 for \$21. *Modisett v. Johnson*, 2 Blackf. (Ind.) 431.

An agreement for double the actual value. *White v. McGannon*, 29 Gratt. (Va.) 511; *Day v. Newman*, cited in 10 Ves. Jr. 300.

And two-thirds. *Harrison v. Town*, 17 Mo. 237.

1. *Woodruff v. Hargrave*, Wright (Ohio) 555; *Galloway v. Barr*, 12 Ohio 354.

2. *Wyche v. Greene*, 16 Ga. 49; *Read v. Long*, 4 Yerg. (Tenn.) 68.

3. **Mental Weakness.**—*McCormick v. Malin*, 5 Blackf. (Ind.) 509.

4. Mental weakness superinduced by drink or attended by habitual drunkenness. *Campbell v. Spencer*, 2 Binn. (Pa.) 129; *Henderson v. Hays*, 2 Watts (Pa.) 148; *Brown v. Wheelock*, 75 Tex. 385; *Grizzle v. Sutherland* (Va. 1892), 14 S. E. Rep. 332.

5. Mental weakness from old age with urgency and haste. *Graham v. Pancoast*, 30 Pa. St. 89.

6. Mental weakness accompanied by an imperfect acquaintance with the language, and a want of experience in business. *Fish v. Leser*, 69 Ill. 394.

7. Youth, ignorance and inexperience. *Clitherall v. Ogilvie*, 1 Desaus. Eq. (S. Car.) 250; *Evans v. Peacock*, 16 Ves. Jr. 512; *Gowland v. De Faria*, 17 Ves. 20; *Brown v. Wheelock*, 75 Tex. 385.

8. *Goring v. Nash*, 3 Atk. 185; *Knye v. Moore*, 1 Sim. & Stu. 61; *Ellison v. Ellison*, 6 Ves. 656; *Mahan v. Mahan*, 7 B. Mon. (Ky.) 579; *Bright v. Bright*, 8 B. Mon. (Ky.) 194; *McIntire v. Hughes*, 4 Bibb (Ky.) 186; *Shepherd v. Bevin*, 9 Gill (Md.) 32; *Haines v.*

Thus, in the enforcement of executory contracts, love and affection have been held sufficient to supply any deficiency in the consideration,¹ but not sufficient to sustain a contract, in the absence of all other consideration.²

The compromise of a controversy is of itself an adequate consideration, for law and equity alike favor compromises.³

Bona fide execution of the consideration agreed upon entitles the one who has so fulfilled his part of the agreement to a decree against the other.⁴

A promise to do a thing which the promisor is already legally bound to do is not a sufficient consideration.⁵

Hardy, 6 Md. 435; *Dennison v. Goehring*, 7 Pa. St. 175; 47 Am. Dec. 505; *Halsey v. Peters*, 79 Va. 60.

The performing of some act involving trouble and expense may constitute a sufficient consideration upon which to base a claim for specific performance. *Law v. Henry*, 39 Ind. 414; *Lafollett v. Kyle*, 51 Ind. 446.

Marriage as Consideration.—A father made a parol promise to convey to a lady who was about to marry his son a lot of ground, she promising to erect a house thereon with her own money. Upon this understanding they were married and the house was built as agreed, possession of the lot having been given by the father. *Held*, that this was a case for a decree of specific performance of the promise to convey. *Neale v. Neals*, 9 Wall. (U. S.) 1.

A court of equity will aid in enforcing a written contract made before and in consideration of marriage, to convey property to be acquired after the marriage. *Gevers v. Wright*, 18 N. J. Eq. 330.

The chancellor will decree specific performance of a voluntary agreement only where possession of land has been given thereunder on a meritorious consideration, and valuable improvements have been made on the faith thereof. *Studer v. Seyer*, 69 Ga. 125.

1. *White v. Thompson*, 1 Dev. & B. Eq. (N. Car.) 493.

2. But love and affection will not warrant a decree if no other consideration appear. *Keffer v. Grayson*, 76 Va. 517; 44 Am. Rep. 171; *Snyder v. Jones*, 38 Md. 542; *Pennington v. Gittings*, 2 Gill & J. (Md.) 217; *Dugan v. Gittings*, 3 Gill (Md.) 156; 43 Am. Dec. 306.

Debt of Husband Insufficient.—An antecedent debt of the husband is not a sufficient consideration to support a bill

for specific performance of the wife's agreement to convey. *Bayler v. Com.*, 40 Pa. St. 37; 80 Am. Dec. 551.

Existence of a Trust Sufficient.—See *Heath's Appeal*, 100 Pa. St. 1.

The doctrine that equity will not decree specific performance of a contract, where there is great inadequacy of consideration, does not apply to the case where A purchases property of B at a low price, and agrees to give the children of B the benefit of it, on being repaid the purchase money and interest. *Sarter v. Gordon*, 2 Hill Eq. (S. Car.) 121. And the contract may be enforced at the suit of B's children. *Sarter v. Gordon*, 2 Hill Eq. (S. Car.) 121.

3. *Central Trust Co. v. Wabash, etc., R. Co.*, 29 Fed. Rep. 554; *Gaines v. Molen*, 30 Fed. Rep. 27; *Leach v. Fobes*, 11 Gray (Mass.) 506; 71 Am. Dec. 732; *Weed v. Terry*, Walk. (Mich.) 501; 2 Dougl. (Mich.) 344; 45 Am. Dec. 257.

4. *Whitworth v. Harris*, 40 Miss. 483; *Laning v. Cole*, 4 N. J. Eq. 229; *Hulmes v. Thorpe*, 5 N. J. Eq. 415; *Traphagen v. Traphagen*, 40 Barb. (N. Y.) 537; *Williston v. Williston*, 41 Barb. (N. Y.) 635.

Where defendant has agreed to convey land and to pay money if a certain deed can be set aside, in consideration of plaintiff's promise to pay costs and attorney's fees in a suit to be brought to set the deed aside, the plaintiff, if he has performed his part of the contract, is entitled to a decree of specific performance against A, such agreement being upon a sufficient consideration. *Dewey v. Life*, 60 Iowa 361.

See *Weaver's Appeal*, 115 Pa. St. 59.

5. *Dunckel v. Dunckel*, 56 Hun (N. Y.) 25; *Keffer v. Grayson*, 76 Va. 517; 44 Am. Rep. 171.

Where land has been given, the donee may, by his conduct, on the faith of the gift, create a consideration for it that will establish his title to the land, as where he has entered into possession and made lasting improvements;¹ or the donor may, by a complete execution of the gift, pass the title to the real estate granted.²

Some courts have required evidence of a valuable consideration before granting a decree.³

VIII. DUTY OF COMPLAINANT—1. Tender⁴ and Performance.—He who seeks to compel another to perform must show upon his own part either a substantial performance, or a tender thereof, or that, by reason of his adversary's conduct, both performance and tender have been rendered unavailing.⁵ And if the contract in

1. See *supra*, this title, *Parol Gifts*. See, also, *Guynn v. McCauley*, 32 Ark. 97.

A decree of specific performance may be granted where a parent has promised in writing to give a child an estate, declaring the instrument to be founded on valuable consideration, and conditioned on the child entering upon and improving the land, and the child has so done. *Hagar v. Hagar*, 71 Mo. 610.

2. As where he has delivered a deed, taken a note for the consideration, and voluntarily surrendered the note and receipted it. *Ferry v. Stephens*, 66 N. Y. 321. See *Gray v. Barton*, 55 N. Y. 68; 14 Am. Rep. 181.

Special Instances.—Services rendered by an attorney in inducing a testator, by threatening to attack his will, to insert a codicil releasing certain persons from their obligation on a bond, were held in *Moon v. Crowder*, 72 Ala. 79, to be inadequate consideration for a conveyance by the persons to the attorney of a large tract of land with personal property thereon as to authorize a decree of specific performance.

F sold to W a farm of three hundred acres, binding himself to make the deed on receipt of \$7,500. W, after taking possession, was offered by C \$15 per acre for a parcel separated from the main body by a railroad, if F would give C a deed thereof, which offer W accepted, and F orally promised to give C such deed when C should pay W. Thereupon C surveyed the parcel, found it to contain nearly thirty-two acres, put his son into possession on his behalf, paid all the taxes, and made valuable improvements, paid W the price and demanded of F a deed, which F refused

to give. It was held that C's payment of the price to W was a sufficient consideration to support F's agreement to convey to C, and this whether F ever received the money from W or not. *Fleming v. Carter*, 87 Ill. 565.

Upon a levy of A's execution against B's land, A bought the lots together instead of separately. Under a parol agreement between the two, bidders were kept off by representations that the sale was in B's interest; and B paid part of the costs of sale, A promising that he would convey the lots to B upon a tender of the amount of the judgment within a specified time. Held, that there was a good consideration for A's promise, and that equity would compel him to convey in accordance therewith. *Heath's Appeal*, 100 Pa. St. 1.

3. *Morris v. Lewis*, 33 Ala. 53; *Allen v. Davison*, 16 Ind. 416; *Cutsinger v. Ballard*, 115 Ind. 93; *Phillips v. Frye*, 14 Allen (Mass.) 36; *Weed v. Terry*, Walk. (Mich.) 501; 2 Dougl. (Mich.) 344; 45 Am. Dec. 257.

Payment or the promise of payment of a subsisting debt is not a sufficient consideration to authorize a court of equity to grant a decree of specific performance of a contract to convey land. *Smith v. Phillips*, 77 Va. 548.

4. See generally *Tender*.

5. See *supra*, this title, *Equitable Maxims—He Who Seeks Equity Must Do Equity*.

When equity will enforce specific performance of contracts relating to land, when tender of performance is necessary, and what relief will be granted, determined in cases dependent on particular facts. *Turner v. Peck*, 1 Barb. Ch. (N. Y.) 549; *Billinger v. Kitts*, 6 Barb. (N. Y.) 273; *Beebe v.*

question created no obligation upon plaintiff, as in case of an option, he cannot enforce it against his promisor until he has fulfilled all that could be expected of him, by accepting the defendant's offer and acting upon it. After he has done this in good faith, it would be inequitable to refuse him a decree.¹

"Equity will not require of the plaintiff, as a condition precedent to his bringing suit for a specific performance, that he should have made payments which the principal defendant has placed it out of his power to make with safety and justice to the rights of others."²

The requirements of equity procedure in reference to tender are not so strict nor so technical as are those of the common-law courts. The spirit and intent of the obligation are recognized, but not always its letter. For example, substantial rather than literal performance is demanded of the complainant. If the contract which he seeks to enforce is for the conveyance of land and the obligation upon him is to produce the purchase money, it has been held that he need only evince his willingness and ability to pay the money when he shall have had his decree, and that an unconditional tender and payment into court are not required.³

Dowd, 22 Barb. (N. Y.) 255; Lanning v. Tompkins, 45 Barb. (N. Y.) 308; Chase v. Hogan, 3 Abb. Pr. N. S. (N. Y.) 57.

1. One who receives from landowners a power of attorney authorizing him to act for them in clearing their titles, and agreeing to allow him a half interest in whatever is recovered, is not entitled, upon subsequent revocation, to a specific performance of the contract unless there has been some performance on his part. *Armstrong v. Cashion* (Ark. 1891), 16 S. W. Rep. 666.

2. *Kellogg v. Lavender*, 9 Neb. 418.

3. *Hunter v. Bales*, 24 Ind. 299; *Lynch v. Jennings*, 43 Ind. 276; *Fall v. Hazelrigg*, 45 Ind. 576; 15 Am. Rep. 278; *McDaniel v. Kimbrell*, 3 Greene (Iowa) 335; *Irvin v. Gregory*, 13 Gray (Mass.) 215.

"A court of chancery is not bound by any fixed rule in relation to the tender of money in bills for specific performance." *Webster v. French*, 11 Ill. 254; *Anderson v. White*, 27 Ill. 57.

An averment that plaintiff "is willing to pay if he can get a good title," is a sufficient tender to support the suit when the obligor has sold the land in controversy and has died, and the rights of the plaintiff and the second vendee have not been judicially settled. *Laverty v. Hall*, 19 Iowa 526.

Tender need not be made before

suit. *Atkinson v. Hudson*, 44 Ark. 192; *Boyce v. Francis*, 56 Miss. 573.

Substantial Performance.—A tender of an amount due upon a contract for the sale of land will, if not complained of as insufficient at the time, be good, although it may not be adequate to cover taxes or a partnership liability growing out of a nursery concern, these being matters subordinate to the sale. *Morgan v. Herrick*, 21 Ill. 481.

Defendant's offer to sell land was accepted by plaintiff. One of the conditions of the offer was that plaintiff should assume a mortgage of \$300 on the land and give his note for \$500, payable in one year, with interest. It having been discovered that the mortgage on the land was for \$315, plaintiff executed his note for only \$485. As at first executed, the note did not bear interest, but this omission was corrected by a new note. *Held*, that the contract would be enforced. *Adams v. Thompson*, 28 Neb. 53.

An agreement was for a conveyance upon payment of the first installment, and for notes and a mortgage to secure the balance. *Held*, that a tender of the first installment, without a tender of notes and a mortgage, entitle the vendee to the deed. *Parker v. McAllister*, 14 Ind. 12.

Upon a bill for specific performance of a written agreement for the sale of land, proof of a tender by complainant,

unless by the terms of his agreement payment was made a condition precedent.¹

The necessity of a formal tender under these rulings is simply that the defendant may be compelled to pay the costs of the suit.² Some kind of a tender, however, is required.³

without any objection either as to time or amount by the defendant, is sufficient. *McDanel v. Kimbrell*, 3 Greene (Iowa) 335.

A bill in equity to enforce the specific performance of a written contract to convey land on the payment of the purchase-money, may be maintained without a previous tender of the money or bringing it into court, if the plaintiff has offered the defendant a sum within a trifle of the amount due, which the defendant has refused to accept, and there is an averment of readiness to pay whatever the court shall order. *Irvin v. Gregory*, 13 Gray (Mass.) 215.

Where the vendee has made the first payment according to contract, and tendered the balance of the purchase-money, and the vendor is in default for not tendering conveyances, the complainant, in a bill for performance, is not bound to bring the money into court; and a motion to that effect was disallowed. *Johnson v. Sukeley*, 2 McLean (U. S.) 562.

A contract for the conveyance of land provided for the payment of the consideration in three installments, after which the obligee was to receive a deed. *Held*, that the payment of the two first and the tender of the amount of the last entitled the obligee to specific performance. *Rogers v. Taylor*, 40 Iowa 193.

1. *West v. Chase*, 3 Ind. 301; *Minneapolis, etc., R. Co. v. Cox*, 76 Iowa 306; *Sanford v. Bartholomew*, 33 Kan. 38; *Washburn v. Dewey*, 17 Vt. 92.

After default, by the plaintiff, in payments which, by the contract, were a condition precedent to a conveyance, the defendant, having notified the plaintiff of his intention to do so, sold the land to a third person. A bill for specific performance, afterwards brought by the plaintiff, was dismissed with costs. *Hatch v. Cobb*, 4 Johns. Ch. (N. Y.) 559.

Where a contract for the sale of land contains a covenant that the payments shall be made by installments at stipulated times, and the conveyance to be executed after all installments and accru-

ing interest shall be paid, the vendee cannot maintain a bill for specific performance if he has failed without cause to pay the first installment, and the last one is not due when the bill is brought. *Troy v. Clarke*, 30 Cal. 419.

A bill in equity brought by a vendee who has been in possession of land for twenty years, against heirs of the vendor, for the specific performance of the following agreement: "Received, 12 Mo., 13th, 1865, of Adam P. Ware, one hundred dollars on acct. of a lot of land sold him; the deed to be hereafter made to him, and, when delivered, he is to give his note for \$58 additional"—cannot be maintained until the vendee has tendered his note for the amount due, with interest, or the amount due in cash. *Ware v. Lippincott* (N. J. 1887), 10 Atl. Rep. 404.

2. *Morris v. Hoyt*, 11 Mich. 9; *St. Paul Land Co. v. Dayton*, 39 Minn. 315; *Seeley v. Howard*, 13 Wis. 336.

3. One cannot be compelled to assign property without proof that the sum agreed to be paid therefor has been paid or tendered. *National Oleo Meter Co. v. Jackson*, 56 N. Y. Super. Ct. 609.

To support a bill to enforce specific performance of a contract to convey land, a tender of payment of the purchase money must have been made. *Huff v. Jennings*, 1 Morr. (Iowa) 454; *Goodale v. West*, 5 Cal. 339; *Allison v. Clark*, 1 Ill. 348; *Doyle v. Teas*, 5 Ill. 202; *Hills v. Hills*, 94 Ind. 436; *Wright v. Le Claire*, 4 Greene (Iowa) 420; *Izard v. Kimmel*, 26 Neb. 51; *Northrup v. Gibbs* (Supreme Ct.), 1 N. Y. Supp. 465; *Oliver v. Dix*, 1 Dev. & B. Eq. (N. Car.) 605; *Irvin v. Bleakley*, 67 Pa. St. 24; *Orne v. Kittanning Coal Co.*, 114 Pa. St. 172.

Complainants will be refused a decree of specific performance of a contract for the sale of land if it appear at the time of filing the bill and at the time of trial that they are indebted to defendant for the balance of purchase money, which they have not offered to pay. *Askew v. Carr*, 81 Ga. 685.

See, also, *Bradford v. Foster*, 87 Tenn. 4; *Willard v. Foster*, 24 Neb.

A different practice is maintained in some States, however, where the rule is that a tender of the purchase money, to be effectual, must be kept good by a payment into court and a notice of such payment to the vendor.¹

The defendant may have rendered a strict tender unnecessary by conduct constituting waiver of that right, as where he has been in the habit of allowing time for payment of installments of purchase money.² So circumstances may sometimes intervene

205; *Mansfield v. Hodgdon*, 147 Mass. 304; *Dulin v. Prince*, 124 Ill. 76.

1. *Doyle v. Teas*, 5 Ill. 202; *Sheriden v. Smith*, 2 Hill (N. Y.) 538; *Brown v. Ferguson*, 2 Den. (N. Y.) 196; *Simpson v. French*, 25 How. Pr. (N. Y.) 464; *Becker v. Boon*, 61 N. Y. 317.

In a contract for the purchase and sale of land, specific performance should not be decreed against the vendor, without first requiring full payment of the purchase money. *Jones v. Alley*, 4 Greene (Iowa) 181.

When specific performance of a contract is prayed for, money admitted to be due should be tendered and brought into court. *Suydam v. Martin*, Wright (Ohio) 384.

2. Where, after default, one waives a condition precedent to the performance of a contract, he cannot insist on the forfeiture provided for in the contract as the result of the non-performance. *Izard v. Kimmel*, 26 Neb. 51.

Specific performance of a contract to convey land may be decreed in favor of a purchaser who has tendered payment of one of the purchase-money notes punctually, where an effort to pay was made, where previous payments had been accepted after the time agreed on, and where, notwithstanding the failure to pay the last note, the vendor did not insist on a forfeiture, but for a year retained other notes. *Svabada v. Cheney*, 28 Fed. Rep. 500.

Where a vendee tenders the whole amount of the purchase money, and the interest due on the first installment, at the time the second falls due, and the vendor has taken no steps to release the vendee from his liability on the contract, specific performance may be decreed in favor of the vendee. *Gibbs v. Champion*, 3 Ohio 337.

One who had purchased land for a large sum sought the vendor on the day set for the delivery of the deed and for payment, going both to her place of business and of residence, but failing to find her, and believing that she was

evading his tender of payment, and that it was not safe to take such a sum home with him, deposited it in a bank at six P. M. On his way home after dark, she met him, tendered the deed, and made a demand for the purchase money with which he could not then and there comply. *Held*, that he was entitled to a decree for specific performance. *Hall v. Whittier*, 10 R. I. 530.

The vendee took possession under a written contract agreeing to pay the price at stated periods, and to construct a building. By the terms of the contract, if payments were not made at the time agreed, nor the building constructed, the vendee should forfeit all right to the property, and the vendor could take possession the same as if no contract had existed. In a suit by the vendee for specific performance, it appeared that the vendee had not complied with the agreement as to time of payment, but it also appeared that, during the existence of the contract, the time for payment had been verbally extended, and the vendee was to pay the whole price instead of partial payments named, and that he had made a tender of the purchase money within the time to which the payment had been extended. *Held*, that he was entitled to a specific performance of the contract. *Izard v. Kimmel*, 26 Neb. 51.

A vendor, on Feb. 19, agreed with his purchaser to deliver a deed April 1, on receipt of cash for part payment and a bond and mortgage to secure the unpaid balance. They met April 1, and the vendee handed the vendor the bond and mortgage, and had a certified check for the cash payment called for. Neither party made a tender. The vendor claimed that he was entitled to interest on the whole purchase money from Feb. 19, and after consulting with his counsel, returned and offered to carry out the contract "according to its terms;" he did not withdraw his construction thereof, nor propose to change the date of the deed. *Held*,

to prevent a strict performance or tender by plaintiff where it would be gross injustice to refuse him equitable relief on account of his technical failure of duty.¹ If payment was to be made in a particular way, the tender must conform to the obligation. Thus, where the consideration was to be labor, a tender of money instead was of no effect.² The tender made must accord with the plaintiff's full duty; and the offer by him of a less amount than his contract calls for, or of but a partial performance will not avail him.³

In the same way, one who seeks to compel another to fulfill a contract of purchase is required to plead and prove his ability and willingness to convey by a sufficient title the entire property which he has agreed to convey and a tender of a sufficient deed thereto. And he must put his vendee into

that a formal tender was not necessary to enable the purchaser to maintain a suit for specific performance. *Sellac v. Tallman*, 87 N. Y. 106. And see *Birdsall v. Waldron*, 2 Edw. Ch. (N. Y.) 315; *Johnson v. Sukeley*, 2 McLean (U. S.) 563; *Stevenson v. Maxwell*, 2 Sandf. Ch. (N. Y.) 279; *Clarke v. Elliott*, 1 Madd. 606.

1. *McHugh v. Wells*, 39 Mich. 175.

2. *Brewer v. Thorp*, 3 Ind. 262.

But compare *Daughdrill v. Edwards*, 59 Ala. 424. The facts of the case appeared to be substantially thus: In *Alabama*, in 1864, D bought land of E, giving for the balance of the purchase money two notes payable "in Confederate money, if paid at maturity," in 1865; and taking from E his bond for title thereon. E made no title and brought an action in ejectment, whereupon D filed a bill in equity, alleging that he had tendered Confederate money, etc., and that he was ready and willing to comply with the contract, and offering "to do whatever this court may order to be done in the premises respecting said Confederate money." And the court held that this was not equivalent to an offer to pay whatever may be found due; that the value of the land was the value of the property in lawful money at the time of the sale; that the specific performance should not be decreed, nor the action of ejectment enjoined.

3. *Ridley v. Ennis*, 70 Ala. 463; *Burkhalter v. Jones*, 32 Kan. 5.

A contract for the sale of land at forty per cent. above its costs, with a credit of one year, is not a usurious contract; and a tender of the original price, with six per cent. interest

thereon, is not sufficient to sustain an action to enforce a specific performance. *Casady v. Scallen*, 15 Iowa 93.

A contract to convey land for a sum of money to be paid in thirty days, cannot be specifically performed where \$381.50 was tendered, the amount due being \$393.10. *Sanford v. Bartholomew*, 33 Kan. 38.

The vendor of real estate, retaining the legal title, and the purchase money being unpaid, levied his execution for the purchase money, and purchased the vendee's interest in the land at the sale for a sum less than the amount of the purchase money; the vendee then tendered the sum due upon the original contract after deducting the amount ostensibly made by the sheriff's sale, and filed a bill for specific performance. He was refused relief. *Huntington v. Rogers*, 9 Ohio St. 511.

In a suit to compel the specific performance of a submission to referees, it appeared that the parties were required to deliver to each other deeds to carry out a partition of a barn and certain land; that plaintiff tendered a deed of the land, but not of the portion of the barn set off to defendant, which was on plaintiff's land. It was held that he could not compel the performance of the agreement on defendant's part. *Counce v. Studley*, 81 Me. 431.

But compare *Totty v. Harris* (Iowa, 1891), 48 N. W. Rep. 1050, where a substantial performance by complainant who tendered \$3,750 instead of \$3,784.42 under a misapprehension as to the correct amount due was held sufficient to entitle plaintiff to a decree on payment of the balance due. See

possession or offer to do so.¹ The deed must be brought into court and the tender of it kept good until the suit has been determined.²

As we have seen, it has been very generally held by the courts that the vendor may have a decree of specific performance if he demonstrates his ability to convey a good title by the time the decree is rendered, and that the tender of title is not a condition precedent.³ Should it appear, however, that on a fair construction of the agreement, performance is a condition precedent, performance must be averred and proved.⁴

All necessity for a formal tender disappears where the defend-

also *Irvin v. Gregory*, 13 Gray (Mass.) 215.

1. *Ex parte Hodges*, 24 Ark. 197; *Rudd v. Savelli*, 44 Ark. 145; *Sowle v. Holdridge*, 63 Ind. 216; *Miller v. Cameron*, 45 N. J. Eq. 95; *Freeman v. Stokes*, 12 Phila. (Pa.) 219.

In an agreement for sale of land wherein the vendee agrees "to purchase of said vendor, and pay said vendor, on or before the expiration of said term, the [price] for all said property," and that "on the said payment of said vendee, . . . the said vendor contracts and agrees to make and deliver to the said vendee a good and sufficient deed," the covenants are dependent and concurrent; and, where the vendor fails to tender his deed at the time named for the performance of the agreement, he cannot afterwards recover of the vendee for non-performance. *Powell v. Dayton, etc., R. Co.*, 13 Oregon 446.

What Constitutes a Sufficient Tender by Vendor.—If the vendor would enforce a contract for the purchase of real estate he must aver a tender of a sufficient warranty deed, and the tender must be kept good by bringing the deed into court, or by averring a readiness and willingness to execute a deed that will vest title in the purchaser. *Goodwine v. Morey*, 111 Ind. 68.

Complainant, in a bill to compel specific performance of a contract to exchange lands, showed that he notified the other party to meet him and exchange deeds at the place designated for the purpose in their contract; that he himself was there accordingly, and executed a deed of his land, which he left for delivery to the other, who had not appeared. *Held*, a sufficient tender and request; and that complainant need not tender to defendant a deed to be executed by him. *Daily v. Litchfield*, 10 Mich. 29.

2. *Benton v. Shreeve*, 4 Ind. 66;

Melton v. Coffelt, 59 Ind. 310; *Sowle v. Holdridge*, 63 Ind. 213; *Goodwine v. Morey*, 111 Ind. 68; *Overly v. Tip-ton*, 68 Ind. 410.

3. See *supra*, this title, *Contracts Relating to Land*.

Accordingly it is held, in a recent West Virginia decision, that a deed need not be tendered with the complaint in order that that pleading shall be good on demurrer. *Tavener v. Barrett*, 21 W. Va. 656.

Delivery or tender of a deed is not necessary before bringing his action by a vendor, to compel specific performance by the vendee. *Hawk v. Greensweig*, 2 Pa. St. 295; *Winton v. Sherman*, 20 Iowa 295; *Rutherford v. Haven*, 11 Iowa 587; *Wells v. Smith*, 7 Paige (N. Y.) 22; 31 Am. Dec. 274. To the contrary, *Klyce v. Broyles*, 37 Miss. 524.

Where a vendor comes into equity to compel his vendee to receive a title, mere neglect to tender a deed, where the vendee is not injured by the delay, will not preclude the vendor from the aid of the chancellor. *Woodson v. Scott*, 1 Dana (Ky.) 470.

An administrator who seeks to enforce a land contract made by his intestate need not actually tender the deed to the purchaser, it being sufficient if he show that he is able and willing to make the deed upon payment of the purchase money. *Faulkner v. Williman* (Ky. 1891), 16 S. W. Rep. 352.

4. *Wilson v. Union Sav. Assoc.*, 42 Fed. Rep. 421; *Mather v. Scoles*, 35 Ind. 1; *Vawter v. Bacon*, 89 Ind. 565; *Bruce v. Tilson*, 25 N. Y. 194.

Where a contract provides that differences between the parties shall be submitted to arbitrators, equity will not enforce specific performance of the contract, unless plaintiff show a refusal on the part of defendant to arbitrate. *Lassar v. Baldrige*, 32 Mo. App. 362.

ant denies or repudiates the contract;¹ so, if it be evident that a tender would be rejected.² In such cases a simple offer to perform will meet the requirements of equity.³

Time of tender is often an important element. The party in search of equitable relief is expected to perform his obligation at the time agreed upon as well as in the manner stipulated. And any neglect or delay upon his part may be construed as a waiver of his right to compel a performance by the other party.⁴

1. *Pollock v. Brainard*, 26 Fed. Rep. 732; *Cheney v. Libby*, 134 U. S. 68; *Goodale v. West*, 5 Cal. 339; *Dowd v. Clarke*, 54 Cal. 48; *Turner v. Parry*, 27 Ind. 163; *Martin v. Merritt*, 57 Ind. 34; 26 Am. Rep. 45; *Young v. Daniels*, 2 Iowa 126; 63 Am. Dec. 477; *Veeder v. McMurray*, 70 Iowa 118; *Harshman v. Mitchell*, 117 Ind. 312; *Irvin v. Gregory*, 13 Gray (Mass.) 215; *Gill v. Newell*, 13 Minn. 462; *Brown v. Eaton*, 21 Minn. 409; *Wilbourn v. Bishop*, 62 Miss. 341; *Deichmann v. Deichmann*, 49 Mo. 107; *Birdsall v. Waldron*, 2 Edw. Ch. (N. Y.) 315; *North v. Pepper*, 21 Wend. (N. Y.) 636; *Crary v. Smith*, 2 N. Y. 60; *Baumann v. Pinckney*, 118 N. Y. 604; *Brock v. Hidy*, 13 Ohio St. 306; *Bradford v. Foster*, 87 Tenn. 4; *Welch v. Darling*, 59 Vt. 136; *White v. Dobson*, 17 Gratt. (Va.) 262; *Wright v. Young*, 6 Wis. 127; 70 Am. Dec. 453; *Cunningham v. Brown*, 44 Wis. 72; *Hunter v. Daniel*, 4 Hare 420.

It is not necessary that a vendor should execute and tender a deed to the vendee in order to entitle him to specific performance of the contract, where he is present at the time and place appointed for delivering it, and the vendee then positively declines and refuses to receive a deed. *Pittenger v. Pittenger*, 3 N. J. Eq. 156.

A purchaser of land, who had paid part of the purchase money, filed his bill for a specific performance, which was resisted by the vendor. *Held*, that the plaintiff could not be compelled to pay the residue of purchase-money into court, to abide the event of the suit. *Birdsall v. Waldron*, 2 Edw. Ch. (N. Y.) 315.

To entitle the purchaser to the specific performance of a contract to convey land, it is not necessary that he tender the consideration or bring it into court, if the vendor has continually denied the binding force of the contract, and if the purchaser has been at all times ready to perform. *Hopwood v. Corbin*, 63 Iowa 218.

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If, when the purchaser offers to pay the last of the purchase money when due, the vendor declines to give a deed as contracted, on the ground that an incumbrance prevents, the purchaser may maintain a bill for specific performance without a formal tender. *Mathison v. Wilson*, 87 Ill. 51.

2. *Stewart v. Cross*, 66 Ala. 22; *Root v. Johnson* (Ala. 1891), 10 So. Rep. 293; *Deichmann v. Deichmann*, 49 Mo. 107.

A tender of performance need not be made where it would be wholly nugatory. Where a lessee, under a lease giving him the right to purchase, had shown his election to purchase by making permanent improvements on the premises to the value of several thousand dollars, and had provided himself with gold wherewith to make a tender, and there was strong reason to believe that a tender would have been wholly unavailing to induce the heirs of the lessor to execute a deed, one or more of them having previously declared their determination not to execute a deed, and their belief that they were not obliged to execute it, and where the facts further showed that the premises were incumbered by a dower right and by a mortgage. *Held*, that a strict tender of the purchase-money was unnecessary. *Kerr v. Purdy*, 50 Barb. (N. Y.) 24.

3. *Veeder v. McMurray*, 70 Iowa 118; *Deichmann v. Deichmann*, 49 Mo. 107.

4. See *infra*, this title, *Laches—Time, When Essential*.

A contract for the payment of the price of land "by the first day of August," is a contract to pay on or before that day, and therefore a tender on July 31 is good. *Parker v. McAllister*, 14 Ind. 12.

A tender by a grantee, of the purchase money, and demand of a conveyance, after a bill filed by the grantor for a specific performance, is a nullity. *Knickerbacker v. Harris*, 1 Paige (N. Y.) 209.

The making of a tender is construed as an admission of liability to the extent legitimately implied by the tender, and no farther, and is in no sense to be taken as a general admission.¹

Tender made to one of two co-obligees is sufficient.

If the purchaser has died, a tender to his executor—who is also a devisee—of a deed to the devisees is sufficient, a tender to all the heirs being unnecessary.² But where the purchaser has assigned his contract for a deed before payment, and the assignee has neglected to make the payments, a tender of conveyance is properly made to the original purchaser.³

2. **Demand.**—The defendant must be given an opportunity to comply with his contract before suit is brought. Hence it is necessary to show either a demand and refusal,⁴ if a time was not named in the contract, or that a demand would have been vain.⁵

1. *Brix v. Ott*, 101 Ill. 70.

In *Irvin v. Gregory*, 13 Gray (Mass.) 215, the court, by Shaw, C. J., said: "When a strict tender of money is required, it must be an unconditional offer of the full amount due, leaving it only at the will of the other to accept it. But when in their nature the stipulations are, the one to pay money and the other to execute a conveyance and no time fixed, and no provision that either is to be done first, the covenants are mutual and dependent. The one is not bound to pay without receiving his conveyance, nor the other to part with his land without receiving his money. The performances must be simultaneous. In such case it is not necessary on the part of the purchaser to make a strict tender, and actually to deliver over the money unconditionally, without his deed; it is sufficient that upon reasonable notice to the owner that he is ready and willing to perform, and when the performance is the payment of money, that he has the money and is able and prepared to pay, and demands the deed, and the other absolutely refuses to receive the money and execute the deed, that is a sufficient tender of performance to warrant the party so offering to maintain his action." See *Kane v. Hood*, 13 Pick. (Mass.) 281.

2. See *Lane v. Ready*, 12 Ind. 475.

3. *Brinkerhoff v. Olp*, 35 Barb. (N. Y.) 27; *Corbus v. Teed*, 69 Ill. 205.

4. *Wright v. Le Claire*, 4 Greene (Iowa) 420; *Mather v. Scoles*, 35 Ind. 1; *Reed v. Hodges*, 80 Ind. 304; *Harless v. Petty*, 84 Ind. 269; *Burns v. Fox*, 113 Ind. 205. See also *Cornell v. Hayden*, 114 N. Y. 278.

A purchaser of land, whose conveyance is to be made upon the payment of notes given for the purchase money cannot maintain a bill to enforce the execution of the deed, filed after all the notes have become due, without showing a payment of all the notes, or a proper offer to pay them, or something equivalent. *West v. Chase*, 3 Ind. 301.

Pursuant to agreement, A set apart certain ware for the payment of the notes, and subsequently filed his bill to compel B to execute to him a deed, but did not aver or prove a demand of the deed. *Held*, that by setting apart the ware, it became the property of B, and the notes were thereby paid; and that B's absence from the State was a sufficient excuse for A's not demanding a deed, had the demand been otherwise necessary. *West v. Chase*, 3 Ind. 301.

In making demand for a deed it is not necessary that the party making the demand prepare and tender the instrument to be executed, although such has been the English practice. *Taylor v. Longworth*, 14 Pet. (U. S.) 172; *Wells v. Smith*, 2 Edw. Ch. (N. Y.) 79; *Hill v. Hobart*, 16 Me. 164; *Tinney v. Ashley*, 15 Pick. (Mass.) 546; 26 Am. Dec. 620; *St. Paul Division v. Brown*, 9 Minn. 157.

5. *Law v. Henry*, 39 Ind. 414; *Burns v. Fox*, 113 Ind. 205; *Cutsinger v. Ballard*, 115 Ind. 93; *Ayer v. Ayer*, 16 Pick. (Mass.) 327; *Heard v. Lodge*, 20 Pick. (Mass.) 53; 32 Am. Dec. 197; *Dye v. Forbes*, 34 Minn. 12.

In an action to compel an administrator to convey—*held*, that it was not necessary to have made a tender and

But this is only necessary to guide the court in its award of costs. The requirements are not strictly binding upon courts of equity, the rights of the parties resting with the discretion of the chancellor instead of being governed by the rigid provisions of the common law.¹

IX. LACHES;² TIME, WHEN ESSENTIAL.—Diligence is expected of all who seek equitable relief. One who disregards the rights of others by unnecessary or unreasonable delay in performing his obligation under a contract, thereby loses the right to require performance of the other party. Where time is in any degree an essential element, his laches will render a decree in his favor inequitable. Delay either in performing his duty or in bringing suit to enforce his rights will endanger his case and justify a court of equity in refusing to give him a hearing.

"It may be laid down as an acknowledged rule in courts of equity," says Chancellor Kent³ "that where the party who

demand, as the administrator could not have conveyed without the direction of the court, and the demand would have been in vain. *Collins v. Vandever*, 1 Iowa 573.

A demand is not essential in a suit for specific performance against the administrator and heirs of the vendor, where the administrator has filed a petition to sell the land as the property of his intestate, and the heirs, as such, have been asserting their title thereto, it being clear that the demand would be unavailing. *Denlar v. Hile*, 123 Ind. 68.

1. *Gray v. Dougherty*, 25 Cal. 266; *Jones v. Petaluma*, 36 Cal. 231.

In *Bruce v. Tilson*, 25 N. Y. 194, the court by Smith, J., said: "The rules applicable to the making of a demand before the commencement of a suit do not apply to equitable actions. They apply to strict legal rights. In equity the court has a discretion in respect to costs, and if an action is brought to enforce an equitable right unnecessarily and unreasonably and without giving the defendant a fair opportunity, upon request or otherwise, to allow and to satisfy the plaintiff's claim without suit, the relief may be and ordinarily will be granted without costs, and the court, if it thinks proper, may make the plaintiff pay the defendant's costs." See *Vroom v. Dittmas*, 4 Paige (N. Y.) 535.

2. Compare LACHES, vol. 12, pp. 555, 558, 581.

Diligence Necessary.—"The party seeking performance," says the court by Shepley, J., in *Rogers v. Saunders*, 16

Me. 92; 33 Am. Dec. 635, "must show that he has not been in fault, but has taken all proper steps towards a performance on his own part, and has been ready, desirous and prompt to perform." *Milward v. Thanet* (Earl), 5 Ves. Jr. 720; *Durant v. Comegys* (Idaho 1891), 28 Pac. Rep. 425; *Hoyt v. Tuxbury*, 70 Ill. 331; *Cook v. Bean*, 17 Ind. 504.

To the same effect are *Rector v. Price*, 1 Mo. 373; *Ludlum v. Buckingham*, 35 N. J. Eq. 71.

3. See *Benedict v. Lynch*, 1 Johns. Ch. (N. Y.) 378; 7 Am. Dec. 484.

See also to the rule that unexplained delay will prevent specific performance: *Milward v. Thanet* (Earl), 5 Ves. Jr. 720; *Guest v. Hornsfray*, 5 Ves. 818; *Ally v. Deschamps*, 13 Ves. 225; *New York Paper-Bag Mach. Co. v. Union Paper-Bag Mach. Co.*, 32 Fed. Rep. 783; *Pratt v. Carroll*, 8 Cranch (U. S.) 471; *Watts v. Waddle*, 6 Pet. (U. S.) 389; *Davison v. Davis*, 125 U. S. 90; *Hayes v. Hall*, 4 Port. (Ala.) 374; 30 Am. Dec. 530; *Hemphill v. Miller*, 16 Ark. 271; *Atkins v. Rison*, 25 Ark. 141; *Green v. Covillaud*, 10 Cal. 317; 70 Am. Dec. 725; *Molaskey v. Peery*, 76 Cal. 84; *Knox v. Spratt*, 23 Fla. 64; *Peck v. Brighton Co.*, 69 Ill. 200; *Marshall v. Peck*, 91 Ill. 187; *Cohn v. Mitchell*, 115 Ill. 124; *Bennett v. Welch*, 25 Ind. 140; 87 Am. Dec. 354; *Thornburgh v. Cole*, 27 Kan. 490; *Johnston v. Mitchell*, 1 A. K. Marsh. (Ky.) 225; 10 Am. Dec. 727; *Calvert v. Nichols*, 8 B. Mon. (Ky.) 264; *Goldsmith v. Guild*, 10 Allen (Mass.) 239; *Ritson v. Dodge*, 33

Mich. 463; *Russell v. Nester*, 46 Mich. 290; *McDermid v. McGregor*, 21 Minn. 111; *Haughwout v. Murphy*, 21 N. J. Eq. 118; *Lawrence v. Lawrence*, 21 N. J. Eq. 317; *Merritt v. Brown*, 21 N. J. Eq. 401; *Morgan v. Bergen*, 3 Neb. 209; *Ruckman v. King*, 19 N. J. Eq. 360; *Young v. Young*, 45 N. J. Eq. 27; *Hatch v. Cobb*, 4 Johns. Ch. (N. Y.) 561; *Delavan v. Duncan*, 49 N. Y. 485; *Campbell v. Hicks*, 19 Ohio St. 433; *Love v. Welch*, 97 N. Car. 200; *Alexander v. Wunderlich*, 118 Pa. St. 610; *Blackwell v. Ryan*, 21 S. Car. 112; *Jones v. Jones*, 11 Phila. (Pa.) 559; *Ives v. Armstrong*, 5 R. I. 567; *Smith v. Hampton*, 13 Tex. 459; *Eppinger v. McGreal*, 31 Tex. 147; *Howe v. Rogers*, 32 Tex. 218; *Williams v. Mattocks*, 3 Vt. 189; *Richardson v. Baker*, 5 Call (Va.) 514; *Pigg v. Corder*, 12 Leigh (Va.) 69; *Booten v. Scheffer*, 21 Gratt. (Va.) 474; *Pratt v. Ayer*, 3 Chand. (Wis.) 265. Compare *Knox v. Spratt* (Fla. 1887), 6 So. Rep. 924.

Lapse of Time.—In the absence of other equitable considerations, lapse of time will prevent plaintiff's recovery where the delay has continued through any extended period, and is unexplained. Thus: A delay of five months was held fatal, *Mix v. Baldue*, 78 Ill. 215. Two years, *Fox v. Phelps*, 18 Fed. Rep. 120. Three years, *Boston, etc., R. Co. v. Bartlett*, 10 Gray (Mass.) 384; *Fuller v. Hovey*, 2 Allen (Mass.) 324; 79 Am. Dec. 782; *contra*, *Osborne v. Bremer*, 1 Desaus. Eq. (S. Car.) 486. Four years, *McCabe v. Mathews*, 40 Fed. Rep. 338. Five years, *McMillin v. McMillin*, 7 T. B. Mon. (Ky.) 560; *McWilliams v. Long*, 32 Barb. (N. Y.) 194; *Chilhowie Iron Co. v. Gardiner*, 79 Va. 305; *Fitch v. Wallard*, 73 Ill. 92. Over six years, *Henderson v. Hicks*, 58 Cal. 364. Eight years, *Ruff's Appeal*, 117 Pa. St. 310. Eight years' delay to perform a contract which was to be performed within three months, *McCabe v. Mathews*, 40 Fed. Rep. 338. Nine to eleven years, *Broaddus v. Ward*, 8 Mo. 217; *Pickering v. Pickering*, 38 N. H. 400; *Strickland v. Fowler*, 1 Dev. & B. Eq. (N. Car.) 629; *Glasscock v. Nelson*, 26 Tex. 150; *Alexander v. Hoffman*, 70 Ill. 114; *Hedberg v. Jones*, 73 Ill. 149; *Iglehart v. Vail*, 73 Ill. 63; *McKin v. Williams*, 48 Tex. 89. Fourteen years, *Haggerty v. Elyton Land Co.*, 89 Ala. 428. Eighteen years, *Johnston v. Mitchell*, 1 A. K. Marsh. (Ky.) 225; 10 Am. Dec. 727. Over twenty

years, *Baird v. Baird*, 5 J. J. Marsh. (Ky.) 580; *Sprigg v. Albin*, 6 J. J. Marsh. (Ky.) 158; *Williams v. Hart*, 116 Mass. 513. Thirty years, *Bracken v. Martin*, 3 Yerg. (Tenn.) 55. Seventy years, *Van Zandt v. Mayor, etc.*, N. Y., 8 Bosw. (N. Y.) 375.

But it has been held in *Texas* that when the holder of a title bond has performed his part of the contract he will be entitled to specific performance any time within ten years. *Reed v. West*, 47 Tex. 240. See *McKin v. Williams*, 48 Tex. 89.

In equity, lapse of time will create a presumption that the parties have waived or settled their rights, and stale claims when brought into a court of chancery are received without favor, and held entitled to but little consideration, unless attended with circumstances that will repel such presumption. *De Cordova v. Smith*, 9 Tex. 129; 58 Am. Dec. 139.

A vendor having renounced his agreement in April, 1850, gave notice thereof to the vendee at that time. The vendee in July, 1852, brought his bill for specific performance. Held, that he had lost his remedy in equity, by his delay in filing his bill. *White v. Bennett*, 7 Rich. Eq. (S. Car.) 260.

In a suit by a married woman for the specific performance of a contract, where it appeared that for seventeen months she had done nothing to perform her part of the contract, although she had previous to that paid money on the contract, and she had not before suit tendered herself ready to perform and demanded performance of the contract—held, that she was not entitled to a decree for specific performance. *Bullock v. Adams*, 20 N. J. Eq. 367.

Even though the rights of third persons have not intervened equity will not enforce a parol gift of land after a delay of thirty-one years, where the terms and conditions of the gift are not clearly shown. *Frame v. Frame*, 32 W. Va. 463.

Defendants contracted to convey lands to complainant, in consideration for which he was to procure them a homestead right in other lands. The evidence showing that he lost such right by reason of their non-compliance with the contract, a decree of specific performance, without awarding the homestead right to defendants, is proper. *Dulin v. Prince*, 124 Ill. 76.

Plaintiff for more than a year neglected to complete his contract to

purchase real estate, and on two occasions expressly refused to perform, on the ground that there was a defect in the title, which objection was unsubstantial. *Held*, that specific performance must be denied. *Simpson v. Atkinson*, 39 Minn. 238.

Where the purchase of land is made upon condition the title is found good, the purchaser may have a reasonable time in which to determine whether he will take the title the vendor has, or reject it. But he cannot keep the contract open indefinitely, so as to have the benefit of a rise in the value of the property, or relieve himself in case of a depreciation. *Hoyt v. Tuxbury*, 70 Ill. 331.

If one of the parties to a contract for the acquisition of land neglects or refuses to contribute his share of the expense until he discovers that the contract is profitable, he will not be entitled to specific performance of the contract. *McClure v. Purcel*, 3 A. K. Marsh. (Ky.) 61. See also *Diamond State Iron Co. v. Todd* (Del. 1888), 14 Atl. Rep. 27.

Where a grantor had received a draft, drawn by the grantee upon a third person, as a consideration for his agreement to convey, it was held that he could not defend himself against a bill for specific performance, on the ground of want of consideration, unless he had used ordinary diligence to collect the draft. *Woodcock v. Bennet*, 1 Cow. (N. Y.) 711; 13 Am. Dec. 568.

Where a contract of sale gives the purchaser of land an option to avoid the contract for objections to the title, any delay in deciding whether he will accept the same will defeat his right to a specific performance. *Hoyt v. Tuxbury*, 70 Ill. 331.

In *Northrup v. Stevens*, 39 Minn. 105, the court refused to decree specific performance of an alleged verbal agreement to convey land where the proof of the agreement was uncertain, and suit was not brought until the lapse of thirty-two years from the time of the alleged agreement, nor until six years after the death of a party in interest whose land was its subject. Plaintiff was not exonerated from laches by the fact that, during nineteen years of the intervening period, the party to be charged had kept his property out of his hands to avoid the claims of creditors, nor by frequent promises on his part to make the conveyance.

In *Cook v. Stafford*, 86 Mich. 163, the court refused to grant specific performance, taking the ground that the complainant had been guilty of inexcusable neglect. The evidence showed that thirty-six years before a father had agreed to convey land to his son; it appeared that for thirty-five years, until the father's death, each had at divers times exercised acts of ownership over such land; that the father kept the fences in repair and paid the taxes; that five years after the making of the bond, with his son's knowledge, he mortgaged said land as security for payment for certain property, a part of which, after the discharge of such mortgage, he conveyed to his son. At the time of the trial no competent witness as to the nature of this transaction was living. It did not appear that the son ever requested performance, nor was any sufficient reason shown for the delay.

Delaying for fifteen years to call for the specific performance of a parol contract to convey land, and not attempting to enforce it in the lifetime of the contractor, if it does not of itself bar an action for relief, is a circumstance of great weight against the complainant, and will make the court require more strict and full proof, and closely scrutinize the evidence. *Eyre v. Eyre*, 19 N. J. Eq. 102.

Without express notice, when the party who applies for a specific performance has omitted to perform his part of the contract by the time appointed for that purpose, without being able to assign sufficient excuse for his delay, and when there is nothing in the conduct of the other party that amounts to an acquiescence in that delay, the court will not compel a specific performance. *Kirby v. Harrison*, 2 Ohio St. 326; 59 Am. Dec. 677.

Specific performance of a land contract will be denied where complainant has delayed more than thirty-five years after the contract was made, and twenty-eight years after it was destroyed, before making any effort to enforce it, though he knew that it rested altogether in the recollection of defendant and himself, where his statement of the contract is not definite, and some of its essentials are denied by defendant, who testifies that the contract was to be performed within six years, since which time defendant has treated the contract as having no force, and where, meanwhile, the property has greatly

increased in value; and it is immaterial that complainant has asserted a claim from time to time. *Van Buren v. Stocking*, 86 Mich. 246.

Where a contract is binding upon the vendor only, the vendee must be prompt in demanding a performance of it, and a delay of more than thirty years without payment of the purchase money or entry into possession, will be regarded as such gross laches that the court will refuse a decree for a specific performance of the contract. *Love v. Welch*, 97 N. Car. 200.

Excuses for Delay Held Insufficient.—By the terms of a contract to convey land, the last payment was due in January, 1858, and payment thereof was not offered until in January, 1873. It was held that the great intimacy and friendship between the parties, the civil war, the purchaser being a citizen of Memphis, Tennessee, the death of the purchaser in 1863, and the minority of his heirs were insufficient excuses for the delay, and a decree for specific performance was, under the circumstances, denied. *Walker v. Douglas*, 70 Ill. 445.

If the purchase money on a contract for the sale of lands falls due in the lifetime of the vendee, the infancy of his heir will not authorize a decree for specific performance after a considerable lapse of time. *Henry v. Conn*, 12 Ohio 193.

An heir cannot plead his infancy to excuse the non-assertion of his rights under an executory contract made with his ancestor, when the immediate performance of his part of the contract is essential to the interest of the other party. *Walker v. Douglas*, 70 Ill. 445.

Defendant promptly executed a contract of sale of land, and sent it to plaintiff to sign, but the latter never returned it, giving as an excuse that it had become defaced and blotted with ink. About six months later plaintiff sent defendant what purported to be copies of the original contract, but defendant did not sign them until more than a year later, giving as a reason for the delay that it had no copy of the original by which to determine whether plaintiff's copies were correct. It was held that, as plaintiff had no reason for requiring the execution of these copies, the delay in obtaining them was no excuse for the delay in tendering the deed. *Chicago, etc., R. Co. v. Wisconsin, etc., R. Co.*, 76 Iowa 615.

Fourteen years' delay in bringing a

suit for specific performance is not sufficiently excused by a general averment of ignorance, without distinct allegations of specific facts showing good reasons therefor. *Haggerty v. Elyton Land Co.*, 89 Ala. 428.

Excuses for Delay.—Because there was an unsatisfied record of a judgment against a former owner of the lot sold, although in fact the judgment had been paid, the purchaser refused the deed. Afterwards he sued the vendor for specific performance, and it was held that if the objections to the title were well founded and urged in good faith, the purchaser was excusable for not performing at the time of the tender; but, if otherwise, he could not be excused for the delay occasioned in the performance on his part. *Hoyt v. Tuxbury*, 70 Ill. 331.

A court of equity will not refuse to decree specific performance in favor of a purchaser who has delayed payment on account of the doubtfulness of the title, while litigation was pending to settle that doubt. *Galloway v. Barr*, 12 Ohio 354.

In *Peters v. Canfield*, 74 Mich. 498, the court decided that delay by the assignee of a contract for the sale of land, in tendering payment and bringing suit for specific performance, is excused where he entertained the idea that the vendor's refusal to recognize his rights was done merely to bother him a little (the vendor having stated to others that that was his object), and also where the vendor has refused to render any statement of payments theretofore made, so as to enable the assignee to know how much to tender, and also where it does not appear that the delay has done the vendor any injury.

Two or three years' delay before claiming title to land orally promised to complainant and bringing suit, is excused by a showing that complainant thought her rights unenforceable for want of a written promise. *Brown v. Sutton*, 129 U. S. 238.

A bill for the specific performance of a parol agreement to convey land cannot be maintained after a lapse of twenty-five years, unless the complainant could not have asserted his claim before; and the neglect of near relations to aid a minor in the assertion of such claims is a circumstance entitled to consideration, when there is no pretense that they were in collusion with the other party. *Dragoo v. Dragoo*, 50 Mich. 573.

Where a party neglects for a great length of time to assert his right under a contract, specific performance of it will not be decreed in his favor. But where there is sufficient excuse for the delay, lapse of time will not bar relief. And where there was a delay of thirty years, a part by mutual agreement of the parties, and the residue, except three years, during the insanity of the complainant's ancestor, who made the contract—held that the lapse of time constituted no objection to granting specific relief. *Craig v. Leiper*, 2 Yerg. (Tenn.) 193; 24 Am. Dec. 479.

A purchaser of land agreed to pay therefor in a week. Upon a showing that he had been unable to have the title examined within that time it was held that he was justified in requiring further delay, and that, a month after the agreement was made he could maintain a suit for specific performance. *Willis v. Dawson*, 34 Hun (N. Y.) 492.

The owner of a leasehold estate sued the owner of the reversion, twelve years after the expiration of the lease, which was for ninety-nine years, to enforce specific performance of a covenant in the lease, on the part of the lessor, to renew "at any time during the continuance of the existing term." As an excuse for the delay in demanding a renewal it was alleged that the plaintiff derived his title to the lease through a sale of the estate of a deceased person, purporting to be a sale of the fee simple. It appeared, however, that soon after the expiration of the term the owner of the freehold had brought an action of ejectment against plaintiff, thus disclosing to him his real title. Specific performance was refused. (*Robinson J.*, dissenting.) *Myers v. Silljacks*, 58 Md. 319.

In *Taylor v. Longworth*, 14 Pet. (U. S.) 172, the court by Story, J., says: "Relief will be given to the party who seeks it if he has not been grossly negligent, and comes within a reasonable time, although he has not complied with the strict terms of the contract; but in all such cases the court expects the party to make out a case free from all doubt, and show that the relief which he seeks is under all circumstances equitable, and to account in a reasonable manner for his delay and apparent omission of his duty." *Quoted in Delavan v. Duncan*, 49 N. Y. 485.

As to excuses for delay, generally, see *Cohn v. Mitchell*, 115 Ill. 124;

Logan v. McChord, 2 A. K. Marsh. (Ky.) 224; *Ashmore v. Evans*, 11 N. J. Eq. 151; *Campbell v. McFadin*, 71 Tex. 28.

Laches—Instances.—A made a contract with B under which B became entitled to a number of acres of land out of one of two different tracts, at his option, or to a certain sum of money with interest. A died, and after a delay of eighteen years, B brought his action on the contract. *Held*, that if it devolved on B to take the initiative in the execution of the contract, he had lost his rights by his laches; if on A, and the contract was not executed within a reasonable time, it became a moneyed demand, and became stale unless prosecuted within four years after the lapse of such reasonable time. *Watson v. Inman*, 23 Tex. 531.

Where a party, seeking specific performance, had taken no step to enforce it for twenty years, and had sold a portion of the property which was the consideration of the defendant's promise, he was left to his remedy, if any, at law. *McGalliard v. Aikin*, 2 Ired. Eq. (N. Car.) 186.

Specific performance of an agreement to convey land will not be enforced if the purchaser has not fulfilled his part of the agreement by an offer of the payment of the purchase-money, and has neglected to seek legal redress until nine months after the time fixed for the payment, notwithstanding that the vendor had declared two years prior to such time that he never would comply with the contract on his part. *Gentry v. Rogers*, 40 Ala. 442.

In 1839, A agreed in writing to take from C a lot on a ground rent, made improvements thereon, and paid ground rent till 1850, often demanding but being refused a conveyance. In 1851, he notified C that he would not recognize his title, and should claim a return of rents paid on the ground that he had no title, there being an outstanding term of 10,000 years. C rested till 1864, and then filed a bill for specific performance, without a step taken to acquire title himself or to make one to A. *Held*, that his contract was stale, and his prayer should not be granted. *Cadwalader's Appeal*, 57 Pa. St. 158.

Where a party in possession of land under a written contract of sale makes default in his payments, and thereupon suffers the vendor to recover judgment against him in an ejectment suit,

and oust him from the premises, he has no equity to entitle him to claim a specific performance. *Tibbs v. Morris*, 44 Barb. (N. Y.) 138.

Change of Circumstances Meanwhile.

—One who desires to enforce specific performance of a parol contract for the purchase of land, must present his claim without any unnecessary delay, and while affairs remain in such a condition that performance can be enforced without injury to others, and must not have done any act that is incompatible with his claim for performance. *Porter v. Dougherty*, 25 Pa. St. 405.

For if while he is delaying in the fulfillment of his obligation, the value of the property or the circumstances of the parties have changed so that it may prove unfair to others to compel the performance, it will not be enforced. See *supra*, this title, *Fairness—Change of Circumstances*. *Mundy v. Davis*, 20 Fed. Rep. 355; *Green v. Covillaud*, 10 Cal. 317; 70 Am. Dec. 725; *McKay v. Carrington*, 1 McLean (U. S.) 50; *Brashier v. Gratz*, 6 Wheat. (U. S.) 528; *Holgate v. Eaton*, 116 U. S. 33; *Requa v. Snow*, 76 Cal. 590; *Shortall v. Mitchell*, 57 Ill. 161; *Young v. Daniels*, 2 Iowa 126; 63 Am. Dec. 477; *Williams v. Starke*, 2 B. Mon. (Ky.) 196; *Maddox v. McQueen*, 3 A. K. Marsh. (Ky.) 400; *Smith v. Canaler*, 83 Ky. 367; *Rogers v. Saunders*, 16 Me. 98; 33 Am. Dec. 640; *Boston, etc., R. Co. v. Bartlett*, 10 Gray (Mass.) 384; *Young v. Rathbone*, 16 N. J. Eq. 224; 84 Am. Dec. 151; *Johns v. Norris*, 22 N. J. Eq. 102; *Jackson v. Edwards*, 22 Wend. (N. Y.) 498; *Peters v. Delaplaine*, 49 N. Y. 362; *Hubbell v. Van Schoenig*, 49 N. Y. 326; *Francis v. Love*, 3 Jones Eq. (N. Car.) 321; *Dentarest v. McKee*, 2 Grant Cas. (Pa.) 248; *Callen v. Ferguson*, 29 Pa. St. 245; *DuBois v. Baum*, 46 Pa. St. 537; *Miller v. Henlan*, 51 Pa. St. 265; *Andrews v. Bell*, 56 Pa. St. 343; *Norris v. Knox*, 1 Pittsb. Rep. (Pa.) 56; *Ruff's Appeal*, 117 Pa. St. 310; *Smith v. Christmas*, 7 Yerg. (Tenn.) 565; *Childress v. Holland*, 3 Hayw. (Tenn.) 274; *Pillow v. Pillow*, 3 Humph. (Tenn.) 644; *Edwards v. Atkinson*, 14 Tex. 373.

Change of Circumstances.—Time is frequently considered not of the essence of an agreement to convey lands; but in all cases where the value of the property has materially changed, or where great financial changes have

materially altered the relative value of money and land, time will be considered material, and a party will not be allowed to lie by until the change sets in his favor, and then ask for specific performance. *Merritt v. Brown*, 19 N. J. Eq. 286.

The court refused to decree specific performance of a contract for the sale of a house, where there had been a delay of eight months in completing the house, which had greatly depreciated in the mean time. *Colcock v. Butler*, 1 Desaus. (S. Car.) 307.

In a bill in equity for specific performance, the general offer to do and perform whatever the court shall decree ought to be done on the part of the complainant, is not enough to maintain his case, when it appears that, prior to the bringing of the suit, he never offered or intended to perform the contract, and that the bill is filed a long time after such things should have been performed, and when the condition of the parties has materially changed. *Ely v. McKay*, 12 Allen (Mass.) 323.

A contract to convey lands will not be specifically enforced when the complainants have unreasonably delayed the filing of their bill, and the defendant has meanwhile made extensive improvements upon the land greatly in excess of its original value. *Penrose v. Leeds*, 46 N. J. Eq. 294.

Where a landowner contracts with an attorney of the owner of certain mill property for an exchange, the deeds to be exchanged simultaneously, the purchaser of the mill to take it subject to certain incumbrances, and the land to be transferred subject to an incumbrance, and the purchaser of the mill tenders his deed and an abstract of his land, but there is a delay on the part of the mill owners, the mill meantime being burned, the contract will not be enforced. *Kinney v. Hickox*, 24 Neb. 167.

A purchaser of property understood by both parties to have been bought for immediate use cannot be compelled to perform when seller delays making title so long as to frustrate the object of the purchase. So held upon suit for a specific performance of a receiver's sale. *Parsons v. Gilbert*, 45 Iowa 33.

Specific performance of an agreement to convey land by warranty deed, will be refused if there has been a delay of six months, when the value was

applies for a specific performance has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay; and where there is nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay the court will not compel a specific performance." If, while he has been sleeping on his rights, the interests of third parties have intervened, he will be estopped from claiming a specific performance as against them. If he has failed to assert his claims and has permitted innocent purchasers to come into possession and make improvements while he has stood by in silence, he will be deemed to have waived and lost his equitable interests.¹

rapidly increasing. *Chicago, etc., R. Co. v. Stewart*, 19 Fed. Rep. 5.

Specific performance of a contract to convey land will not be granted, where the grantee has delayed for nearly six years in bringing his suit, and meanwhile the grantor has died, the taxes have all been paid by him and his heirs, and the land has increased 20 to 50 fold in value. *Combs v. Scott*, 76 Wis. 662.

But compare *Austin v. Wacks*, 30 Minn. 335, where it was held that if time be not essential, and the situation of the parties is unchanged, and the delay is reasonably excused, and the vendee manifests good faith and is reasonably vigilant, the court may relieve him from the consequences of the delay, even though the land has increased in value. *Austin v. Wacks*, 30 Minn. 335.

Compare *Sylvester v. Born*, 132 Pa. St. 467. See *supra*, this title, *Fairness—Change of Circumstances*.

In *Roby v. Cossit*, 78 Ill. 638, the contract sought to be enforced had been made for the sale of land in February, 1867, for \$52,000, one-third of which was to be paid in cash, and the balance in two equal annual installments, with interest. The purchaser paid only \$500 down, and did not offer to make the several payments when due, and did not file his bill for specific performance until July, 1873, when the property had greatly risen in value. It was held in the absence of any excuse being shown, that the delay in offering to perform, and in filing his bill, were such that equity could not aid him.

It was agreed between a judgment creditor and debtor that the latter should pay the judgment in land, at a value to be fixed by persons desig-

nated, and the debtor defeated the performance of the agreement until his land had risen in value. *Held*, that he could not maintain a bill for specific performance of the contract. *Pillow v. Pillow*, 3 Humph. (Tenn.) 644.

1. *Warder v. Cornell*, 105 Ill. 169; *Gray v. Crockett*, 35 Kan. 66; *Gariss v. Gariss*, 16 N. J. Eq. 79; *Van Doren v. Robinson*, 16 N. J. Eq. 256; *Grummett v. Gingrass*, 77 Mich. 369; *Ins. Co. v. Union Canal Co.*, Bright. (Pa.) 48; *Frame v. Frame*, 32 W. Va. 463. Compare *Stone v. Tyree*, 30 W. Va. 687.

Other Interests Intervening.—Where no effort was made by a vendee of land, in his lifetime, to obtain a conveyance of the land, nor by his heirs, after his death, until after the lapse of twenty-nine years from the time when the vendee was entitled to demand a conveyance, the value of the land having, in the meantime, materially increased, and other circumstances having changed—held, on a bill by the heirs for specific execution of the contract of sale, that the lapse of time was conclusive against their claim. *Holt v. Rogers*, 8 Pet. (U. S.) 420.

Where a contract for the sale of land provides for the payment of the purchase money in installments, the last of which falls due within two years, and the purchaser fails to make any payment for eight years and until after the land has been sold to another, except a small sum at the time of making the contract, he cannot enforce specific performance either against his vendor or the second vendee. *Thompson v. Bruen*, 46 Ill. 125.

Where a bill was filed for specific performance of a contract, thirty-

It has been held that laches will not be imputed to an infant.¹ But this is denied.²

Laches is no defense to one who, by his own acts, has occasioned the plaintiff's delay or failure to perform; nor to one who has recently recognized the validity of the contract by acting under it or by overlooking the complainant's laches, and has thus waived his right to a rescission; nor to one who fails to show that he has been ready at all times to perform all substantial conditions required of him.³

seven years after it was alleged to have been made, no effort having been made in the meantime to enforce it, and where the rights of subsequent *bona fide* purchasers, without notice, had intervened, specific performance was refused. *Ewing v. Beauchamp*, 6 B. Mon. (Ky.) 422.

After he had warned the purchaser, who was grossly in default, the vendor sold the premises to others who knew the facts, but purchased in good faith, paying a sum which would not exceed the amount remaining due from the former purchaser, and which was all that could have been obtained at a sale on foreclosure. The former purchaser did not warn the later one against proceeding to use the lands. *Held*, that he had waived his claim and a decree for specific performance in his favor, on a bill against the vendor and the later purchaser, was not equitable and must be denied. *Russell v. Nester*, 46 Mich. 290.

Against the personal representatives of a decedent specific performance of his written contract to convey land, which was lost during decedent's lifetime, will not be enforced ten years after its execution. *Hodge v. Weeks*, 31 S. Car. 276.

An agreement to execute a mortgage will not be enforced against creditors of the mortgagor where the complainant has slept upon his rights for three years before the mortgagor's death and for eight years afterward. *Nelson v. Hagerstown Bank*, 27 Md. 51.

A purchaser at a trustee's sale, the terms of which are cash, who does not tender the money within a reasonable time, cannot afterwards demand a specific performance of the contract against the debtor who has paid the debt and costs, especially if he obtained his purchase through the inadvertence of the debtor. He who wants strict law, in such a case, must strictly comply with the law. *Heuer v. Rutkowski*, 18 Mo. 216.

On a suit against the heirs of an estate for the specific performance of an oral contract made with their ancestor thirty years before, the delay must be excused by a very satisfactory showing of facts. *Ritson v. Dodge*, 33 Mich. 463.

1. See *LACHES*, vol. 12, p. 552.

Where A, by a valid agreement, was to convey land to B, the fact that, after B's death, his child, during her infancy, lived near the land for many years, and saw A's grantee making improvements, will not prevent such infant from specifically enforcing the contract on her arrival at majority. *Putnam v. Tinkler*, 83 Mich. 628.

2. See *Havens v. Patterson*, 43 N. Y. 218; *Hayes v. Nourse*, 114 N. Y. 595; 11 Am. St. Rep. 700; *Scott v. Barber*, 14 Ohio 547.

3. *Karns v. Olney*, 80 Cal. 90; *Belt v. Brooklyn L. Ins. Co.*, 12 Mo. App. 100; *Kellogg v. Lavender*, 9 Neb. 418.

As where it is occasioned by the tender by the defendant of a defective deed. *Johnson v. Jones*, 85 Ala. 286.

In *Tilton v. Stein*, 87 Ill. 122, a jeweler had sold his stock and good will, binding himself in the sale not to engage in that business in the town, except to finish up the work on hand and make good the warranties on previous work. It was held that a delay of eight years would not defeat a bill by the purchaser, to enforce the contract; the vendor having carried on business in the name of another. *Tilton v. Stein*, 87 Ill. 122.

Where the vendor has notified his purchaser to surrender possession and has sued him in ejectment before he has had time or opportunity to complete performance of his agreement to erect thereon one residence within four months, and another within a year, the failure on the purchaser's part to build the second house within the year was not the laches of the purchaser, and did not estop him from obtaining equit-

able relief. *Powell v. Higley*, 90 Ala. 103.

A vendor delivered to a conveyancer, who had been chosen to draw up a conveyance, the title deed under which he held; the purchaser withdrew this deed, and, by neglecting to return it, embarrassed the preparation of the conveyance. He also neglected other duties devolving on him, incidental to the performance of the contract. On a bill afterwards filed by him for a specific performance he was denied a decree on the ground that his own defaults had prevented performance by the vendor. *Kinney v. Redden*, 2 Del. Ch. 46.

Where the vendor in a contract for the sale of land, promptly offers to perform on his part, and the purchaser is able to perform on his part but refuses to do so, and is informed that, unless he does so, on or before the day for performance named in the contract, the vendor will not convey, and he still refuses to perform, without any reasonable excuse for so doing, and permits the time named in the contract to expire, before offering to perform, he has no right to a specific performance of the contract. *Ditto v. Harding*, 73 Ill. 117.

A contract for sale of land acknowledged a payment to bind the bargain and provided that the balance be paid within five days, without naming a place of payment. On the third day the parties met, and agreed to meet that evening and complete the contract. The vendee went to the place where, as he testifies, they agreed to meet, while the vendor remained at his residence, where he and others testify that the meeting was to take place. At this time a lien on the land remained undischarged, so that the vendor could not give title. After the expiration of the five days, the vendee repeatedly tried to find the vendor, but failed, and the evidence tended to show that the latter knew that the vendee had contracted to sell at a profit, and therefore he did not wish to complete the contract. He had stated when making the contract that he was in need of money, but he did not use the check given as part payment. The price was fair and reasonable. The vendee finally tendered the price, and it was refused. *Held*, that time was not of the essence of the contract, and specific performance would be decreed. *Dynan v. McCulloch*, 46 N. J. Eq. 11. *Eubank v.*

Hampton, 1 Dana (Ky.) 343; *Lake v. Lewis*, 16 Neb. 94.

Where there has been a lapse of twenty-three years from the date of purchase and thirteen years since a payment has been made, but the vendor has preserved the vigor of the contract by the pendency of an action to enforce a lien for the purchase money, and the vendee, answering to that action, offers to perform and asks specific performance against the vendor, the latter cannot be heard to object on account of the delay, because by his own act he has continuously recognized the obligation of the contract. *Bennett v. Welch*, 25 Ind. 140; 87 Am. Dec. 354.

A delay of two days, in the payment on a contract to convey land, is not material, where the parties had already waived the delay of one day. *Durand v. Sage*, 11 Wis. 151.

Where a party has accepted a part performance of the contract at several different times after the time limited by the contract for complete performance, and down nearly to the time of filing a bill against him for a specific performance of his part of the contract, he cannot defend on the ground of lapse of time. *Voorhees v. DeMeyer*, 2 Barb. (N. Y.) 37.

In a late New Jersey case complainant's husband, who wished to purchase a certain property for business purposes, induced defendant to take the title until the husband could pay him the purchase price, \$2,800, which the husband was to raise in two years. On obtaining possession, he made improvements to the building which cost nearly \$1,000. The owner made a deed to defendant, and a contract was signed by defendant agreeing to convey to complainant. Under the agreement between the husband and defendant, the former immediately took possession, and paid defendant \$168 a year. At the expiration of the two years, the husband, finding himself unable to pay the amount due, requested defendant to extend the agreement for three years, and an extension for two years was granted. At the expiration of the last two years, the husband asked for more time, and was refused. Defendant continued, however, to take the payments from the husband, and until more than a year thereafter gave him no warning that he was no longer under obligations to convey the property. Nor did he ever offer to deliver

Contracts which fix no imperative day for performance or of which time is not of the essence must be fulfilled within a reason-

a deed to complainant or her husband on paying the price agreed. *Held*, in a suit for specific performance begun shortly after said last notice, that complainant's right to have the contract enforced had not been lost. *Schloetter v. Wagner* (N. J. 1891), 21 Atl. Rep. 863.

One who has acquiesced in the delay cannot be heard to complain. *Brown v. Guarantee Trust, etc., Co.*, 128 U. S. 403; *Bass v. Gilliland*, 5 Ala. 761; *Stewart v. Stokes*, 33 Ala. 494; 73 Am. Dec. 429; *Barsolou v. Newton*, 63 Cal. 223; *Moody v. Griffin*, 60 Ga. 459; *Morgan v. Scott*, 26 Pa. St. 51; *Collins v. Vandever*, 1 Iowa 573; *Hutcheson v. McNutt*, 1 Ohio 14; *Logan v. McChord*, 2 A. K. Marsh. (Ky.) 224; *Hull v. Sturdivant*, 46 Me. 34; *Schroeppel v. Hopper*, 40 Barb. (N. Y.) 425.

Where one of the parties to a contract for the sale of land notifies the other that he will not perform it, acquiescence in this by the other party (not being in possession) by a comparatively brief delay in enforcing his right by suit will bar an action for specific performance. *McDermid v. McGregor*, 21 Minn. 111.

In a suit for specific performance, where the evidence shows continued acquiescence on the part of defendant in the conduct of the plaintiff, and no serious harm is done by the delay to seek relief, the defense of laches is of no avail. *Welch v. Whelpley*, 62 Mich. 15.

A provision in a contract to convey, making time of the essence of the contract is waived by the vendor's insisting on payment after the expiration of the time. *Thayer v. Wilmington Star Min. Co.*, 105 Ill. 540.

In a case where time was not of the essence of the contract, where the vendee met the first payments, and having become insolvent failed to make the later ones as agreed, but was accommodated by the vendor, who allowed him to remain in possession for three or four years, and make valuable improvements, and afterwards tendered to him a deed which was not according to the agreement, because it did not contain full covenants, and without any offer to return the money already paid, with the consideration notes—held, that the vendee was entitled upon payment

of the balance of the purchase money to specific performance. *Murphy v. Lockwood*, 21 Ill. 611.

In a contract for the conveyance of land, where the vendor has shown great indulgence, time not being of the essence of the contract, he may be prevented from suddenly insisting upon a forfeiture. *Murphy v. Lockwood*, 21 Ill. 611.

Where the purchaser of land took possession and made payments, and continued to pay the interest, notwithstanding the vendor had failed to deliver certain bonds according to the agreement at the time of the sale—held, that the defendant had waived the delivery of the bonds at the day. *Ramsay v. Brailsford*, 2 Desaus. Eq. (S. Car.) 582; 2 Am. Dec. 698.

If one party sues on the note which, according to the terms of the contract, should have been, but was not, paid at the day, or otherwise treats the contract as valid and subsisting, he will be deemed to have waived the failure to perform at the day. *Younger v. Welch*, 22 Tex. 417; *Minert v. Emerick*, 6 Wis. 355.

Where the contract fixes no time for the payment of the purchase money, and imposes no penalty for default of payment, and the purchaser is allowed to enter into possession and improve the property, a subsequent acceptance of the purchase money by the grantor is a waiver of any default in payment, and the purchaser is entitled to a deed. *Lake v. Lewis*, 16 Nev. 94.

A vendor who contracts for the sale of a parcel of land for the sum of \$3,300, and on the same day makes out a deed, properly describing the land, and places it in escrow, and afterwards, at different times, accepts from the purchaser the sum of \$3,159.50 on the purchase price, one payment being accepted after the time limited in the contract had expired, cannot avoid specific performance of such contract by mailing to the purchaser a certificate of deposit of a local bank of the amount paid by such purchaser. *Wilson v. Emig*, 44 Kan. 125.

Acceptance of part payment is a waiver of defaults on the part of purchaser. *Paulman v. Cheney*, 18 Neb. 392; *Brassell v. McLemore*, 50 Ala. 476; *House v. Beatty*, 7 Ohio 84.

able time on the part of the one seeking specific performance or the delay explained consistently with good faith.¹

Mere delay need not prejudice the interests of the one in default, unless the delay be so great as to work an injury to the other, or unless the parties have made time of the essence of the contract; for, ordinarily, a trifling delay may be compensated in the decree by awarding damages or by the allowance of interest. Nor will lapse of time constitute a defense to a bill brought by one upon whom the contract has imposed no condition precedent.² Nor will one who has been diligent outside of court in

1. *Taylor v. Merrill*, 55 Ill. 52; *Fitch v. Boyd*, 55 Ill. 307; *Ditto v. Harding*, 73 Ill. 117; *Roby v. Cossitt*, 78 Ill. 638; *Johnson v. Johnson*, 40 Md. 189; *Benson v. Tilton*, 24 How. Pr. (N. Y.) 494; *Wellesley v. Wellesley*, 4 M. & C. 579.

Where the act called for is the payment of purchase money, to be made in a reasonable time, payment after a lapse of two and a half years will not answer. *Fowler v. Sutherland*, 68 Cal. 414.

Nine months later—held reasonable. *Renwick v. Bancroft*, 59 Iowa 116.

Where no time is fixed in the contract for the sale of land, or time is not essential, it will not, however, be permitted to the party who is to make the conveyance to trifle with the interests of the opposite party by unnecessary delay. It is in the power of the party to fix some reasonable time, not capriciously or with intent to surprise, but a reasonable time, according to the circumstances of the case, within which he will expect the title to be made at the peril of rescinding the agreement. *Thompson v. Dulles*, 5 Rich. Eq. (S. Car.) 370.

2. Compare, *supra*, this title. See *Glover v. Fisher*, 11 Ill. 666; *Spalding v. Alexander*, 6 Bush (Ky.) 160; *Smoot v. Rea*, 19 Md. 398; *Derrett v. Bowman*, 61 Md. 526; *Voltz v. Grummett*, 49 Mich. 453; *Peters v. Canfield*, 74 Mich. 498; *Bomier v. Caldwell*, 8 Mich. 463; *Hanna v. Ratekin*, 43 Ill. 462; *Williston v. Williston*, 41 Barb. (N. Y.) 635; *Osborne v. Bremer*, 1 Desaus. (S. Car.) 486; *Primm v. Barton*, 18 Tex. 206; *Ballard v. Ballard*, 25 W. Va. 470; *Crittenden v. Drury*, 4 Wis. 205; *Hall v. Delaplaine*, 5 Wis. 206; 68 Am. Dec. 57; compare *Randall v. Latham*, 36 Conn. 48.

In *Haffner v. Dickson*, 2 Har. & J. (Md.) 46, a conveyance of land was enforced after a lapse of twenty-seven years.

Ordinarily, payment of the price at the day is not necessary where not expressly stipulated for, and where the purchaser can be compelled to make ample compensation for the delay. *Reed v. Jones*, 8 Wis. 392.

Where an action for specific performance of an agreement to abandon a suit was not begun until about ten years after the execution of the agreement, but it appeared that the loss of the stipulation had not been discovered until about a year before the bringing of the action, and defendant had suffered no harm from the delay, laches was held to be no defense. *Deen v. Milne*, 113 N. Y. 303.

Specific performance of an intestate's contract to convey was granted in *Pritchard v. Todd*, 38 Conn. 413, notwithstanding the purchaser was chargeable with delay in paying the balance of price.

Time is not of the essence of every contract, and therefore every failure by the petitioner in a literal performance does not of necessity furnish a sufficient defense against a bill for a specific performance. The provision broken should be of such a character as to constitute a condition precedent to the petitioner's right to enforce the contract, or be such as to invalidate the contract; or in some other manner to make it clearly inequitable, under circumstances indicating fraud, mistake, surprise, unreasonable delay, gross neglect, or bad faith, that the petitioner should have a decree. *Quinn v. Roath*, 37 Conn. 16.

Where time is not of the essence of the contract, the delinquent party is entitled to relief if the delay is excused, and the situation of the parties is not so altered that injury will result, and the party has shown reasonable vigilance. *Hubbell v. Von Schoening*, 49 N. Y. 326.

Where time is not of the essence of

asserting his rights and attempting to enforce his contract be made to suffer for his delay in commencing suit, even though it be long continued.¹ But where one party has been guilty of negligence and the other has done everything in his power to rescind, equity will give no aid to the one in default.²

It has been said that in equity time is not of the essence of the contract. But this doctrine is to be accepted with caution and

the contract, the vendor will be allowed a reasonable time to obtain a perfect title. *Rader v. Neal*, 13 W. Va. 373.

Where in a contract for the sale of land it does not appear that time is of the essence, the fact that the vendor tenders the deed about a month later than agreed upon does not prejudice his right to a specific performance of the contract. *Butler v. Archer*, 76 Iowa 551.

And a delay of four months in bringing suit upon such a contract, was held not fatal in *Litsey v. Whittemore*, 111 Ill. 267.

In *Young v. Daniels*, 2 Iowa 126; 63 Am. Dec. 477, notes had been given; three months after the last one was due the party sought to pay it; the holder of the notes never demanded payment, nor when the suit was brought, two years after the first and one year after the second note was due, did he offer to return the notes; specific performance was decreed, it not appearing that the respondent was injured by the delay.

A delay of eighteen years to enforce execution of a contract for the purchase of land is not a bar to a suit for the land, where a large part of the price has been paid, and a judgment entered for the residue, the interest on which was more than paid by the rents or profits. *McLaughlin v. Shields*, 12 Pa. St. 283.

Certain parties who had conveyed land to a county had never obtained a patent therefor. The county took possession, and agreed with a claimant that he was to quitclaim the land, upon a reasonable demand when he should obtain a patent. He obtained the patent the next year. *Held*, that the right to such deed was not lost by lapse of time. *Skipwith v. Martin*, 50 Ark. 141.

The parties contracted in June for an exchange of real estate in Missouri and Iowa, respectively; executed their deeds and deposited them, in a bank, together with \$500 of defendant's money as part consideration, to be

paid when defendant should ascertain that plaintiff had a good title, the parties agreeing to make good any defect in their respective titles. Plaintiff tendered an abstract showing a good title, and his own deed of warranty in September of the same year. *Held*, that having complied with his contract within a reasonable time, he was entitled to a specific performance. *King v. Gsantner*, 23 Neb. 795.

Under an agreement between A and B in 1837, B took a transfer of a land certificate to hold one-half in trust for A; the patent was issued in 1847, and B acknowledged the trust in 1848; the first act in the record denoting hostility to A's claim was the sale of the land by B's administrator in September, 1852, and the suit to enforce the trust was brought in December, before the payment of the purchase-money. *Held*, that the claim could not be regarded as stale. *Hodges v. Johnson*, 15 Tex. 570; *Koen v. White, Meigs (Tenn.)* 358.

1. *Coulson v. Walton*, 9 Pet. (U. S.) 62.

2. *O'Donnell v. Jackson*, 69 Cal. 622; *Remington v. Kelley*, 7 Ohio 97; *Higby v. Whittaker*, 8 Ohio 198; *Brewer v. Connecticut*, 9 Ohio 189.

S entered into a contract to purchase lands and paid a small portion of the price at the time of execution, but did not pay the subsequent installments. Several years afterward the vendor notified him that the contract had long been forfeited, and that he was only hesitating what to do on his part. S took no steps to enforce the sale until three years after such notice, when the land had become valuable, although, in the meantime, the vendor had paid taxes on the land and sold it again. *Held*, that S was not entitled to specific performance. *Smith v. Lawrence*, 15 Mich. 499; 99 Am. Dec. 344.

But it is not a sufficient defense to a suit for specific performance to show that when the defendant had the option of rescinding he wrote to plaintiff that he would rescind, without proof that

may not be made the excuse or justification of one who has been guilty of gross neglect or unconscionable laches. If the parties have made the time of performance an essential element in the contract, equity will so regard it.¹ Time may be made essential

the letter was received. *Echols v. Butler*, 28 Miss. 114.

1. Time is not of the essence of the contract unless made so by the parties themselves. *Garnett v. Macon*, 2 Brock. (U. S.) 185; *Brashier v. Gratz*, 6 Wheat. (U. S.) 528; *Hepburn v. Auld*, 5 Cranch (U. S.) 262; *Cheney v. Libby*, 134 U. S. 68; *Potter v. Tuttle*, 22 Conn. 512; *Smith v. Brown*, 10 Ill. 309; *Steele v. Biggs*, 22 Ill. 643; *Stow v. Russell*, 36 Ill. 18; *Brumfield v. Palmer*, 7 Blackf. (Ind.) 227; *Ewing v. Crouse*, 6 Ind. 312; *Keller v. Fisher*, 7 Ind. 718; *Mathews v. Gilliss*, 1 Iowa 242; *Garrettson v. Vanloon*, 3 Greene (Iowa) 128; 54 Am. Dec. 492; *Davis v. Stevens*, 3 Iowa 158; *Magoffin v. Holt*, 1 Duv. (Ky.) 95; *Kercheval v. Snope*, 6 T. B. Mon. (Ky.) 362; *Montgomery v. Phoenix Mut. L. Ins. Co.*, 14 Bush (Ky.) 51; *Jones v. Robbins*, 29 Me. 351; 50 Am. Dec. 593; *Barnard v. Lee*, 97 Mass. 92; *Walton v. Wilson*, 30 Miss. 576; *Lake v. Lewis*, 16 Nev. 94; *Pennock v. Ela*, 41 N. H. 189; *Baldwin v. Van Vorst*, 10 N. J. Eq. 577; *Huffman v. Hummer*, 17 N. J. Eq. 263; *Benedict v. Lynch*, 1 Johns. Ch. (N. Y.) 370; 7 Am. Dec. 484; *Wells v. Smith*, 7 Paige (N. Y.) 22; 31 Am. Dec. 274; *Falls v. Carpenter*, 1 Dev. & B. Eq. (N. Car.) 237; 28 Am. Dec. 613; *Scott v. Fields*, 7 Ohio 90; *Knott v. Stephens*, 5 Oregon 235; *Younger v. Welch*, 22 Tex. 417; *Farris v. Bennett*, 26 Tex. 568; *Hipwell v. Knight*, 1 Y. & C. 401.

Where, by the terms of the contract, time is not made material, either party may enforce performance by executing, or tendering the execution of the contract on his part, and demanding the same of the opposite party. *Knott v. Stephens*, 5 Oregon 235.

In *Barnard v. Lee*, 97 Mass. 92, the court by Gray, J., said: "This equitable doctrine" (that time will not be considered to be of the essence) "was formerly carried to an unreasonable extent, and the specific performance of contracts enforced after such a lapse of time and change of circumstances as to produce as much injustice as it avoided. In modern times the doctrine has been more guardedly applied, and it is now held that time, although not ordinarily of the essence of a contract

in equity, yet may be made so by clear manifestation of the intent of the parties in the contract itself, by subsequent notice from one party to the other, by laches in the party seeking to enforce it, or by change in the value of the land or other circumstances which would make a decree for specific performance inequitable."

In *Secombe v. Steele*, 20 How. (U. S.) 94, the court by Campbell, J., said: "But it must affirmatively appear that the parties regarded time as an essential element in their agreement, or a court of equity will not so regard it." And see *Brown v. Guarantee Trust, etc., Co.*, 128 U. S. 403.

For instances where time has been held not essential, see *Skipwith v. Martin*, 50 Ark. 141; *Langan v. Thummel*, 24 Neb. 265; *Willard v. Foster*, 24 Neb. 205; *Moote v. Scriven*, 33 Mich. 500; *De Camp v. Crane*, 19 N. J. Eq. 166; *Miller v. Miller*, 25 N. J. Eq. 354; *Day v. Hunt*, 112 N. Y. 191; *Sylvester v. Born*, 132 Pa. St. 467.

The earlier rule in *Indiana* and elsewhere was that courts of equity would not count time as essential unless from the terms of the contract and the conduct of the parties it was evident that it was the intention of the parties to make it so. *Brumfield v. Palmer*, 7 Blackf. (Ind.) 227; *Keller v. Fisher*, 7 Ind. 718; *Day v. Patterson*, 18 Ind. 114.

But this has been denied in the later decisions. Says the court by Elliott, C. J., in *Cartmel v. Newton*, 79 Ind. 1: "It is the general rule in equity that 'time is not, in general, of the essence of the contract, and may, in a court of equity, under certain circumstances be disregarded.' The rule is somewhat differently stated by Judge Story, who says: 'Time is not generally deemed in equity to be of the essence of the contract, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract.' 1 Story Eq. Jur., § 776. This doctrine has received the approval of this court. *Brumfield v. Palmer*, 7 Blackf. (Ind.) 227; *Ewing v. Crouse*, 6 Ind. 312; *Day v. Patterson*, 18 Ind. 114. The general rule is, it will be observed, stated in guarded terms. The soundness of the

rule itself has been doubted by able lawyers. It is, at all events, a rule to be stated with care and applied with caution. If not, there is danger of courts making rather than enforcing contracts. The reason for the rule shows the necessity of applying it with scrupulous care."

Instances Where Time Has Been Deemed Essential.—A court of equity will not enforce the specific performance of an agreement, by which the defendant was to convey to the plaintiff on a day certain, a farm with growing crops, in the midst of the growing season, and also transfer horses and cattle, and was to vacate his place of residence, remove his family therefrom, and seek another home, where the defendant offered to fulfill his part of the agreement on such a day, but the plaintiff declined at that time to carry out the contract. *Gale v. Archer*, 42 Barb. (N. Y.) 320.

Where a bond is given for title to land, if the price is paid by a day certain, time is of the essence of the contract, and unless the money is paid at that day, the vendee cannot enforce a specific performance, there being no obligation to pay the purchase-money. *Shuffleton v. Jenkins*, 1 Morr. (Iowa) 427.

Where the payment of the price on a particular day was a condition precedent to the conveyance and surrender of the possession of the land sold, time was held to be of the essence of the contract; and the personal representatives of the purchaser, he having died just before the day to pay arrived, were not allowed to have specific performance, payment not having been tendered on that day. *Jones v. Noble*, 3 Bush (Ky.) 694.

Where A agreed with B to rent him a store on his procuring C as surety for the rent before a day certain, and B failed to procure C as surety before the time fixed—held, that as time was of the essence of the contract, B was not entitled to a performance of A's contract, nor to the aid of a court of equity by injunction. *Mitchell v. Wilson*, 4 Edw. (N. Y.) 697.

By the provision of a contract for the purchase of land, if the vendor failed to perfect the title within nine months, the purchaser might either perfect it at the vendor's expense, or at his election, reconvey and receive back the consideration. Time was held to be of the essence of this part of the contract, and

specific performance against the purchaser refused when the vendor had not perfected his title within the time named, although he did so afterwards. *Lowery v. Niccolls*, 11 Ill. App. 450.

The manager had the right to purchase his principal's business of manufacturing and trading cloaks, on giving sixty days' notice. Time being of the essence of this contract, the court held that a notice given when the manager was not able to pay the price and unaccompanied by a tender, and not followed up promptly could not be made the foundation of a suit for specific performance. *Carter v. Phillips*, 114 Mass. 100.

A wife executed an agreement that if her husband would pay a certain sum on a mortgage debt on the day it became due, she would deed a part of the land mortgaged. Held, that time was essential, and the husband by failing to pay the money on the day specified lost the right to enforce it. *Stembridge v. Stembridge*, 87 Ky. 91.

Time is essential, in a parol contract for the sale of land, in respect to the specific performance of it by a court of equity. *Goodwin v. Lyon*, 4 Port. (Ala.) 297.

A title bond stipulating that the erection of certain improvements within six months is the principal consideration of sale, and that a failure so to do will work a forfeiture, must be strictly construed, and neglect to make the required improvements for two years without sufficient excuse is a good defense to a bill by the heirs of the purchaser for specific performance. *Haggerty v. Elyton Land Co.*, 89 Ala. 428.

Where the plaintiffs gave their note to the defendants, payable in one year, and bearing interest at the rate of ten per cent. per annum, at a time when the current rate of interest was ten per cent. per month, in consideration of which he received a covenant from the payees to convey them certain land on the payment of the note at maturity—held, that the low rate of interest raised the presumption that the parties intended that the note should be paid at maturity. *Brown v. Covillaud*, 6 Cal. 566.

A contract for the sale of lands provided that unless two notes were paid at maturity, the time of their payment to be regarded as of the essence of the contract, the agreement should be void. The vendee paid one note at maturity, and tendered payment of the other six

days after it fell due. *Held*, that he was not entitled to a decree of specific performance. *Heckard v. Sayre*, 34 Ill. 142.

Plaintiff and defendant together bought a lot and erected a dwelling-house on it, and took stock in a building and loan association, and on the loan obtained were required to make monthly payments. They agreed that if at any time either should fail to pay his share of the dues for two months, he should surrender to the other his right to the stock, and convey to him his interest in the premises. Time was held to be of the essence of the contract, and defendant, who had defaulted for two months and a half in the payment of the dues, was decreed to convey his interest. *Nageli v. Lenimer* (N. J. 1888), 16 Atl. Rep. 205.

Where in a contract of purchase time was made essential, and the agreement provided for a forfeiture of the purchase if payments were not punctually made, and of all rights acquired under it, without any right in the vendee of reclamation or compensation for money paid, etc., and the vendor declared a forfeiture for default in payment of the purchase-money notes, when due, but did not surrender the notes to the purchaser—held that the purchaser was not entitled to a specific performance, and that an offer to return the notes was not necessary before declaring the forfeiture; and that the fact that the vendor had before indulged the purchaser by accepting payments after they were due, furnished no excuse for his not meeting the other payments promptly, and did not operate to prevent the vendor from declaring the forfeiture. *Phelps v. Illinois Cent. R. Co.*, 63 Ill. 468.

Specific performance of a contract for the sale of land will be refused where the contract is wholly executory and the time when the purchase money is to be paid is particularly set with an express condition of forfeiture if not paid at the time, and where the purchaser has never taken possession or expended anything on the premises, but has waited for several years after the payments were due, and until there has been a rise in value. *O'Fallon v. Kennerly*, 45 Mo. 124.

In *Reed v. Breeden*, 61 Pa. St. 460, time was held to be of the essence of the contract in suit, it being an agreement for the sale of land, by which a portion of the purchase-money was to

be paid on delivery of the deed. The deed was executed, but the purchaser paid only a portion of the amount agreed to be then paid; and the attorney was instructed that if the remainder of the amount agreed to be paid down was not paid at an appointed time, all negotiations should cease, and he should destroy the deed.

A contract for the purchase of real estate provided that if the vendee should fail to pay any installment of the purchase price at the time specified, or should fail to perform any of the covenants to be performed by him, all moneys already paid should be forfeited, and the vendor should be forever discharged from any liability under the contract, which should become void. The court held that this provision was intended for the benefit of the vendor, who might waive it, and that the vendee was not entitled to avoid the contract for his own default. *Dana v. St. Paul Investment Co.*, 42 Minn. 194.

After a lapse of seven years, the court will not decree a specific performance of a contract in which time is essential, and where the parties cannot be placed in the same situation as though exact punctuality had been observed, and where real fault is imputable to the plaintiff, notwithstanding that in the part execution of the contract large sums of money have been expended by the plaintiff, and the first default was on the part of the defendant, which laches of the defendant caused the fault imputable to the plaintiff. *Pratt v. Carroll*, 8 Cranch (U. S.) 471.

At a sale on execution, the plaintiff's attorney bought the land sold, and afterwards sold the same to A, who gave his bond to the defendant, to convey to him in consideration of sums paid and to be paid, the bond to be void on failure to pay at a day certain. The defendant failed to obtain the money, when B advanced it for him, took a conveyance to himself, and gave a similar bond to the defendant, who failed to raise the money, and procured B to convey to C, who gave the defendant a written promise to convey to him, on payment of a specified sum, on a day fixed. *Held*, that, after the lapse of the time specified, neither the defendant nor his creditors had any claim in equity for specific performance of the contract; that, as there was no evidence of fraud on the part of the attorney at the sale, he could not be deemed a trustee for

either by the terms of the contract itself, or by the subsequent conduct of the parties in relation thereto.¹

the benefit of the defendant's creditors, and that the purchaser from him took a valid title. *Russell v. Geyer*, 4 Mo. 384.

The rule that in the case of a contract for the sale of land where time is expressly made of the essence of the contract notwithstanding hardship of forfeiture, equity will enforce it and will not relieve from a forfeiture applied where a railroad company sold to B, "for improvement and cultivation," eighty acres of land in Kansas for \$120, whereon was a three-foot vein of coal, which fact B knew, but the company did not, and B was prevented from seasonably making a payment, by reason of having sprained his foot while on a visit to Indiana, B never having entered into possession or made any improvements, and the company tendering back the money it had received. *Missouri River, etc., R. Co. v. Brickley*, 21 Kan. 275.

July 31, 1886, G purchased from T a city lot, paying fifty dollars upon the price which was \$1,800 and took a receipt therefor, the terms being that \$1,000 in cash should be paid on delivery of a deed, G to assume a mortgage of \$750. The receipt stipulated that "if final payment is not made within twenty days all rights are to be forfeited." Possession was not taken by G. At the end of the 20 days, T tendered G a deed, and demanded payment, which was refused, the reason assigned being that one C had begun suit against T to enforce a contract of sale made August 9, following the date of G's contract, but which sale was shown to have been made by an agent, without authority, as G knew. June 23, 1887, G filed his answer and cross-bill in the suit of C against T, by which he sought specific performance and conveyance. Meantime the property had greatly increased in value. *Held*, that time was of the essence of the contract, and that G could not enforce it. *Canfield v. Tillotson*, 25 Neb. 857.

In *Kelsey v. Crowther* (Utah 1891), 27 Pac. Rep. 695, the vendor contracted to sell land and to furnish an abstract of title, the vendee to have thirty days to examine the title and pay the balance of the price. *Held*, that a tender of the purchase money by the vendee on the 31st day was too late even

though the vendor did not furnish the abstract within the thirty days.

A contract to convey land which provides that the purchase price be paid within sixty days from its date, "otherwise this agreement to be null and void," clearly shows the intention of the parties to make time the essence of the contract; and the failure of the vendees or their assignee to make or tender payment within the specified time precludes them from maintaining an action for the specific performance of the contract. *Martin v. Morgan*, 87 Cal. 203.

The contract sued upon in *Bennett v. Hyde* (Cal. 1891), 28 Pac. Rep. 104 provided that if plaintiff should "fail to comply with any one of the agreements herein specified, then this contract shall immediately become void," and defendant in a letter extending the time for the last payment wrote that "time must be the special and essential ingredient in the extension, as it was intended to be in the original contract." It was held that the evidence proved conclusively that time was of the essence of the contract. See, also, *Tiernan v. Roland*, 15 Pa. St. 420.

Elements in Determining Whether Time Is Essential—Time may be of the essence of a contract for the sale of land, not only by the express agreement of the parties, but where the circumstances of the case show such must have been their intention. The fact that land is the subject of a contract for sale is not, of itself, sufficient to make time of the essence of such contract; but the fact that land is constantly rising in this State, in value, is a circumstance in favor of the presumption that time is to be, and was regarded by the parties as, material. Where default is made, the payment of interest on the purchase money would be comparatively but a slight compensation to the vendor for the loss in the increased value of the land, and of the use of the money in the purchase of other land or property which is augmenting in value or price. *Edwards v. Atkinson*, 14 Tex. 373.

1. *Jackson v. Ligon*, 3 Leigh (Va.) 161; *Sharp v. Trimmer*, 24 N. J. Eq. 422; *Cordes v. Kenney* (Supreme Ct.), 7 N. Y. Supp. 849; *Izard v. Kimmel*, 26 Neb. 51; *Kansas Lumber Co. v. Horrigan*, 36 Kan. 377.

The rule that time is not of the essence of the contract governs where the agreement is for the conveyance of real estate and the parties have acted upon the faith of it so far as to suffer a change of possession and the making of improvements.¹

Time Not Essential—Waiver of Promptness.—The fact that neither party performed or offered to perform on the day fixed by the contract, and that the purchaser continued in possession some days after, shows that time was not regarded by them as of the essence of the contract; and continued possession by a party precludes him from rescinding the contract on the ground that the other did not perform on the precise day. If no other time is fixed, by notice, or otherwise, in such a case, a reasonable time is to be allowed for doing so. *Benson v. Tilton*, 24 How. Pr. (N. Y.) 494.

Neither party to a contract can be in default thereunder until the other party has offered to perform his part of the agreement in full. And where both parties fail to perform their mutual covenants on the day named, they will be held to have waived its strict performance as to time, though it will be unimpaired in its effect. *Van Campen v. Knight*, 63 Barb. (N. Y.) 205.

Although a contract to convey expressly declares prompt payments to be of the essence, yet if the vendor, by his failure to send the notes to the place of payment, and his conduct in other ways, has induced the purchaser to believe the requirement of promptness to be waived, the purchaser may enforce specific performance. *Ballard v. Cheney*, 19 Feb. 58.

Where a contract to convey real estate, upon the payment of the purchase money in installments, expressly declares time to be of its essence and the vendor retains the right to rescind the contract and to declare payments already made forfeited in case of any payment not being promptly made, the right to rescind and declare a forfeiture may nevertheless be waived, and if the facts show a waiver, the vendee is entitled to specific performance of the contract to convey, notwithstanding he has neglected to make a certain payment promptly. *Coles v. Shepard*, 30 Minn. 446.

See also *Brink v. Morton*, 2 Iowa 411; *Armstrong v. Pierson*, 5 Iowa 317; *Kansas Lumber Co. v. Horrigan*, 36 Kan. 387; *Henry v. Graddy*, 5 B.

Mon. (Ky.) 450; *Bellamy v. Ragsdale*, 14 B. Mon. (Ky.) 293; *Snowman v. Harford*, 55 Me. 197; *Barnard v. Lee*, 97 Mass. 92; *Wallis v. Pidge*, 4 Mich. 570; *Keyport Brick, etc., Co. v. Lorillard* (N. J. 1890), 19 Atl. Rep. 381; *Remington v. Irwin*, 14 Pa. St. 143; *Chadwell v. Winston*, 3 Tenn. Ch. 110.

1. *Oliver v. Piatt*, 3 How. (U. S.) 333; *Mason v. Wallace*, 4 McLean (U. S.) 77; *Taylor v. Longworth*, 14 Pet. (U. S.) 172; *Somerville v. Trueman*, 4 Har. & M. (Md.) 43; 1 Am. Dec. 387; *Bragg v. Olson*, 128 Ill. 540; *Armstrong v. Pierson*, 5 Iowa 317; *Brink v. Morton*, 2 Iowa 411; *Williams v. Lewis*, 5 Leigh (Va.) 686; *Metcalf v. Hart* (Wyoming, 1891), 27 Pac. Rep. 900; *Cordes v. Kenney* (Supreme Ct.), 7 N. Y. Supp. 849; *Decouche v. Savetier*, 3 Johns. Ch. (N. Y.) 190; 8 Am. Dec. 478; *Louisville, etc., R. Co. v. Philyaw* (Ala. 1891), 10 So. Rep. 83; *Skipwith v. Martin*, 50 Ark. 141; *Russell v. Napier*, 80 Ga. 77; *Cutsinger v. Ballard*, 115 Ind. 93; *Chadwell v. Winston*, 3 Tenn. Ch. 110; *Janson v. Peterson* (Wash. 1891), 27 Pac. Rep. 273. Compare *Russell v. Baughman*, 94 Pa. St. 400.

Where the vendee of land is let into possession, it is taken for granted that each party is satisfied, until one or the other moves towards the execution of the contract by demanding a specific performance, and neither party, under such circumstances, has a right to insist on lapse of time as a bar to specific performance. *Scarlett v. Hunter*, 3 Jones Eq. (N. Car.) 84; *Miller v. Bear*, 3 Paige (N. Y.) 466.

Where an exchange of lands is made, and no money is to be paid, and possession of the several tracts is taken pursuant to the contract, a delay of ten years to proceed to compel execution of deeds is not a bar to an action for specific performance. *Stretch v. Schenck*, 23 Ind. 77.

A plaintiff who, under a parol agreement to exchange lands, conveys his share as agreed, and enters upon and improves the land to be conveyed to him under a promise of a deed, is not guilty of laches when he sues for specific performance some ten years after.

Hunkins v. Hunkins (N. H. 1889), 18 Atl. Rep. 655.

A agreed to sell land to B for \$300, one-third thereof to be paid down, and the residue in two equal annual payments with interest, B to have possession immediately. The agreement contained a provision that, in default of either of the payments, A should be discharged from his contract, and B forfeit the payments already made by him, and deliver up the possession of the premises to A. B made valuable improvements on the land, paid the first two installments of the purchase-money at the time specified in the contract, and assigned his contract to C, who took possession, but did not make payment of the last installment on the day it fell due, nor was he called on for it, nor a deed offered to him of the land. A few days afterwards he tendered the money and demanded a deed, which A refused, and insisted upon a forfeiture. On a bill filed by C against A, held, that time was not of the essence of the contract, and that C was entitled to a specific performance of the contract. *Edgerton v. Peckham*, 11 Paige (N. Y.) 352.

By a contract for the sale of land, the vendor was to convey at a time specified, and the vendee was "at the same time," to secure the purchase money. The vendee took possession under the contract; but no conveyance was executed, and the purchase money was not paid for fifteen years. *Held*, that the lapse of time was no objection to a decree for specific performance, at the suit of the vendee. *Waters v. Travis*, 9 Johns. (N. Y.) 450.

Mere lapse of time does not constitute a bar to specific performance of a contract, but it may be explained. And where a turnpike company contracted for the purchase of land, and took possession and occupied the land, for the purposes of the company, twenty-three years, the contract was specifically enforced at the instance of the company. *New Barbadoes Toll Bridge v. Vreeling*, 4 N. J. Eq. 157.

A purchaser who has gone into possession and cut the timber from the lands, will not be allowed to resist a bill for specific performance on the ground of mere delay in making a conveyance; for the vendor cannot be put *in statu quo*. *Burton v. Adkins*, 2 Del. Ch. 125.

Where the owner of land permitted a person to occupy and improve the

same for a number of years, under a verbal contract of purchase, and under the impression that he might pay for it when demanded, and the purchaser offered to pay when notified to do so—held, that there was no such laches imputable to the purchaser as should debar him from the specific performance of the contract. *Ingersoll v. Horton*, 7 Mich. 405.

A notice served by the owner in such a case, requiring the purchaser to pay for the land in a specified time, and take a deed therefor, estops him from taking advantage of laches of the purchaser prior to such notice. *Ingersoll v. Horton*, 7 Mich. 405.

Where a vendee is in possession of land under a contract of sale, and the vendor afterwards conveys the minerals in the land to third persons, and then dies without having conveyed the land to the vendee, the third persons hold the legal title in trust for the vendee, and the vendee may maintain a bill in equity against them for conveyance thereof, and laches will not be imputed to the vendee for delay in bringing such bill, as his possession is notice of his rights. *White v. Patterson*, 139 Pa. St. 429.

A contract for the sale of land in California, where the vendor lived, was, thirteen days after its execution by the vendor, mailed by an agent of both parties to the purchasers, who lived in Missouri, but who, as was known by all parties, would not be at home for four days. Seventeen days after writing the agent received from the purchasers an acceptance of the offer, with money, notes, and mortgage, in accordance with the contract. Six days afterwards, it being discovered that the mortgage was not properly acknowledged, at the instance of the vendor's wife, it was returned to Missouri for correction, and twenty-one days thereafter was, with notes and money, tendered to vendor and his wife, and a deed demanded; the purchasers having been given possession of the premises in the meantime by the wife. *Held*, in a suit for specific performance by the purchasers, that their compliance with the contract was within a reasonable time. *Phillips v. Deck*, 76 Cal. 384.

In 1848 a vendor, by his attorney in fact, executed his title bond for the conveyance of 150 acres of land at \$1 per acre. The attorney marked off the boundaries, and the vendee took possession, and held it, until his death, in

Where the parties have made time a necessary feature of the agreement, neither will be heard to plead, in justification of his delay, that circumstances have changed and the property involved has increased or diminished in value.¹

1865. In 1852, the vendor receipted to the vendee for two notes of a third party, which, when collected, were to be applied upon the payment of the purchase money. The vendor admitted that he had collected the notes, and ratified the title bond. The court held that an action of specific performance, commenced in 1875 by the heirs of the vendee, was not barred by laches or the Statute of Limitations. *Norman v. Bennett*, 32 W. Va. 614.

In a suit to compel the specific performance of a contract for the sale of realty, it appeared that plaintiff, upon the day set for the transfer of the property, had the purchase price therefor in readiness, but that the transfer was not completed on that day, because defendant, by mistake, had neglected to bring with him some necessary papers. Thereafter, relying on defendant's promise to complete the transfer, plaintiff entered into possession. *Held*, that the evidence was sufficient to support a decree for specific performance against a purchaser from defendant with notice. *Hughes v. Reese*, 22 Neb. 78.

The vendor, as to the land, is in equity regarded as trustee for the vendee from the time of the contract, and the failure of a railroad company for thirteen years to ask for a deed to its right of way, in pursuance of a contract to that effect executed by the owner of the land, will not bar a bill for specific performance, where the company has performed its part of the agreement, and has been in undisputed possession throughout that time. *Chicago, etc., R. Co. v. Hay*, 119 Ill. 507.

In a bill by a vendee in possession to compel the conveyance of land pursuant to a title bond, the plea of the Statute of Limitations is bad. *Gen. St. Kentucky*, ch. 71, art. 4. § 20, excepts cases of continuing and subsisting trust, and actions by a vendee of real property, in the possession thereof, to obtain a conveyance, from the operation of the statute. *Hampton v. Bailey* (Ky. 1887), 5 S. W. Rep. 383.

Defendant sold land to plaintiff, the condition of the agreement being that if plaintiff constructed a proposed railroad, and had trains running thereon

within a year, then defendants should deed the property to plaintiff, at which time the consideration should become due and payable, and plaintiff then agreed to pay said sum. *Held*, that after plaintiff had taken possession under the option, and performed the conditions precedent, time was no longer of the essence of the contract, and specific performance would be granted, even though the money was not tendered and deed demanded until some months after the expiration of the year; as, the tendering of the deed and payment of the money being, by the contract, concurrent acts, plaintiff was not in default, no deed having been tendered. *Byers v. Denver Circle R. Co.*, 13 Colo. 552.

In *Pierce v. Morse* (N. J.), 18 Atl. Rep. 792, the evidence showed that the vendee was prevented from a strict compliance with the provisions of the contract by a mistaken interpretation, and the vendor did not insist upon a forfeiture, because of the failure to perform on the day named in the contract, nor give notice of an intention to do so, but was ready to execute a deed on a subsequent day, if the vendee would comply with his demands, many of which were unwarranted, and the vendee in good faith offered to perform his part. The court refused to enforce a forfeiture but decreed specific performance, it not appearing that there had been any increase in the value of the property, or want of diligence in seeking relief.

An answer to a bill in equity admitted that a deed for land, absolute upon its face, had been made as charged in the bill, upon a parol trust that such deed should be a security for payment of a sum of money. But the answer relied upon the lapse of ten years since the execution of such deed as a defense to the enforcement of the contract. *Held*, that, the complainant having been in possession of the land all the time, the defense was not good. *Price v. Gaskins*, Phil. Eq. (N. Car.) 224.

1. Losses in business and deprivation of rents, occasioned by burning of buildings, are not legitimate excuses for non-payment of money, where

X. WAIVER AND ABANDONMENT.¹—The right to enforce specific performance may be lost by waiver. Conduct on the part of plaintiff or neglect of his rights which indicates that he has not considered the contract binding upon himself or has failed to enforce it, will prevent his holding others to its performance. A familiar application of this rule occurs where the plaintiff has accepted a modification of the agreement by acquiescing in the defendant's breach of some of its conditions. In such cases he must be content with a substantial compliance with the contract as modified.² But the court will indulge no presumptions in favor of a waiver nor infer it upon slight proof.³ So, too, the right to enforce an agreement in equity is lost where the

time is made of the essence of the contract. *Stow v. Russell*, 36 Ill. 18.

1. As to waiver, see *supra*, this title, *Laches; Time, When Essential*.

2. Neither party to a contract for the sale of lands can enforce its specific performance in chancery, after each has tried to establish his own claim to the lands independently of the agreement, and each has assented to the other's acts in repudiation thereof. *Walworth v. Miles*, 23 Ark. 653.

The plaintiff gave his note, payable four months after date, in consideration of which the defendants executed a contract for a deed of land on payment of the note. *Held*, that after a tender of the deed, and demand of payment of the note after its maturity, and refusal to pay, the plaintiff had forfeited his right to insist on the performance of the contract. *Pearis v. Covillaud*, 6 Cal. 617; 56 Am. Dec. 543.

Where a vendee under an executory contract abandoned possession of the land, according to a stipulation in the agreement, though the dissolution of the contract was by parol, held to be sufficient to bar his claim to a conveyance in equity. *Washington v. M'Gee*, 7 T. B. Mon. (Ky.) 131.

Defendant's wife having refused her assent to the sale, defendant refused to proceed further. Plaintiff then sued for damages, and, after nearly two years, and after the land had increased in value, and improvements had been made thereon, sued for specific performance, offering to take a deed subject to the contingent dower rights of defendant's wife. *Held*, that the right to specific performance had been waived. *Ford v. Euker*, 86 Va. 75.

A granted to B a license to use A's patent, knowing that B believed the patent to cover more than it really did. A took no steps to prosecute persons selling without licenses to the injury of B's business. *Held*, that A, by his conduct, precluded himself from demanding specific performance in a court of equity. *Brewster v. Tuthill Spring Co.*, 34 Fed. Rep. 760.

Plaintiff contracted with defendant for the purchase from defendant of a certain lot, and afterwards they agreed that the lot and another should be sold by defendant to plaintiff's son at a different price, with the right to a reconveyance to defendant of the second lot, within a given time. *Held*, that the first contract was waived, and specific performance could not be enforced. *Ford v. Euker* (Va.), 9 S. E. Rep. 500.

By accepting from the assignee his installments of purchase money, the vendor waives his right to object to the assignment of the contract, even where the contract expressly forbids assignment and may be compelled, at the assignee's instance, to perform specifically. *Camp v. Wiggins*, 72 Iowa 643.

Where the vendor, under a contract for the sale of land, accepts the purchase price agreed to be paid therefor, and delivers a deed in which a portion of the land is fraudulently omitted, though supposed by the vendee to include the whole, he waives his right to object to a specific performance of the contract on the ground of the inadequacy of the consideration. *Nicholson v. Tarpey*, 70 Cal. 608.

3. *Hanthorne v. Brooklyn L. Ins. Co.*, 5 Mo. App. 73; *Huffman v. Hummer*, 18 N. J. Eq. 83.

party seeking specific performance has consented to the rescission of the contract or has abandoned it. It requires a new meeting of minds, indeed a new contract, to create any rights that a court of equity will respect.¹

Receiving a deed from the heirs of an ancestor who had contracted to convey is not a waiver of the right to a specific execution of the ancestor's contract. *Trabue v. North*, 2 A. K. Marsh. (Ky.) 361.

Refusal of the heir, who had purchased the mortgage, to accept a tender of the amount due, made on condition that he assign the mortgage to the vendee, is not a waiver of his right to insist that the vendee shall pay the mortgage before receiving his deed. *Wheeler v. Wheeler* (Supreme Ct.), 2 N. Y. Supp. 496.

1. *York v. Passaic Rolling Mill Co.*, 30 Fed. Rep. 471; *Hubbard v. Gray*, 21 Ark. 501; *Conrad v. Lindley*, 2 Cal. 173; *Greene v. Covillaud*, 10 Cal. 317; 70 Am. Dec. 725; *Maxfield v. Terry*, 4 Del. Ch. 618; *Hale v. Bryant*, 109 Ill. 34; *Harrison v. Polar Star Lodge*, 116 Ill. 279; *Fowler v. Marshall*, 29 Kan. 665; *Webster v. Brown*, 67 Mich. 328; *Arnoux v. Homans*, 25 How. Pr. (N. Y.) 427; *Falls v. Carpenter*, 1 Dev. & B. (N. Car.) 237; 28 Am. Dec. 613; *Boyce v. McCulloch*, 3 W. & S. (Pa.) 429; 39 Am. Dec. 35; *Russell v. Baughman*, 94 Pa. St. 400; *Powell v. Hankey*, 2 P. Wms. 82.

One in possession of land under an agreement to pay for the same within a fixed time, who surrenders at the expiration of the time named without having paid anything, has no equity of redemption entitling him to enforce specific performance. *Givens v. Cobb*, 83 Mo. 189.

To sustain the allegation by the vendee that the contract had been abandoned by the vendor, he ought to show that the conduct of the vendor was such as ought to justify a reasonable man in believing that he acquiesced in the decision of the vendee to abandon the contract; such as might reasonably influence the conduct of the vendee, and induce him to regulate his own affairs on the presumption that it was no longer incumbered by his contract. *Garnett v. Macon*, 2 Brock. (U. S.) 185.

A vendee of land in possession paid part of the purchase money under the contract, but, on being sued for the residue by the vendor, pleaded the Statute

of Frauds to the action, and thereby defeated the suit. *Held*, that this was an abandonment of the contract, and that he was not entitled to a specific execution of it, but that he was entitled to have the money which he had paid refunded to him. *Payne v. Graves*, 5 Leigh (Va.) 561.

In such case the vendee will be required to account for the rents and profits received by him from the land, the amount to be deducted from the money paid by him; and if it exceeds the sum so paid, he will be decreed to pay the excess to the vendor. *Payne v. Graves*, 5 Leigh (Va.) 561.

A vendee in possession under a recorded contract, who, intending to have nothing more to do with the land, abandons it after an attempted re-sale to the vendor on execution issued on a judgment against the vendee for a portion of the price, cannot, after a delay of twelve years, specifically enforce the contract of sale as against a *bona fide* purchaser from the vendor, although such purchaser took the land with constructive notice of the contract. *Holden v. Purefoy*, 108 N. Car. 163.

The obligor of a bond, to make title to land, cannot insist, in a suit for a specific performance, that the obligee has abandoned the contract, and lost the right to relief, while he himself still holds the bonds given for the purchase money, without having offered to surrender them to the obligee. *White v. Butcher*, 6 Jones Eq. (N. Car.) 231.

Defendant, in order to interest plaintiff in its business, agreed to give him, in addition to his salary, twenty-eight shares of its stock, to be paid for out of the dividends upon the stock given. Subsequently plaintiff, against defendant's wish, severed his connection with defendant and surrendered the contract for the stock. *Held*, that since he had voluntarily rescinded and surrendered his contract he was not entitled to specific performance. *York v. Passaic Rolling Mill Co.*, 30 Fed. Rep. 471.

In consideration of a contract to convey real estate, complainant had agreed to preserve for defendants a right to certain other lands as a homestead. It appeared on a suit for specific performance that the parties contemplated a

XI. PROCEDURE—1. Generally.—Specific performance may be enforced either directly by a suit for that purpose, or, in some cases, indirectly, by an injunction. Where a person has agreed not to do a certain act, specific performance may be decreed in the form of an injunction.¹ So, where a party agrees to do certain acts and not to do others, he may be enjoined from doing the latter acts, and specific performance of the contract will thus be enforced to that extent, although the court may have no power to decree specific performance of the acts which he agreed to do.² A mandatory injunction may also enforce the affirmative terms of a contract indirectly in some cases in which a direct suit for specific performance would not lie.³

2. Parties.⁴—While, ordinarily, the parties to the contract are the proper parties to a suit to enforce specific performance thereof, yet there may be cases in which others are proper, and, in some instances, necessary parties. Thus, an attachment or execution creditor of the vendor may be a proper party.⁵ So, in a suit by the vendee to enforce specific performance of a contract to convey land, an infant, to whom a portion of the purchase-money notes were made payable by direction of the vendor, is a proper party.⁶ The personal representative of

right of homestead in government lands as secured by United States statutes. *Held*, that the contract was to procure for defendants the right to occupy the land as claimants of a homestead, and that a tender of performance was not necessary in order to maintain the suit, defendants having abandoned the contract before complainant could have obtained the stipulated right. *Dulin v. Prince*, 124 Ill. 76.

What acts of the parties will so affect an executed parol agreement in relation to land as to evidence its abandonment, and prevent a court of equity from enforcing it—determined, in a case depending on peculiar and unusual circumstances. *Wynn v. Garland*, 19 Ark. 23; 68 Am. Dec. 190.

1. *Hapgood v. Rosenstock*, 23 Fed. Rep. 86; *Barret v. Blagrove*, 5 Ves. 555. Many other cases are cited and reviewed in the article on INJUNCTION, vol. 10, pp. 937-948.

2. *Lumley v. Wagner*, 1 DeG. M. & G. 485.

Thus, where authors agree to write for one firm and not to write for any other, or actresses agree to act at one theater and not to act at any other, they may be restrained from writing for other firms or acting at other theaters, although they cannot be compelled to write or act for the firm or theater agreed upon. *Morris v. Col-*

man, 18 Ves. 437; *Daly v. Smith*, 49 How. Pr. (N. Y.) 150; *Hayes v. Willio*, 11 Abb. Pr. N. S. (N. Y.) 167; *McCaull v. Braham*, 16 Fed. Rep. 37. But *contra*, see *Clarke v. Price*, 2 Wils. 157.

3. *Lane v. Newdigate*, 10 Ves. 192; *Rankin v. Huskisson*, 4 Sim. 13; *Lord Manners v. Johnson*, 45 L. J. Ch. 404; *Storer v. Great Western R. Co.*, 2 Y. & C. 48; *Foster v. Birmingham, etc., R. Co.*, 2 W. R. 378; *Schworer v. Borlston Market Assoc.*, 99 Mass. 285; *Leake on Contracts* 1120. See further, as to when a mandatory injunction will be granted, INJUNCTIONS, vol. 10, p. 789, *et seq.*

4. See 42 Law Mag. 267; 43 Law Mag. 19. See also on the general subject of parties, PARTIES TO ACTIONS, vol. 17, p. 470.

5. *Horton v. Hubbard*, 83 Mich. 123. So, a mortgage creditor may be a necessary party. *Duruty v. Musacchia*, 42 La. Ann. 357.

6. *Gentry v. Gentry*, 87 Va. 473. See also *Wilcox v. Pratt*, 125 N. Y. 688.

"Specific performance cannot be decreed when the defendant, the original party to the contract, has assigned and sold his rights thereunder to third parties, who are purchasers without notice, and are not brought before the court." *Wollensak v. Briggs*, 119 Ill. 553.

the vendor is generally the proper party to enforce specific performance where the purchase money is unpaid, after the death of the vendor,¹ although, if a conveyance has to be made, the vendor's heirs or devisees may also be necessary parties.² If the vendee is dead his personal representatives and heirs or devisees are necessary parties defendant where the purchase money is unpaid and no deed has been made.³ Where the vendee is dead and specific performance is sought as against the vendor, the heirs or devisees of the vendee are the proper parties to bring the suit.⁴ If the vendor is dead his widow and heirs or devisees are generally necessary parties defendant in such a case;⁵ and his personal representative is a proper, but not always a neces-

But in a suit for specific performance of a contract to convey land, the title to which is in litigation between the vendor and a third person not a party to the contract, the objection that the latter ought to have been made a party to the suit must be raised by plea or answer in the trial court. *Bragg v. Olson*, 128 Ill. 540.

Where the purchaser of land assigns his contract to a third party, the assignee will have the option of completing the contract, and thereupon to insist upon a conveyance to himself; but the vendor cannot compel him to perform, even though the assignee may have paid something on the contract, for the reason that there is no contract between them. The vendor should enforce the contract against the original vendee. *Corbus v. Teed*, 69 Ill. 205.

"One to whom a contract for the sale of land has been assigned by the vendor as collateral security has such interest in the contract as makes him a proper party to an action to enforce it." *Butler v. Gage* (Colo. 1889), 23 Pac. Rep. 462.

In an action brought for the specific performance of a written contract to convey real estate, one to whom the vendor sold and conveyed the legal title, before the commencement of the action, is a necessary party. *Atchison, etc., R. Co. v. Benton*, 42 Kan. 698.

But the assignor is not, it has been held, a necessary party in a suit by the assignee upon a title bond. *Colerick v. Hooper*, 3 Ind. 316; 56 Am. Dec. 505. See also *Miller v. Whittier*, 32 Me. 203.

It has been held, however, on a bill against a vendee of land by a third person, claiming the land under a written agreement by the vendor to convey to him in a certain event, the vendor, or his legal representatives, should be made parties. *Lewis v. Madisons*, 1

Munf. (Va.) 303; *Daily v. Litchfield*, 10 Mich. 29; *Hoover v. Donally*, 3 Hen. & M. (Va.) 316.

1. *Butler v. Gage* (Colo. 1889), 23 Pac. Rep. 462; *Hill v. Proctor*, 10 W. Va. 59; *Robinson v. Appleton*, 124 Ill. 276; *Angell v. Steere*, 16 R. I. 200.

But in *Wyoming*, under Rev. St., § 3008, providing that the "heirs at law or devisees of a person who purchased an interest in land by written contract, and died before conveyance thereof to him, may compel such conveyance as the deceased might have done," the administrator of a deceased vendee cannot sue for specific performance. *Boburg v. Prael* (Wyoming, 1890), 23 Pac. Rep. 70. See also *Wilson's Estate*, 7 Pa. Co. Ct. Rep. 458; *Young v. Young*, 45 N. J. Eq. 27.

2. *Thomson v. Smith*, 63 N. Y. 301; *Schropel v. Hopper*, 40 Barb. (N. Y.) 425; *Mitchell v. Shell*, 40 Miss. 118.

3. *Champion v. Brown*, 6 Johns. Ch. (N. Y.) 402; 10 Am. Dec. 343. But if the purchase money is fully paid the administrator is not generally a necessary party. *McKay v. Broad*, 70 Ala. 377.

4. *Buckmaster v. Harrop*, 7 Ves. 341; *Spier v. Robinson*, 9 How. Pr. (N. Y.) 315; *House v. Dexter*, 9 Mich. 246; *Webster v. Tibbits*, 19 Wis. 438; *Buck v. Buck*, 11 Paige (N. Y.) 170. But the personal representative ought also to be a party where part of the purchase money is yet to be paid.

5. *Morgan v. Morgan*, 2 Wheat. (U. S.) 290; *Hubbard v. Johnson*, 77 Me. 139; *Moore v. Murrah*, 40 Ala. 573; *Jacobs v. Locke*, 2 Ired. Eq. (N. Car.) 286; *Craig v. Johnson*, 3 J. J. Marsh. (Ky.) 572; *Watson v. Mahan*, 20 Ind. 223; *Long v. Brown*, 66 Ind. 160; *Young v. Young*, 45 N. J. Eq. 27; *Ander's Estate*, 12 Phila. (Pa.) 45; *Hoffner v. Wynkoop*, 97 Pa. St. 130

sary party.¹ A grantor who conveys property in trust for a specific purpose retains such an interest as will entitle him to a specific performance of the trust.² The trustee of an express trust may sue in his own name or join the beneficiary as party.³ But it has been held that an agent cannot enforce a specific performance of a contract for the sale of land made in his name as agent.⁴ And the assignee of a contract to convey who purchased before suit is a necessary party.⁵ Other cases, showing who are proper parties, are cited below.⁶

But heirs who have conveyed their interest need not be joined. *Barnard v. Macy*, 11 Ind. 536.

1. *Potter v. Ellice*, 48 N. Y. 323.

2. *Chapman v. Wilbur*, 4 Oregon 362.

3. *Wright v. Tinsley*, 30 Mo. 389.

4. *King of Spain v. Machado*, 4 Russ. 228; *M'Namara v. Williams*, 6 Ves. 142; *Morton v. Stone*, 39 Minn. 275; *Morton v. Hagerman* (Minn. 1888), 39 N. W. Rep. 497. See, also, *Tavener v. Barrett*, 21 W. Va. 656. But to the contrary effect, see *Kelly v. Thuey*, 102 Mo. 522. Compare *Bartlett v. Pickersgill*, 1 Cox 15; *Nelthorpe v. Holgate*, Coll. 203; *Small v. Atwood*, 1 Young 407.

5. *Atchison, etc., R. Co. v. Benton*, 42 Kan. 698.

6. A entered into a contract with B for the purchase of land owned by the latter, and, before performance of the conditions on either side, contracted to sell the same land to C, and thereafter neglected or refused to complete his contract with B so as to acquire the title. *Held*, that the contracts were independent, and that an action could not be maintained by C against A and B to compel a specific performance of the first-named contract by A, so that B's title might be acquired and transferred to C. *McCarthy v. Couch*, 37 Minn. 124.

Under a contract by which the defendant leased to the plaintiffs, co-partners, a newspaper, the contract providing for a renewal for a further term, and that, in case of a termination of the partnership, the partner succeeding to the business might continue by himself alone, or by a new partnership satisfactory to the defendant, a bill in equity may be maintained to enforce a renewal, although the plaintiffs have dissolved their old partnership, and subsequently formed a new one, in which one of them has only a nominal interest. *Floyd v. Storrs*, 144 Mass. 56.

Where a vendor files his bill to subject land to the payment of the purchase money, and the vendee answers and says that portions of the land are held by others, naming them, by title paramount, and shows, in his answer, that the grounds on which such third persons claim portions of said land are such as will put a reasonable man in just apprehension of losing his land, plaintiff must amend his bill, and set out specifically all the facts within his knowledge as to the claims of such third parties; and if he insists that his own title is good, and the land is his he must make such third parties defendants to the bill, so that a proper decree may be entered, protecting the rights of parties interested. *Heavner v. Morgan*, 30 W. Va. 335.

Complainant entered into a written contract with four persons conducting hotels in a city, to run impartially a hack line to and from the depot and hotels for five years, in consideration of their refraining from running free hacks or omnibuses. One of the persons assigned his business to his sons; and they, claiming that complainant had discriminated against their hotel, started a line of free omnibuses; whereupon complainant sought to enjoin them from running the free line, and to compel specific performance. It appeared that another one of the hotels had also changed hands. *Held* that, under the circumstances, and changed relations of the parties, specific performance could not be decreed. *Pingle v. Conner*, 66 Mich. 187.

The specific performance of an agreement to make and maintain a fence upon each side of its railroad track through a farm, made by a railroad company with parties who had no title to the farm, in consideration of the said parties' obtaining a conveyance of the right of way from the owners to the company without expense to it, cannot be enforced against

the successor of the said railroad company by the subsequent owners of the farm, who derived their title subsequent to the date and record of a deed of the right of way to the company, which contained no agreement to fence. *Vanderveer v. New Jersey Southern R. Co.* (N. J. 1887), 8 Atl. Rep. 99.

Mr. Pomeroy says that all parties directly interested in the performance of the contract must be, and all directly and specifically interested in the subject-matter may be joined as parties. *Pom. Spec. Perform.*, § 483. See also *Herrington v. Hubbard*, 2 Ill. 569; 33 Am. Dec. 426 and note 430.

Thus it has been held that to a bill in equity for specific performance of a contract to convey land, all persons interested in the estate are proper parties, and if minor children are improperly made parties, the rest of the bill will not be impaired thereby. *Williams v. Leech*, 28 Pa. St. 89.

So to obtain the specific performance of a contract with a corporation for the sale of real estate, the trustee who holds the legal title to the corporation lands should be made a co-defendant with the corporation. *Morrow v. Lawrence University*, 7 Wis. 574.

The tenant for life, together with the contingent remainderman in fee, may represent the inheritance in a bill for specific performance, though their interests are merely equitable, provided the issue of the remainderman will take, if he fails to do so by reason of the contingency. *Sohier v. Williams*, 1 Curt. (U. S.) 479.

The party for whose benefit an agreement is to be performed, especially if any valuable portion of the consideration has been rendered by him, has the legal right to enforce it, though the promise to fulfill was not made to him. *Van Dyne v. Vreeland*, 11 N. J. Eq. 370; *Guard v. Bradley*, 7 Ind. 600.

A gave a title bond to G, who assigned the bond to W. Thereupon W gave his bond to convey the premises referred to in the first bond to J, and J gave his bond for a conveyance of the same premises to S, by whom a bill for a specific performance was brought against A. *Held*, that the persons through whom the plaintiff claimed were necessary parties to the suit. *Allison v. Shilling*, 27 Tex. 450; 86 Am. Dec. 622.

In *Tennessee*, by the act of 1794, ad-

ministrators and executors are authorized to convey land of the deceased, according to a bond for title given by him before his decease; but to a bill by the vendee, in such case, to compel a conveyance, the heirs must be made parties. *Hale v. Darter*, 5 Humph. (Tenn.) 79.

Where both the vendor and vendee of real estate are deceased, intestate, upon a proceeding in the orphan's court, by the administrator of the vendor, to enforce the specific execution of the contract, the administrator and heirs of the vendee, and all persons deriving title under them, or interested in the contract, must be made parties, and notice should also be given to the heirs of the deceased vendor. *Anshutz's Appeal*, 34 Pa. St. 375.

The heirs of a vendee who had a contract for the conveyance of land, and had paid the whole price, are necessary parties to a suit by their grantee in fee, against the vendor, for specific performance. *Lord v. Underdunk*, 1 Sandf. Ch. (N. Y.) 46.

On a bill filed by the heirs at law of a deceased vendee by parol contract against a purchaser claiming by a subsequent deed from the vendor, charging such purchaser with notice of the parol contract of sale, and praying a decree for specific performance against such purchaser—held, that the administrator of the vendee was a necessary party to such a suit where the personal estate was small, the estate still unsettled, and it did not appear that the debts of the deceased vendee have been paid. *Downing v. Risley*, 15 N. J. Eq. 93.

Where A, B, C, and D make an agreement for a deed, in a suit to enforce the agreement, B and D being dead, their heirs-at-law should be parties, and the party of the second part being dead, his personal representative should be a party. *Miller v. Henderson*, 10 N. J. L. 320.

An assignee in bankruptcy may be a necessary party. *Sweepson v. Rouse*, 65 N. Car. 34; 6 Am. Rep. 735.

To a suit for specific performance of a contract of sale under a deed of trust, the grantor should be made a party. *White v. Watkins*, 23 Mo. 423. Compare *Hines v. Baine*, 1 Smed. & M. Ch. (Miss.) 530.

In a suit against one for specific performance of his contract to sell land, persons having, or claiming to have, an interest in the land, obtained from

the defendant after date of the contract, and with notice thereof, are necessary parties. *Morris v. Hoyt*, 11 Mich. 9; *Seager v. Burns*, 4 Minn. 141; *Stone v. Buckner*, 12 Smed. & M. (Miss.) 73. See also *Rochester v. Anderson*, Litt. Sel. Cas. (Ky.) 143; *Estill v. Clay*, 2 A. K. Marsh. (Ky.) 497; *Crosby v. Davis*, 9 Iowa 98; *Stansberry v. Pope*, 4 Bibb (Ky.) 492; *Casady v. Scallen*, 15 Iowa 93; *Fulleton v. McCurdy*, 4 Lans. (N. Y.) 132.

A joint owner of property is rightly made a party to a bill in equity seeking to compel a vendee to perform his contract. *Lavender v. Thomas*, 18 Ga. 668. See also *Wilcox v. Pratt*, 125 N. Y. 688.

In a bill to compel the execution of securities on specific real estate, alleged to have been promised to secure a loan of money, prior mortgagees of the same real estate are necessary parties; and it is not a sufficient answer to the objection that they are not made parties to such bill, that a decree is asked which will operate only on the interest of the party promising the security in the land. Courts of equity, having the power, should exercise their jurisdiction so as to reduce the rights of all persons, interested in the subject-matter of the suit, to certainty and precision. *Caldwell v. Taggart*, 4 Pet. (U. S.) 190.

Infant or adult heirs of a vendor are bound to fulfill his contract to convey land, to the extent of the estate that descends to them, and may be compelled so to do, although not named in the contract. *Hill v. Ressegieu*, 17 Barb. (N. Y.) 162.

See also *Barry v. Barry*, 64 Miss. 709; *Behr v. Willard*, 11 Neb. 601; *Nevill v. Rentzell*, 39 Ark. 289; *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498; *Corwin's Estate*, 61 Cal. 160; *Mitchell v. Shell*, 49 Miss. 118; *Davis v. Henry*, 4 W. Va. 571.

One who has purchased from a married woman property which had been bought by her during coverture with her paraphernal funds cannot be compelled to accept title until presumption that it is community property, has been overcome by proper proof; and, when it appears that a judicial mortgage is recorded against the husband, the purchaser may require such mortgage creditor to be made a party to a suit by the vendor for specific perform-

ance. *Duruty v. Musacchia*, 42 La. Ann. 357.

One who holds as collateral security by assignment from a contract for the sale of lands, the vendor, has such an interest in the contract as makes him a proper party to an action to enforce it. *Butler v. Gage* (Colo. 1889), 23 Pac. Rep. 462.

The vendor, after such assignment, is still a proper party to an action for its enforcement; and, after his death, pending such litigation, his executors have the right to be substituted as parties. *Butler v. Gage* (Colo. 1889), 23 Pac. Rep. 462.

The fact that defendants were prevented from making their proof by making the executors parties to the action, defendants cannot affect the right of the executors to become parties. *Butler v. Gage* (Colo. 1889), 23 Pac. Rep. 462.

The owner of land agreed to sell it to an attorney in consideration of \$200, and that he should clear the title at his own expense from a cloud created by a sale on execution against the owner. The attorney brought ejectment in the name of the owner against the purchaser at the execution sale, and the latter then procured a quitclaim deed from the plaintiff, with full knowledge of the agreement with the attorney. It was held that the attorney could intervene by cross-petition, have specific performance of the agreement and recover possession of the land. *Montgomery v. Nulton* (Kan. 1891), 26 Pac. Rep. 30.

Who Are Not Necessary Parties.—On the other hand, the following cases will show who have been held not to be necessary parties:

The promisee named in a written contract, who has transferred it by an unconditional verbal assignment, need not be made a party to a suit by his assignee for specific performance of the contract. *Currier v. Howard*, 14 Gray (Mass.) 511.

Where A makes a contract, and therein names B as his attorney to carry out its provisions, B is not a necessary or proper party in a suit against A for specific performance. *Dahoney v. Hall*, 20 Ind. 264.

In a suit by the grantee of the equitable title to land, to compel a conveyance of the legal title to him, his grantor need not be made a party. *Elliott v. Armstrong*, 2 Blackf. (Ind.) 198.

3. Pleading.—The general rules of equity pleading have already been stated.¹ It is sufficient, in this place, to call attention to such rules as seem peculiarly appropriate to the pleadings

On a bill filed to enforce the specific performance of a contract, for the conveyance of real estate, it is no defense, to set up that the money paid was a trust fund; or that the purchase was made by one as trustee of another. If a trust exists, the vendee, or, in case of his death, his heirs, will be liable to account to the *cestui que trust*, and the latter is not a necessary party to a bill to compel a conveyance. *Gibbs v. Blackwell*, 37 Ill. 191.

Pending a suit for a specific performance of a contract to convey property, in which the purchase money had been paid into court, creditors of the vendor recovered judgments against him, and sold the property in question. *Held*, that such judgment creditors were not necessary parties to the suit, nor were the purchasers under such judgments. *Secombe v. Steele*, 20 How. (U. S.) 94.

Where a purchaser of land from the State, having a certificate and possession, but no patent, mortgaged the land, and the mortgagee purchased at the sale, *held*, that the original purchaser was not a necessary party to an action against the assignee of the original purchaser's certificate, to compel a conveyance of the land. *Stewart v. Hutchinson*, 29 How. Pr. (N. Y.) 181.

The wife of a surviving partner has no vested interest in real estate held as stock of the partnership, and need not be made a party to a suit to enforce a specific performance of a contract for the sale thereof. *Galbraith v. Gedge*, 16 B. Mon. (Ky.) 631.

Several persons in possession of distinct parcels of a tract of land, as purchasers, cannot unite in a bill to compel the specific performance, by the former owner of the tract, of a contract for the sale of the land to a third person, which has been assigned to one of such purchasers, on the ground that it was assigned to him for the benefit of all, especially where there is nothing beyond the allegation in the bill to show that the contract was so assigned. *Wood v. Perry*, 1 Barb. (N. Y.) 114.

The plaintiff had a right to the conveyance of certain land under contract. *Held*, that he could not bring

in as parties to his bill to enforce specific performance of the contract, prior mortgages of this and other land, in order to adjust his equities with reference to the order of sale on a future foreclosure, or to secure the application of the purchase money he was to pay to the payment of the mortgage debt. *Chapman v. West*, 17 N. Y. 125.

When the obligee of a bond, conditioned for conveyance of land, brings a bill for specific performance, he cannot make a party one who purchased from the obligor after the obligee's note given for the purchase money was overdue. The proper defendants to such a bill are the obligor and his heirs. *Harrington v. Pinson*, 30 Miss. 30.

A wife cannot, after the death of her husband who has contracted for the sale of her land, describing it as his, enforce specific performance by the purchaser for her own benefit. *Hoover v. Calhoun*, 16 Gratt. (Va.) 109.

Where the wife was not a party to a contract for the sale of land, she cannot be required to join in the conveyance, and she cannot properly be made a party to a bill by the purchaser for specific performance. *Richmond v. Robinson*, 12 Mich. 193.

Strangers to the contract are generally not necessary parties. *Moulton v. Chaffee*, 22 Fed. Rep. 26; *Washburn, etc., Mfg. v. Chicago Galvanized Wire Fence Co.*, 109 Ill. 71; *Pennsylvania, etc., Co. v. Ryerson*, 36 N. J. Eq. 112; *Smith v. Sheldon*, 65 Ill. 219; *Hanchett v. McQueen*, 32 Mich. 22; *Bowne v. Ritter*, 26 N. J. Eq. 456; *Willard v. Tayloe*, 8 Wall. (U. S.) 557.

Upon a bill by the executor of a deceased vendor for specific performance of a contract for the sale of land, notice to his widow and heirs is not necessary, as the contract of sale converts the land into personalty, over which the executor has exclusive control. *Simmons' Appeal*, 140 Pa. St. 567.

Tenants in common, when not. See *Borden v. Curtis*, 46 N. J. Eq. 468.

1. SEE EQUITY PLEADINGS, vol. 6, p. 724.

in suits for specific performance, and to cite illustrative cases showing what pleadings are good and what are bad.

The bill or complaint should show that the contract is one that can be enforced; that the plaintiff has performed or offered to perform its conditions on his part;¹ that the defendant has failed to perform;² that a money compensation in damages would not be adequate,³ and that specific performance ought, in equity, to be granted. It is also necessary, in some cases, to aver a demand and refusal.⁴

1. Chess' Appeal, 4 Pa. St. 52; 45 Am. Dec. 668; Wilson v. Lineberger, 92 N. Car. 547; Frixen v. Castro, 58 Cal. 442; McKleroy v. Tulane, 34 Ala. 78; Bell v. Thompson, 34 Ala. 633; Bass v. Gilliland, 5 Ala. 761; 3 Pom. Eq. Jur. § 1407. But see Crosby v. Moses, 48 N. Y. Super. Ct. 146; Hatcher v. Hatcher, 2 McMull. Ch. (S. Car.) 311; Passmore v. Moore, 1 J. J. Marsh. (Ky.) 591.

A bill for the specific performance of a contract must show that the complainant has done everything on his part necessary to entitle him to performance of the contract by the defendant. Bates v. Wheeler, 2 Ill. 54; Underhill v. Allen, 18 Ark. 466; Doyle v. Teas, 5 Ill. 201.

A general statement that the plaintiff had done "all that he was bound to do," has been held insufficient. The facts should be stated. Davis v. Shreve, 4 Litt. (Ky.) 261; Hart v. McClellan, 41 Ala. 251; Duff v. Fisher, 15 Cal. 375. But see St. Paul Division v. Brown, 9 Minn. 157. Under the Code a general averment of performance is usually considered sufficient.

2. A purchaser seeking relief in the nature of a specific performance should aver in his bill that he has requested his vendor to make title in conformity to the terms of the bond for title, or show some excuse for not doing so, and an averment that the vendor was insolvent is not sufficient to excuse the necessity of such request. Carter v. Thompson, 41 Ala. 375. See also Dodge v. Clark, 17 Cal. 586.

In a suit on a bond for title, for specific performance, an averment that the obligee failed and refused, and still fails and refuses, to perform the conditions, is a sufficient statement of a breach. Holman v. Criswell, 15 Tex. 394.

Plaintiff, in her bill must set out her title in such manner as to show her right to convey. Freeman v. Stokes, 12 Phila. (Pa.) 219.

But in a suit brought by a vendor to compel the specific performance of a contract to purchase land, a deed need not be tendered with the bill. Tavenor v. Barrett, 21 W. Va. 656.

3. Angus v. Robinson, 62 Vt. 60.

4. The following cases will show what should be alleged in the bill in particular instances:

The complaint need not allege the plaintiff's citizenship, except in cases where it is necessary to jurisdiction. Moritz v. Lavelle, 77 Cal. 10. Compare Ducie v. Ford, 8 Mont. 233.

A complaint to enforce specific performance of a contract to convey real estate must allege a demand of the conveyance or a sufficient excuse therefor, or an allegation that the other party has repudiated the contract, or refused to perform it. Burns v. Fox, 113 Ind. 205.

The allegation as to performance, that "plaintiff has performed all and singular his agreements and covenants with defendant," is sufficient on demurrer. Moritz v. Lavelle, 77 Cal. 10.

"A complaint to enforce an exchange of lands, which alleges that by reason of an error in the supposed boundaries of defendants' land, discovered by plaintiff since the contract was made, there is a deficiency in quantity, and they are therefore unable to fully carry out the contract, and which prays compensation for such deficiency, states a cause of action, as plaintiff may, at his option, require defendants to execute the contract as far as possible, and make compensation for the residue." Swain v. Burnette, 76 Cal. 299.

Where defendant agreed to procure a patent to mining land, and convey a half interest to complainants, in consideration of their relinquishing all claims, a complaint alleging that complainants have paid their share of the purchase money, and also that they are able and willing to pay if defend-

ant will accept and state how much they owe, but not alleging any time or amount of payments, is contradictory and insufficient. *Ducie v. Ford*, 8 Mont. 233.

Where, upon the face of an agreement to convey land, the description of the land is sufficient, but the fact may be that the defendant or party to convey has more than one tract answering the description, and thus the description may be rendered indefinite and insufficient, it is not necessary for the plaintiff to allege, in the bill for specific performance, that the defendant has only one tract answering the description, but the burden is upon the defendant to set up in his answer and prove his ownership of two such tracts. *Lente v. Clark*, 22 Fla. 515.

The *Colorado* statute provides that "nothing contained in chapter 43 of 'Frauds and Perjuries' shall be construed to abridge the power of courts of equity in cases of part performance to compel specific performance." Defendant made a verbal contract to convey a tract of land to plaintiff's grantor, on condition that she would make certain improvements thereon. A complaint contained averments showing an acceptance of, and compliance with, the terms of the proposition made by defendant. *Held*, that the averments of the complaint showed a proper case for specific performance. *Hayt v. Hunt* (Colo. 1887), 15 Pac. Rep. 410. So, it is held, in *California*, that the complaint need not aver that the contract was in writing. *Nunez v. Morgan*, 77 Cal. 427.

"A bill that asks a specific performance against one defendant, and to enjoin a suit for unlawful detainer, brought by other defendants, claiming under title from the former defendant, is not multifarious." *Shafer v. O'Brien*, 31 W. Va. 601. See also *Young v. Young*, 45 N. J. Eq. 27; *Henry v. McKittrick*, 42 Kan. 485.

When the description in a bill for specific performance of a contract for the sale of land and the proof are so vague that the court cannot describe the boundaries of the land with certainty, a decree will not be granted." *Askew v. Carr*, 81 Ga. 185.

A complaint praying specific performance of a contract for the sale of land need not allege that plaintiff has no adequate remedy in damages, nor that defendant is the owner of the land when the action is brought, where it

does allege that he was such owner when he made the offer, and the complaint was filed on the day when plaintiff accepted it." *Ide v. Leiser*, 10 Mont. 5.

C, in consideration of plaintiff's prospective services as attorney for him in litigation then pending concerning land, agreed to convey to plaintiff a certain lot "out of the premises which may be recovered by him." After C's death, and after plaintiff had performed services in the litigation, C's administrator compromised against plaintiff's advice, and conveyed C's interest in the land to B, the other litigant. *Held*, that a complaint in a suit for specific performance need not allege against C's administrator and B, and purchasers from B that C had any title to the land, as plaintiff was entitled, as against all the defendants, to a convey of C's interest, whatever it may have been. *King v. Gildersleeve*, 79 Cal. 504.

The complaint was held sufficient in a suit for specific performance of a bond to make "a good and valid deed in common form," which described the bond in accordance with its legal effect as an obligation to convey "in fee-simple by warranty deed." *Phillips v. Herndon*, 78 Tex. 378.

Under a prayer for general relief, plaintiffs may be entitled to a decree for a specific performance of the stipulations in the deed, although not prayed for specifically. *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346.

"Equity will not aid in enforcing specific performance of a parol contract for the purchase of land, where the purchaser seeks to take it from the operation of the Statute of Frauds by alleging part payment, unless the contract is definitely alleged, and the proof clearly establishes the particular contract set up in the bill." *Allen v. Young*, 88 Ala. 338.

In a bill for specific performance of a contract to procure the surrender of a lease held by defendant and his partner, it is not necessary to allege that defendant is able to get his partner to execute such surrender. *Borden v. Curtis*, 46 N. J. Eq. 468.

The contract must be accurately stated in the bill, and the proof should correspond with the contract thus set up. *Carswell v. Walsh*, 70 Md. 504.

The courts will not decree specific performance of a contract to sell land, the price of which plaintiff was to pay

In suits for specific performance, it seems, contrary to the general rule, that the defendant may be granted affirmative relief without filing a cross-bill. Thus, where the parties differ as to the terms of the contract, and the matter is decided in favor of the defendant, the court may compel the plaintiff to perform the contract thus established, although no cross-bill has been filed.¹

in work, where the complaint fails to show how much work has been done, how much has been paid in that way, what is the balance due, or that there is any dispute on these points. *Wakeham v. Barker*, 82 Cal. 46; *Mayer v. Cruse*, 5 Mont. 485; *Powell v. Central Plank Road Co.*, 24 Ala. 441; *Arguello v. Edinger*, 10 Cal. 150; *Cameron v. Abbott*, 30 Ala. 416; *Crocker v. Higgins*, 7 Conn. 342; *Pitts v. Cable*, 44 Ill. 103; *Park v. Johnson*, 4 Allen (Mass.) 259; *Mills v. Metcalf*, 1 A. K. Marsh. (Ky.) 477; *Roy v. Willink*, 4 Sandf. Ch. (N. Y.) 525; *Mallory v. Mallory*, 1 Busb. Eq. (N. Car.) 80; *Yonger v. Welch*, 22 Tex. 417; *Low v. Heck*, 3 W. Va. 680; *Harris v. Knickerbacker*, 5 Wend. (N. Y.) 638; *Kauffman's Appeal*, 55 Pa. St. 383; *Hudson v. Johnson*, 45 Cal. 21; *Norrow v. Laurence University*, 7 Wis. 574; *New, etc., R. Co. v. Lawton*, 35 N. J. Eq. 386; 11 Am. & Eng. R. Cas. 406; *Jones v. Jones*, 49 Tex. 683; *Platt v. Stonington Sav. Bank*, 46 Conn. 476; *Clough v. Hart*, 8 Kan. 487; *Martin v. Merritt*, 57 Ind. 34; 26 Am. Rep. 45; *Greenfield v. Carleton*, 30 Ark. 547; *Capehart v. Hale*, 6 W. Va. 547.

See generally, *Coolbaugh v. Roemer*, 32 Minn. 445; *Farwell v. Johnston*, 34 Mich. 342; *Fitschen v. Thomas*, 9 Mont. 52; *Taft v. Taft*, 73 Mich. 502; *Zeringue v. Texas, etc., R. Co.*, 34 Fed. Rep. 239; *Gerrish v. Tourie*, 3 Gray (Mass.) 82; *Swales v. Jackson*, 126 Ind. 282; *Fife v. Clayton*, 13 Ves. 546; *Lattin v. Hazard*, 85 Cal. 58; *Deglow v. Meyer* (Ky. 1891), 15 S. W. Rep. 875; *Phillips v. Herndon*, 78 Tex. 378; *Horton v. Hubbard*, 83 Mich. 123; *Bvrs v. Thompson* (Tex. 1891), 15 S. W. Rep. 1087; *Slingerland v. Slingerland*, 46 Minn. 100.

In a suit for specific performance of a contract to convey land it should be so described that it can be identified and a conveyance decreed. *Gray v. Davis*, 3 J. J. Marsh. (Ky.) 381; *Baker v. Hathaway*, 5 Allen (Mass.) 103; *Allen v. Chambers*, 4 Ired. Eq. (N.

Car.) 125. As to what is sufficient, see *Goodenow v. Curtis*, 18 Mich. 298; *Askew v. Carr*, 81 Ga. 685; *Carswell v. Walsh*, 70 Md. 504.

The prayer of a bill in equity for relief, on the ground of a promise by the defendant to give a mortgage to secure some notes of his, due to the complainant, is too vague and indefinite to enforce, where there is no specification of the property, whether land or personal estate, which was agreed to be mortgaged. *Sanderson v. Stockdale*, 11 Md. 563.

The petition must state the terms of the agreement. *Ward v. Stuart*, 62 Tex. 333. And in some of the States the written contract must be set out in full.

A complaint, in a suit to compel from heirs the specific performance of their ancestor's agreement to convey land, need not allege title in the ancestor. *Cottrell v. Cottrell*, 81 Ind. 87; *Moore v. Burrows*, 34 Barb. (N. Y.) 173.

It is held in *California* that if the vendee relies on part performance as a ground for compelling specific performance of an oral agreement to convey land, he must aver in his complaint the acts constituting part performance. An allegation that he entered and made valuable improvements is not enough. *Fowler v. Sutherland*, 68 Cal. 414.

1. *Fife v. Clayton*, 13 Ves. 546; *Stapylton v. Scott*, 13 Ves. 425; *Redfield v. Gleason*, 61 Vt. 220; *Northern R. Co. v. Ogdensburg, etc., R. Co.*, 18 Fed. Rep. 815; *Bradford v. Union Bank*, 13 How. (U. S.) 57. See also *Adams v. Valentine*, 33 Fed. Rep. 1; *Thompson v. Hawley*, 14 Oregon 199. But it is doubtful if this rule would apply in the code States, and it has been held in *Illinois* that a cross-bill is necessary if the defendant desires affirmative relief in a suit for specific performance. *Hanna v. Ratekin*, 43 Ill. 462. And the same has also been held in *Tennessee*. *Bussy v. Gant*, 10 Humph. (Tenn.) 238.

Where the original bill is fatally defective upon its face, either in form or substance, a demurrer will lie;¹ but defects not appar-

Cross-Bills.—Affirmative relief by way of specific performance may be granted the defendant, where the finding is in his favor, upon a proper cross-bill. *Moser v. Cochrane*, 107 N. Y. 35; *Thompson v. Hawley*, 14 Oregon 199; *Harshman v. Mitchell*, 117 Ind. 312. See also Bliss on Code Pleading, §§ 349-351. See *Kelly v. Dee*, 2 Thomp. & C. (N. Y.) 286.

It has been held that a cross-bill may be filed at any time before the final hearing. *Neal v. Foster*, 34 Fed. Rep. 496; *Rogers v. Reissner*, 31 Fed. Rep. 592. See as to the requirements of a cross-bill, and the proceedings thereon, *Foster's Fed. Prac.*, §§ 172-173, note to *Hurd v. Case*, 83 Am. Dec. 251. *EQUITY PLEADINGS*, vol. 6, pp. 769-771.

In a suit for the specific performance of an agreement to convey land according to the condition of a title-bond which recited payment of the consideration—held, that defendant could, in his cross-complaint, contradict this recital, and demand payment of the purchase money, and that plaintiff could not reply that the Statute of Limitations interposed a bar to defendant's demand for the purchase money. *Hamilton v. Plaut*, 81 Ind. 417. See also *Bennett v. Welch*, 25 Ind. 140; 87 Am. Dec. 354.

In a proceeding for partition defendant filed a cross-complaint, alleging that he and plaintiff, as tenants in common, had executed a title-bond for the property to B, the consideration for which was to be paid by procuring and surrendering for cancellation certain notes executed by plaintiff, for which he alone was liable; that the bond had been assigned for value to defendant, and that he had caused the notes to be surrendered to plaintiff; and prayed for specific performance of the obligations of the title-bond. *Held*, that it was not necessary to allege or show a demand for a deed before filing the cross-complaint, and that defendant was entitled to a decree for specific performance. *Harshman v. Mitchell*, 117 Ind. 312.

In a suit for specific performance the defendant cannot set up in a cross-bill fraud of the plaintiff in other matters not connected with the contract. *May v. Armstrong*, 3 J. J. Marsh. (Ky.) 260; 20 Am. Dec. 137. But see *Cross v. De Valle*, 1 Wall. (U. S.) 5.

1. Thus where the laches of complainant appears on the face of the bill, advantage may be taken by demurrer. *McCabe v. Mathews*, 40 Fed. Rep. 338.

So where a bill to enforce the specific performance of a contract shows that such contract is within the Statute of Frauds it is ground of demurrer. *Chambers v. Lecompte*, 9 Mo. 575.

In *Vermont*, a bill for specific performance of a contract to deliver bonds is demurrable unless it sets forth such facts as show that a money compensation, to be recovered in a suit at law, will not be adequate. *Angus v. Robinson*, 62 Vt. 60. See, also, *Prewitt v. Jenkins*, 1 Blackf. (Ind.) 294.

A demurrer lies to a bill for the specific performance of a contract of sale made by an agent, which fails to show that the person executing the same was the agent of the owner, duly authorized, either by any charge, or by the contract so far as it is set out. *Roby v. Cossitt*, 78 Ill. 638.

When a bill for specific performance and injunction, with several non-resident corporations defendants, does not state definitely when the contract is to be performed, nor where made, nor whether to be performed in or out of the State, and does not give the name of the alleged agent of the non-resident corporations, and the consideration agreed to be paid, a demurrer to the bill should be sustained. *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498.

A demurrer was held properly sustained to a bill for specific performance which alleged that defendant authorized a firm of brokers to sell his land at \$45 net per acre if sold without the growing crops, and for \$47.50 net if sold with the growing crops, and that the brokers sold to plaintiff for a lump sum, without showing the number of acres, or whether it was sold with or without the growing crops. *Stephens v. Soule*, 83 Cal. 438.

So where a complaint for specific performance alleged that, in consideration of benefits to accrue from a steam dummy railroad which plaintiff's assignor agreed to build, defendant made a written contract to execute to him certain notes, and also a deed to five acres of land on the line of the proposed road, and deliver them to a certain bank in escrow, to be delivered to

ent upon its face, and special matters of defense, must generally be taken advantage of by plea or answer.¹

him if he completed the road in a time specified, otherwise to be returned; that said assignor built the road as agreed within the time limited; that afterwards he conveyed to plaintiff all his right to a deed of the land; and that plaintiff had demanded a deed therefor, which defendant refused to make, it was held that a demurrer to the complaint would lie since it did not appear therefrom that defendant had not performed his contract by delivering the note and deed to the bank, or to plaintiff's assignor. *Lattin v. Hazard*, 85 Cal. 58.

But where in an action to reform a deed, and for the specific performance of a contract for the sale of land, the complaint shows on its face that the purchase price was accepted, and a deed delivered, a demurrer on the ground of inadequacy of consideration will not be sustained. *Nicholson v. Tarpey*, 70 Cal. 608.

And a bill filed by a married woman and her husband, for performance of a contract for the sale of land belonging to the female plaintiff, is not demurrable because it appears on the face of the deed tendered with the bill, that the acknowledgment is dated after the suit had been commenced. *Vaught v. Cain*, 37 W. Va. 424.

1. See EQUITY PLEADINGS, vol. 6, p. 785; DEMURRER, vol. 5, pp. 550-552.

Thus, where it did not appear on the face of a complaint that the proposition from defendant, specifying the conditions on which he would convey, was not in writing. *Held*, that the question whether defendant's proposition was in writing could not be raised by demurrer; if raised at all it must be by answer. *Hayt v. Hunt* (Colo. 1877), 15 Pac. Rep. 410.

So, where the Statute of Limitations or the Statute of Frauds is relied on by the defendant, it must be pleaded unless it appears upon the face of the bill that the contract is within the statute. *Frye on Spec. Perform.*, *156; LIMITATION OF ACTIONS, vol. 13, p. 769.

The Answer.—Where, in the answer to a bill for the specific performance of a contract of sale of real estate, the vendor admits his failure to convey on demand, and claims not only the balance of the purchase-money agreed on, but also an old debt of the vendee's father, which is alleged to be a lien on

the land, before he is willing to execute a deed, this being new matter, not responsive to the allegations of the bill, and not supported by proof, is no ground for denying the relief prayed for. *Smoot v. Rea*, 19 Md. 398.

When the vendor, plaintiff, alleges that he is able, ready, and willing to convey the title, and tenders a conveyance, the purchaser must either aver that the vendor has no title; or, if the title is defective, must point out the defects, that they may be remedied or the contract rescinded. *Logan v. Bull*, 7 Ky. 607.

Where an obligee, in a bond to make title, files a bill for a specific performance of the contract, and claims to have the land conveyed according to certain boundaries, which, he alleges, were meant by the contract, and the defendant, in his answer, denies that such boundaries were meant, and sets out others, which, he alleges, were intended, the plaintiff, not having in the pleadings, averred his willingness to accept a deed according to the lines as set out by the defendant, and not having offered to release him from any farther claim, is not entitled to a decree according to the defendant's allegations. *Richardson v. Godwin*, 6 Jones' Eq. (N. Car.) 229; *Sain v. Dulin*, 6 Jones' Eq. (N. Y.) 195. See also *Gariss v. Gariss*, 13 N. J. Eq. 320.

The answer to a bill for the specific performance of a contract of sale admitted that "the defendant negotiated to and with the plaintiff for a sale of the lot for \$700," but denied "that the defendant did sell the same." *Held*, that the contract was not admitted. *Auter v. Miller*, 18 Iowa 405.

In a suit to enforce specific performance of a contract to convey land, the defendant cannot avail himself of the facts that the land is his homestead; that he is a married man, and that his wife did not join in the contract, as a defense to the action, without pleading such facts, unless the plaintiff consents to try that defense without it being pleaded. Such facts cannot be proved under a mere denial of the execution. *Brown v. Eaton*, 21 Minn. 409.

Where, pending a suit for a specific performance, it becomes, by the act of a third party, impossible for defendant to perform, he should be allowed to set up the facts by supplemental answer.

It has been held, however, that evidence of the illegal purpose for which a house was sold may be introduced under a general denial.¹

An independent claim which the defendant has against the plaintiff cannot be set up by way of defense to a bill for specific performance.² Nor is the insolvency of the plaintiff any defense, where the contract was entered into with a knowledge of such insolvency,³ nor where the plaintiff tenders security.⁴

4. **Evidence.**—The proof must, in every essential particular, correspond with the contract stated in the bill,⁵ although a slight variance in immaterial matters may not be fatal,⁶ and, in many cases, the pleadings may be amended so as to correspond with the proof.⁷

The burden of proof is upon the plaintiff to show the making of the contract and its terms,⁸ and to establish his title, if put in

Wilbur v. Gold, etc., Tel. Co., 52 N. Y. Super. Ct. 189.

Where, to a bill for the specific performance of a contract to convey land, the defendant pleads that the contract was not in writing, and is void, and at the same time answers, denying the contract set up in the bill, the answer overrules the plea; and, to entitle the plaintiff to a decree against such an answer, he must show a contract in writing. *Wildbahn v. Robidoux*, 11 Mo. 659.

See also *Hughes v. Young*, 31 N. J. Eq. 60; *Dorsey v. Campbell*, *Bland* (Md.) 356; *Spence v. Spence*, 17 Wis. 448; *Williams v. Langevin*, 40 Minn. 180; *Bragg v. Olson*, 128 Ill. 540.

1. *Sprague v. Rooney*, 104 Mo. 349.

2. *Right v. Luke*, 69 Ala. 423; *Thompson v. Winter*, 42 Minn. 121; *Seaman v. Van Rensselaer*, 10 Barb. (N. Y.) 81; *Cook v. Cook*, 77 Tex. 85. And see *Morgan v. Herrick*, 21 Ill. 481.

3. *Brush-Swan Light Co. v. Brush Electric Light Co.*, 43 Fed. Rep. 225.

4. *McFarlane v. Williams*, 107 Ill. 33.

5. *Carswell v. Walsh*, 70 Md. 504; *Forsyth v. Clark*, 3 Wend. (N. Y.) 637; *Magee v. McManus*, 70 Cal. 553; *Taylor v. Williams*, 45 Mo. 80.

Thus, where the bill averred that the contract was made September 30, 1885, while the proof showed that it was made September 30, 1886, the variance was held fatal. *Johnston v. Jones*, 85 Ala. 286.

So, a bill alleging an agreement to pay the purchase money in seven years, with interest, was held not to be supported by proof, or the admission of a contract to pay in seven years, without

interest. *Harris v. Knickerbacker*, 5 Wend. (N. Y.) 638.

6. *Taft v. Taft*, 73 Mich. 502; *Williams v. Langevin*, 40 Minn. 180; *Zane v. Zane*, 6 Munf. (Va.) 406; *Farley v. Eller*, 29 Ind. 322; *Andrews v. Andrews*, 28 Ala. 432; *Ashmore v. Evans*, 11 N. J. Eq. 151.

A bill in equity for specific performance of a contract of sale alleged that the whole of the purchase money had been paid, and also offered to pay any sum which might be found to be still due. *Held*, that the bill might be sustained though the proof showed that a part of the purchase money was still due. *Mix v. Beach*, 46 Ill. 311.

In a contract for the conveyance of land, the time, place, and mode of payment are not matters of substance, unless made so by the express stipulations of the parties, or unless this is to be inferred from the special nature of the case. Therefore, where on a bill for the specific performance of a parol agreement for the purchase and conveyance of lands, the contract as proved differed in these particulars from that set out in the bill, but corresponded in other respects, it was held that the variance was not material. *Bomier v. Caldwell*, 8 Mich. 463.

7. *Cairncross v. McGrann*, 37 Minn. 130.

8. *Williamson v. Williamson*, 4 Iowa 279; *Walsh v. Barton*, 24 Ohio St. 28; *Magee v. McManus*, 70 Cal. 553. See also cases cited in next note below. *Lapham v. Driesvogt*, 36 Mo. App. 275; *Worthington v. Worthington* (Neb. 1891), 49 N. W. Rep. 354.

But where the defendant pleads fraud, mistake, rescission by a new con-

issue by the answer;¹ and the evidence upon these points must be clear and satisfactory to warrant a decree of specific performance.² The circumstances under which the contract was made may generally be shown.³ The defendant may show by parol evidence that the contract was without consideration;⁴ that his understanding as to the extent of the property included, or the meaning of the contract differed from that of the plaintiff at the time it was executed;⁵ that, through mistake, the writing does not express the real agreement of the parties, or that he was induced to enter

tract, or some other affirmative defense the burden of proof as to such defense is generally upon him. *Durst v. Swift*, 11 Tex. 273; *Crawford v. Paine*, 19 Iowa 172; *Pike v. Underhill*, 24 Ark. 124; *Trustees of Lexington v. Lindsay*, 2 A. K. Marsh. (Ky.) 443; *Ferussac v. Thorn*, 1 Barb. (N. Y.) 42; *Wheeler v. Wheeler* (Supreme Ct.), 2 N. Y. Supp. 496.

He must prove the identical contract alleged. *McFarland v. Reeve*, 5 Del. Ch. 118.

1. *Cornell v. Andrus*, 36 N. J. Eq. 321.

2. *Allen v. Fiske*, 42 Vt. 462; *Willmer v. Farris*, 40 Iowa 309; *Madeira v. Hopkins*, 12 B. Mon. (Ky.) 595; *Lobdell v. Lobdell*, 36 N. Y. 327; *Sims v. McEwen*, 27 Ala. 184; *Brewer v. Wilson*, 17 N. J. Eq. 180; *Carver v. Lasater*, 36 Ill. 182; *Allen v. Webb*, 64 Ill. 342; *Suydam v. Columbus Ins. Co.*, 18 Ohio 459; *Wright v. Wright*, 31 Mich. 380; *Tiernan v. Granger*, 65 Ill. 351; *Veth v. Gierth*, 92 Mo. 97; *Odell v. Morin*, 5 Oregon 96; *Higgins v. Butler*, 78 Me. 520; *Burton v. Vessels*, 5 Del. Ch. 568; *Foster v. Kimmons*, 54 Mo. 488.

"A court of equity will not enforce a parol contract for the sale or exchange of land, unless the terms of the contract are admitted or clearly proven." *Boggs v. Bodkin*, 32 W. Va. 566; *Ralls v. Ralls*, 82 Ill. 243.

Specific performance of an agreement made with the owner's agent for the sale of land will not be decreed unless the evidence clearly shows the terms of the contract and the authority of the agent, or a ratification by the owner. *Hadfield v. Skelton*, 69 Wis. 460.

Thus, in a recent case, the issue being whether the agent who sold the land to complainants was authorized to sell, one of the respondents and the agent gave nearly all the testimony regarding such authority. Their testimony was directly contradictory, that

of the respondent being that the sale was made after the expiration of the time in which the agent was authorized to sell. The evidence showed that respondent had previously put the land in the hands of one agent to sell, and was averse to placing it in the hands of any other. The agent testified that the respondent had previously stated to him substantially the same facts relative to the transaction as the latter had testified to at the trial. *Held*, that specific performance would not be decreed. *Blair v. Sheridan*, 50 Va. 527.

The party seeking to enforce performance must prove the contract substantially as pleaded, and by clear, definite, and satisfactory evidence. *Cutsinger v. Ballard*, 115 Ind. 93.

3. *Ratcliffe v. Allison*, 3 Rand. (Va.) 537; *Printup v. Mitchell*, 17 Ga. 555; 63 Am. Dec. 258; *Lennon v. Stiles* (Supreme Ct.), 5 N. Y. Supp. 570; *Campbell v. McClenahan*, 6 S. & R. (Pa.) 171.

4. *Short v. Price*, 17 Tex. 403; *Jefferys v. Jefferys*, Craig & Ph. 138.

It may also be shown by parol that the consideration has been paid. *Vincent v. Larson*, 1 Idaho (N. S.) 241.

5. *Cortelyou's Appeal*, 102 Pa. St. 576; *Coles v. Boune*, 10 Paige (N. Y.) 526; 2 Pom. Eq. Jur., § 860.

Thus, where the evidence showed that the plaintiff understood that there was an absolute sale, while the defendant understood that he was taking the land upon condition only that it turned out as represented, with the right to return it, and recover the purchase money, if it did not turn out so, it was held that equity would not decree specific performance. *Veth v. Gierth* (Mo.), 4 S. W. Rep. 432. And in the same case it was held that the rule as to the admission of such evidence is liberal in favor of the defendant.

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into it through mistake, fraud, or surprise.¹ So, under proper pleadings, the defendant may show that the contract relied on by the plaintiff has been rescinded by a parol agreement,² but not that it has been modified by a contemporaneous parol contract.³ The courts are very liberal in admitting evidence in favor of the defendant, and any good reason why the equitable relief demanded should not be granted may be shown by competent parol evidence.⁴ To justify refusing specific performance much less proof is required than to sustain a bill to set aside a contract for fraud or mistake.⁵

Ordinarily presumptions will not be indulged in favor of the contract sought to be enforced but the complainant will be put to full proof of the terms and provisions of the agreement. Thus it has been held that specific performance of a contract for the

So, in a case where the evidence tended to show that the oral contract relied upon was never fully understood and unconditionally agreed to between the parties. *Held* that, as the trial court found this to be true, the decree would not be disturbed. *Burr v. Knowles*, 72 Iowa 764.

1. *Calverly v. Williams*, 1 Ves. 210; *Ball v. Storie*, 1 S. & S. 210; *Joyes v. Statham*, 3 Atk. 388; *Clark v. Grant*, 14 Ves. 519; *Baxendale v. Seale*, 19 Beav. 601; *Barnard v. Case*, 26 Beav. 253; *Watson v. Marston*, 4 DeG. M. & G. 230; *Western R. Corp. v. Babcock*, 6 Met. (Mass.) 346; *Park v. Johnson*, 4 Allen (Mass.) 259; *Rider v. Powell*, 28 N. Y. 310; *Quinn v. Roath*, 37 Conn. 16; *Chambers v. Livermore*, 15 Mich. 381; *Ryno. v. Darby*, 20 N. J. Eq. 231; *Cathcart v. Robinson*, 5 Pct. (U. S.) 253; *Towner v. Lucas*, 13 Gratt. (Va.) 714. Compare *Stoutenburgh v. Tompkins*, 9 N. J. Eq. 332.

See also, generally, MISTAKE, vol. 15, p. 625.

The plaintiff may also allege and prove by parol evidence mistake or fraud, and by stating and proving the true agreement as intended by the parties he may have it specifically enforced as corrected. *Keisselbrack v. Livingston*, 4 Johns. Ch. (N. Y.) 144; *Bellows v. Stone*, 14 N. H. 175; *Glass v. Hulbert*, 102 Mass. 41; 3 Am. Rep. 418; *Murphy v. Rooney*, 45 Cal. 78; *Beardsley v. Knight*, 10 Vt. 185; 33 Am. Dec. 193; *Gower v. Sterner*, 2 Whart. (Pa.) 75; *Clopton v. Martin*, 11 Ala. 187; *Harris v. Columbiana Co. Mut. Ins. Co.*, 18 Ohio 116; 51 Am. Dec. 448; *Bailey v. Bailey*, 8 Humph. (Tenn.) 230; 2 Pom. Eq. Jur., § 862. The English rule appears to be *contra*.

Woollam v. Hearn, 7 Ves. 211; 2 Pom. Eq. Jur., § 861.

On a bill for specific execution of an agreement, if the defendant by his answer denies the interpretation of such agreement, which appears obvious from the words, the complainant may, it has been held, explain it by parol evidence. *Coutt v. Craig*, 2 Hen. & M. (Va.) 618. See, also, *Whitworth v. Harris*, 40 Miss. 483.

2. *England v. Jackson*, 3 Humph. (Tenn.) 584; *McCorkle v. Brown*, 9 Smed. & M. (Miss.) 167.

But where there is no averment in the pleadings of a settlement or abandonment of the contract, evidence of such settlement or abandonment is inadmissible. *Mix v. White*, 36 Ill. 484.

"In a suit by the vendor against the vendee to enforce the specific performance of a contract to sell land, where the defendant sets up a contemporaneous verbal agreement by which certain mutual accounts were to be settled and the balance due him credited on the purchase money, such an agreement may be proved by oral evidence." *Redfield v. Gleason*, 61 Vt. 220.

3. A parol promise made at the time a bill single was executed, not to enforce the collection of it till a given time after it falls due, cannot be enforced in chancery. *Hancock v. Edwards*, 7 Humph. (Tenn.) 349.

4. *Herren v. Rich*, 95 N. Car. 500; *Veth v. Gierth*, 92 Mo. 97; *Lennon v. Stiles* (Supreme Ct.), 5 N. Y. Supp. 870.

5. *Clark v. Maurer*, 77 Iowa 717. And see *Cathcart v. Robinson*, 5 Pet. (U. S.) 264; *Jackson v. Ashton*, 11 Pet. (U. S.) 229; *Benton v. Shreeve*, 4 Ind. 66; *Clitherall v. Ogilvie*, 1 Desaus. Eq. (S. Car.) 250.

sale of lands will not be decreed on the presumption of payment arising from lapse of time.¹ But in a case where possession had been taken under a deed and the deed destroyed accidentally, the possession continuing for many years was held to create a presumption in favor of the deed against the grantor's creditors, and specific performance was decreed.²

Where the contract sued on is within the Statute of Frauds, the burden of proof is upon the party who seeks to enforce it to show that such things have been done as will take it out of the statute.³

The cases cited below will serve to show what has been held sufficient evidence to justify the specific enforcement of contracts in particular instances.⁴

1. *Morey v. Farmers' Loan & Trust Co.*, 14 N. Y. 302; *Lawrence v. Ball*, 14 N. Y. 477.

2. *Wade v. Greenwood*, 2 Rob. (Va.) 474; 40 Am. Dec. 759.

3. *Luzader v. Richmond*, 128 Ind. 344. See *Allen v. Young*, 88 Ala. 338.

4. Where it is sought to enforce a specific performance of a contract of sale of land, executory on the part of both parties, and the contract is lost, it should clearly appear that the land claimed and that in the contract were the same; the amount of the consideration and the fact of its payment should also appear. *Madeira v. Hopkins*, 12 B. Mon. (Ky.) 595.

Where the substance of the contract stated in the bill is proved by two witnesses, it will be carried to execution by the court, unless weighty objections are urged. *Trigg v. Robertson*, Sneed (Ky.) 194.

Where on a bill for specific performance, complainants attempted to introduce evidence of conversations which they had with a third person, relating to the terms of a contract with him, and which complainants claim was the same as the one in suit, the defendant assuming said third person's place in the contract, the evidence was held properly excluded for irrelevancy. *Askew v. Carr*, 81 Ga. 685.

Where the relief asked has been refused, the judgment will not be reversed when the evidence for plaintiff is the testimony of two witnesses who are contradicted by two witnesses for the defendant, not shown to be less credible than the witnesses for plaintiff. *Strange v. Crowley*, 91 Mo. 287. Compare *Phoenix Ins. Co. v. Rink*, 110 Ill. 538.

The complainant may be estopped by an admission under oath. *Potter v. Hollister*, 45 N. J. Eq. 508. But see *Alexander's Appeal* (Pa. 1887), 11 Atl. Rep. 83.

It is sufficient if the plaintiff, a vendor, can show a good title at any time before final decree, although he did not have it when the suit was brought. *Hobson v. Buchanan*, 96 N. Car. 444.

Where the purchaser resists specific performance upon the ground that the title is unmarketable, it is not error to exclude evidence to the effect that attorneys regarded the title insecure. The question is one for the court to answer. *Moser v. Cochrane*, 107 N.Y. 35.

"Where the evidence as to whether a judgment creditor agreed with his debtor to accept certain notes and securities in satisfaction of his judgment is conflicting, and it appears that, after some negotiation, the papers, without being examined or approved by the creditor, were sent to him by mail, and he objected to them, specific performance will not be enforced." *Spear v. Long* (S. Car. 1890), 11 S. E. Rep. 332.

Where a father purchased land of his son, paid the purchase money, and took possession of the land, and lived thereon twenty-two years, always refusing to take a deed from his son, and from the children of his son, after the son's death, and declaring that the son or his children should have it, the father being possessed of a large property—held that this was sufficient evidence of the discharge of the contract of sale, on a bill for a specific performance by the heirs of the father. *Tolson v. Tolson*, 10 Mo. 736.

5. Decree¹—*a*. SCOPE.—Wide latitude is exercised in the granting of a decree for specific performance. Under the familiar doctrine that equity, having once acquired jurisdiction of a controversy, determines all questions necessary to the accomplishment of complete justice to all parties, it has been the practice to enforce contracts either specifically as demanded by the complaint or in a modified form as prayed in the answer,² or substantially as required by the facts of the particular case.³ In some instances, neither decree is feasible, and the chancellor awards a

"In a suit by vendors of land sold at public auction, to compel the purchaser to complete the contract, parol evidence is admissible to prove that the written memorandum of contract, signed by the auctioneer, did not contain the stipulation relied on as a condition." *Averett v. Lipscombe*, 76 Va. 404.

On a bill for the specific performance of a contract to convey land, where the evidence showed that the disability to perform the contract was the result of a fraudulent arrangement and conspiracy between W, the vendor, and B, for the purpose of depriving the complainants of the benefit of their contract, it was held: 1. That the decree for compensation should be against B, as well as against W. 2. That the declarations of W, tending to implicate B in the fraudulent transaction, were part of the *res gestæ* and admissible against B. 3. That the complainants were entitled to the repayment of the purchase money, with interest from the time it was paid. *Powell v. Young*, 45 Md. 494.

In order to sustain a suit for specific performance to compel a railroad company to construct its line through a certain city, the plaintiff must prove that he had an agreement with it binding it to construct and operate its main line through the city. *Crane v. Chicago, etc., R. Co.*, 20 Fed. Rep. 402; 17 Am. & Eng. R. Cas. 174.

See also *Fery v. Pfeiffer*, 18 Wis. 510; *Chicago, etc., R. Co. v. Wisconsin, etc., R. Co.*, 76 Iowa 615; *Miller v. Nelson*, 64 Iowa 458; *National Oleometer Co. v. Jackson*, 56 N. Y. Super. Ct. 609; *Holderman v. Gray*, 130 Ill. 442; *Gregory v. Littlejohn*, 25 Neb. 368; *Walton's Appeal* (Pa. 1887), 9 Atl. Rep. 922; *Hughey v. Bratton*, 48 Ark. 167; *Blake v. McMurtry*, 25 Neb. 290; *Cooper v. Carlisle*, 17 N. J. Eq. 525; *McLure v. Tennille* (Ala. 1890), 8 So. Rep. 60.

1. See DECREE, vol. 5, p. 377.

2. See *Brown v. Munger*, 42 Minn. 482.

B filed a bill for partition against his co-tenant S, and the latter in his answer prayed for the specific performance of a contract whereby B had agreed to sell his half interest for a fixed sum. Held, that the demand for specific performance being an application for equitable relief, the court would not compel S to bring a separate suit, but would terminate the controversy by adjudicating the rights of the parties and administering appropriate relief. *Booten v. Scheffer*, 21 Gratt. (Va.) 474.

Where one party to a contract in writing, brings a bill in equity for a specific performance thereof, and the defendant in his answer, submitting to a specific performance of the real agreement, alleges that the written contract was entered into by mistake, and under a misapprehension of the facts, and establishes this by evidence, he is entitled to a specific performance of the agreement as proved, even against the claim of the plaintiff to have his bill dismissed. *Bradford v. Union Bank*, 13 How. (U. S.) 57.

3. Other Relief.—Where, on a bill by a vendor for specific performance of the contract of sale by the vendee in possession, if the decree for specific performance is refused, relief may be granted to the vendor, in respect to the rents and profits, under the general prayer for relief, although the bill contains no specific prayer that they be paid to him. *Watts v. Waddle*, 6 Pet. (U. S.) 389.

In *Ross v. Purse* (Colo. 1891), 28 Pac. Rep. 473, the court by Helm, C. J., said: "Under our system of procedure courts award any relief to which plaintiff's pleading and proof entitle him, regardless of the prayer embodied in his complaint."

Where specific performance of an agreement is impracticable, the plaintiff may have approximate relief in some other form, which will secure to

money judgment to be paid as in the chancellor's discretion seems equitable, by the delinquent party, even though he be the party originally seeking relief.¹

The decree of specific performance of a contract to convey does not have the effect of a judicial sale,² nor will it pass title to land situated beyond the jurisdiction, although it is in the power of the court to direct the conveyance of such real estate.³

him the substantial advantages of his contract. *Bennet v. Abrams*, 41 Barb. (N. Y.) 619.

Where an agreement contains provisions which, by reason of some technical principle of law, cannot be carried into effect according to its literal import, it is the duty of a court of equity, for the sake of the intent, to give it that construction which the rules of law will tolerate, and the intention of the parties, collected from the whole instrument, will justify. So, where rents arising from real estate were made payable by an agreement to a *cestui que trust*, her executors and administrators, a court of equity, decreeing specific performance of the agreement, directed them to be paid to the *cestui que trust* and her heirs. *Coale v. Barney*, 1 Gill & J. (Md.) 324.

Where the contract in suit is alleged to be one by which the defendant was to take a lease of land, and the proof shows that she contracted for the fee, and for no other estate in the property, and authorized no other person to make a different contract for her, she will not be compelled to accept a lease instead of a deed in fee, or give the complainant compensation for the non-performance of the contract. *Ellicott v. White*, 43 Md. 145.

See, generally, *Booten v. Scheffer*, 21 Gratt. (Va.) 474.

1. **Money Compensation.**—Equity will not enforce a voluntary agreement to convey land, although the donee was put in possession and made improvements; but, if the bill is properly drawn, he may obtain compensation for the labor he expended and the improvements he made. *Boze v. Davis*, 14 Tex. 331.

Where a bill filed against commissioners under the drainage act, to compel specific performance of an agreement in relation to damages, cannot be sustained, the agreement being within the Statute of Frauds, yet the court will retain the bill, and award an issue to assess the damages which the plaintiff has sustained, and for which he has no

remedy, or a doubtful and inadequate one, at law. *Phillips v. Thompson*, 1 Johns. Ch. (N. Y.) 131.

Where a bill for a specific performance contains a prayer for general relief, and the answer admits the payment of a part of the purchase money, and contains an offer to settle, the court, although it cannot decree a specific performance, for want of a sufficient writing within the Statute of Frauds, will, nevertheless, decree an account and repayment. *Capps v. Holt*, 5 Jones Eq. (N. Car.) 153.

Where, after the filing of a bill for specific performance, conveyance to a third party has been made by a defendant who bought the land of the complainant's vendee with notice of his contract of sale, the complainant is entitled to a money decree against him, as holding the proceeds in place of the land, for the purchase money paid on the original contract. *Oliver v. Crosswell*, 42 Ill. 41.

Where a party who had covenanted to convey a tract of land, and given possession, and taken bonds for the purchase money, got back the possession on a bill for a specific performance—held, that he was liable for profits he had made, or reasonably might have made while in possession. *Sugg v. Stowe*, 5 Jones Eq. (N. Car.) 126.

It has been held that a vendee, who, by reason of his own fraud or default, is denied a decree, may have a return of all moneys paid out by him. *Smith v. Lavin*, 8 Wis. 265. See also *Hess v. Evans* (N. J. 1888), 15 Atl. Rep. 310.

2. Where a bill is filed for specific performance, by a transfer of land from vendor, to vendee, a decree for that purpose is not a judicial sale, and one purchasing from either party is chargeable with notice of all involved in the suit, as a purchaser *pendente lite*. *Gilman v. Hamilton*, 16 Ill. 225.

The Georgia Code gives it this effect, however. See Code 1882, § 4209.

3. See *supra*, this title, *Jurisdiction and Powers of the Court*.

While it is not proper for the court to make the contract or alter it for the parties, it will, upon a sufficient showing of mutual mistake and a prayer for reformation, reform the agreement before enforcing it, and where the pleadings are such as to justify reformation and specific performance the court will grant the dual relief.¹

Whatever equity requires shall be done as between the parties, the decree should make provision for.² Thus where specific performance is refused, the court will order such repayment of money and reimbursement of expenses incurred on account of the contract in litigation as appears to be required by the circumstances of the case.³ Where the decree granted contains no provision as to the time of performance the plaintiff may demand its enforcement at any time until barred by the Statute of Limitations.⁴

See also *Burnley v. Stevenson*, 24 Ohio St. 474; 15 Am. Rep. 625; *Watts v. Waddle*, 6 Pet. (U. S.) 389; *Page v. KcKee*, 3 Bush (Ky.) 135; 96 Am. Dec. 201; *Johnson v. Kimbro*, 3 Head (Tenn.) 557; 75 Am. Dec. 781.

As to Land Situated Abroad.—*Burnley v. Stevenson*, 24 Ohio St. 474; 15 Am. Rep. 621, was a suit for the specific enforcement of a trust in relation to real estate situated abroad. In reference to the effect of the decree in the case, the court by *McIlvaine, J.*, said: "Although the decree or the deed of the master executed in pursuance thereof cannot operate to transfer the title to such lands, yet the decree is binding upon the consciences of the parties and concludes them in respect to all matters and things properly adjudicated and determined by the court."

"When the decree in such case finds and determines the equities of the parties in respect to such land, and directs a conveyance by the parties in accordance with their equities, such decree, although no conveyance has been executed, may be pleaded as a cause of action or as a ground of defense in the courts of the State where the land is situated; and it is entitled in the court where so pleaded to the force and effect of record evidence of the equities therein determined, unless it be impeached for fraud." See *Johnson v. Kimbro*, 3 Head (Tenn.) 557; 75 Am. Dec. 781.

Philpot v. Elliot, 4 Md. Ch. 273, *Ross v. Purse* (Colo. 1891), 28 Pac. Rep. 473; *Waterman v. Dutton*, 6 Wis. 265.

In an action to reform a contract and for relief thereunder, the court may either decree specific performance or compensation for non-performance.

Columbus, etc., R. Co. v. Steinfeld, 42 Ohio St. 449; 22 Am. & Eng. R. Cas. 260.

But the contract will not be reformed in the absence of an allegation of fraud or mistake in drafting it. *White v. Port Huron, etc., R. Co.*, 13 Mich. 355.

1. See *supra*, this title, *Doctrines Illustrated—Equity May Enforce but Not Make Agreements*. See also *MISTAKE*, vol. 15, p. 677.

2. In decreeing specific performance of an agreement for a lease, the court may direct the lease to be dated at a time antecedent to alleged breaches, in order to give the plaintiffs their action upon the covenants. *Noonan v. Orton*, 21 Wis. 283.

3. See *Benson v. Cutler*, 53 Wis. 107; *Wonson v. Fenno*, 129 Mass. 405; *Eastman v. Simpson*, 139 Mass. 348.

If upon the faith of a parol contract for the sale of lands, the purchase money, in whole or in part, has been paid, a court of equity upon a bill by the vendee for a specific execution, to which the Statute of Frauds is set up as a defense, will decree that the money be refunded with interest, and, as against the vendors, it will be declared a lien on the land agreed to be conveyed. *Hilton v. Duncan*, 1 Coldw. (Tenn.) 313; *Mialhi v. Lassabe*, 4 Ala. 712; *Johnston v. Glancey*, 4 Blackf. (Ind.) 94.

In a suit to enforce the specific performance of a covenant to reconvey certain land upon a certain condition, judgment for possession may follow the final ascertainment of the plaintiff's title. *Baker v. St. Louis*, 75 Mo. 671.

4. *Redington v. Chase*, 34 Cal. 666. As to time of performance of the

b. AFFECTS WHOM.—The decree operates primarily upon the conscience of the parties before the court, and is enforced more often against the person of the delinquent party than against the thing in dispute.¹ Its effect, as has been shown, is not confined to the original parties to the contract, but extends to all who claim under them in privity of estate or representation or title.² But the wife of a party is not bound by the decree unless herself actually a party to the proceeding.³ And the public, being in many instances an actual party in interest, is recognized as such and its rights considered in the exercise of this equitable power.⁴

The decree must bind all the parties, for a decree of specific performance against the defendant is erroneous unless it requires of the plaintiff the performance of his share of the obligations.⁵

decree generally, see *King v. Ruckman*, 24 N. J. Eq. 556.

1. See *supra*, this title, *Jurisdiction and Powers of the Court*.

2. See *supra*, this title, *Doctrines Illustrated—Equity Binds Privies as Well as Parties*.

3. *Schoonmaker v. Bonnie*, 119 N. Y. 565.

4. *Public Interests.*—It has even been held in a recent English case that where, in the sound discretion of the court, a breach of the contract may subserve public good, the court will issue an injunction sustaining the breach and merging it into the form of a decree for specific performance. *Wolverhampton, etc., R. v. London etc. R.*, L. R., 16, Eq. 433.

Specific performance will not be decreed where it will result in delay, inconvenience, and loss to the public. *Richmond v. Dubuque, etc., R. Co.*, 33 Iowa 422.

And it may be refused where its enforcement might injure persons not parties to the contract and whose interests have vested since the contract was made. *Curran v. Holyoke Water Power Co.*, 116 Mass. 90.

5. *Craft v. Bent*, 8 Kan. 328; *Baxter v. Brand*, 6 Dana (Ky.) 296; *Owens v. Hall*, 13 Ohio St. 571. And see *Clark v. Gordon* (W. Va. 1892), 14 S. E. Rep. 255.

Upon a bill for the specific performance of a parol contract for the sale of land, part performance sufficient to take the case out of the Statute of Frauds being shown, the court should find the balance due on the purchase price, if any, and on payment of the same into court vest the title in the vendee. *Webb v. Toms*, 86 Mo. 591.

Where a purchaser comes into equity for specific performance, and the whole contract is before the court, and all the money due, it is erroneous to leave the vendee to his legal remedy for the recovery of his money, while the purchaser obtains a decree for rents and costs. *Sibert v. Kelley*, 6 T. B. Mon. (Ky.) 669.

A decree directing one party to pay on a certain day, on condition that the other surrender the land, without ordering a surrender, or reserving to the court to determine on the performance, was held to be erroneous. *Jarman v. Davis*, 4 T. B. Mon. (Ky.) 115.

A decree declaring that a contract for the sale of land ought to be performed, and directing the vendee to execute a mortgage thereof, to secure the purchase money, is to be understood as requiring the vendor first to make title to the vendee. *Mayo v. Purcell*, 3 Munf. (Va.) 243.

A non-resident purchaser suing for specific performance may be required to pay the purchase money into court, though he was not in possession. *Binns v. Mount*, 28 N. J. Eq. 24.

It is erroneous to decree specific execution of a contract for conveyance of land, without requiring payment of what is due for the land. *Brewer v. Peed*, 7 J. J. Marsh. (Ky.) 230.

On bill by the vendor of land for specific performance, a decree in favor of the vendor, which makes the clerk of the court custodian of the deed tendered by the complainant, to be delivered to the vendee on payment of the purchase money found to be due is proper. The vendor cannot be made to part with his title until the money is paid to him, or until the

c. FORM.—The decree, in its simplest form, directs the defendant to execute the contract according to its terms, as set forth in the complaint.¹ It sometimes runs in the alternative, as for the specific performance of the contract, or, upon failure to perform, for the payment of a money judgment.² Again, it may direct

time of redemption has expired, in case of a sale of the vendee's interest. *Corbus v. Teed*, 69 Ill. 205.

The contract provided for the construction of a wharf on the land by the vendor, within thirty days, under a penalty. There was no evidence showing that the vendee could not have gone on the wharf and transacted his business within the thirty days, though the entire lot had not been graded to the vendee's satisfaction. *Held*, that the vendee could not complain of a decree which required the vendor, without unnecessary delay, to fill the lot up to grade, while it required the vendee, in conformity with the contract, to execute a ground-rent deed for the premises on its presentation by vendor. *McCullough's Appeal*, 132 Pa. St. 43.

Vendee, who has taken a bond for title, and given notes for the purchase money, and indirectly purchases them after maturity for a mere trifle at a judicial sale by the vendor's administratrix, will be required to pay the balance due before she can compel a conveyance to her by the vendor's heirs. *Burnap v. Sidberry*, 108 N. Car. 307.

But it has been held that after a decree, on a bill for specific performance, directing the defendant to convey on the payment of the purchase-money, a decree cannot be made ordering the plaintiff to pay the purchase money, though this might have been done in the first instance; but a cross-bill must be filed to obtain such decree. *Etchison v. Dorsey*, 1 Bland (Md.) 535.

The plaintiff and defendant had agreed to exchange farms, but the plaintiff was unable to complete the contract, at the time appointed, in consequence of an incumbrance upon his farm. On a bill by him for a specific performance—held, that a receiver of the rents of the defendant's farm could not be appointed before the removal of the incumbrance. *Baldwin v. Salter*, 8 Paige (N. Y.) 473.

1. *Evans v. Miller*, 38 Minn. 245.

2. **Alternative Relief.**—On a bill for the specific performance of a contract, the court ought not to decree the pay-

ment of a sum of money absolutely, in lieu thereof, but only conditionally, leaving to the defendant the election to pay such sum, or perform his agreement specifically. *Hook v. Ross*, 1 Hen. & M. (Va.) 310.

If the answer in a suit to enforce performance of a parol contract sets up a different contract from that stated in the bill and the evidence sustains the answer, the court may either dismiss the bill or permit the plaintiff to elect whether he will have the contract rescinded or enforced as proved. *McComas v. Easley*, 21 Gratt. (Va.) 23.

Where a purchaser, who has obtained a decree for the specific performance of the contract, neglects to perform it on his part, on motion by the defendant, the decree will be amended, by directing a sale of the subject of the contract, at the risk of the plaintiff as to the price; or that the right of the plaintiff to a specific performance shall be barred, unless he will accept the conveyance and pay the purchase money within the time prescribed by the order. *Clark v. Hall*, 7 Paige (N. Y.) 382.

Where a vendee of land, holding the vendor's bond for a title, files a bill for rescission or specific execution, if the vendor can comply with the contract, the final decree should settle the whole case, and prevent any further litigation of the matter. *Pollock v. Wilson*, 3 Dana (Ky.) 25.

Where the plaintiffs, instead of a decree for a specific performance, which they were entitled to, elected to take a decree for the payment of money by the defendant instead, it was held that they could not, on an allegation of his subsequent insolvency, afterwards obtain a decree for a specific performance; especially where there was an intervening innocent purchaser. *Weber v. Fowler*, 11 How. Pr. (N. Y.) 458.

In a suit (on a bond to make title to a league of land) for specific performance, or compensation in damages, the verdict was, "For the plaintiff, one-fourth of the value of the league of land in question valued at one dollar per acre." The court affirmed a judg-

performance conditioned upon a compliance by the other party; and it may prescribe any conditions that will be equitable.¹

The court will be guided by the pleadings and evidence in determining the form and extent of the decree. In ordinary cases where the plaintiff is awarded specific performance, the decree must correspond with the bill, and it is error to enforce a different contract than the one therein set out, unless the contract enforced is so enforced upon a cross-bill of the other party.²

ment for the sum of money to which one-fourth of a league of land would amount at \$1 per acre. *McMullen v. Kelso*, 4 Tex. 235.

A built a house for B, receiving therefor his obligation to convey a tract of land. B had no title to the land, except the verbal promise of his father to convey it to him. On a bill to enforce a conveyance, brought by A—held, that a decree against the father for a conveyance was erroneous, but that B should be compelled to procure a conveyance, or pay damages. *Hickman v. Grimes*, 1 A. K. Marsh. (Ky.) 86; 10 Am. Dec. 714.

1. *Hulmes v. Thorpe*, 5 N. J. Eq. 415; *Preble v. Abrahams*, 88 Cal. 245.

Though a court of equity might make a decree for a conveyance depend upon the payment or refunding of taxes, it will not deny a party his rights altogether. *Morgan v. Herlick*, 21 Ill. 481.

Where the form of the decree, on a bill for the specific performance of an agreement to convey land, was such as to leave it optional with the defendant to pay the balance of the purchase money or not, but still required this to be done as a condition of the relief decreed—held, that the decree was not, on this account, erroneous. *Annan v. Merritt*, 13 Conn. 478.

On judgment reversing the judgment below for plaintiff because of false representations that the title to the land contracted for was clear when there were in reality tax liens against it, and holding that plaintiff is not entitled to specific performance so long as the property remains incumbered with the tax liens, the case will be remanded with directions to decree specific performance upon condition the title be perfected before judgment or decree. *Isaacs v. Strainka*, 95 Mo. 517.

On a bill for specific performance of a contract to convey, brought by the purchaser after the expiration of the stipulated time for payment, the time condition having been waived,

the decree should order payment within a certain time, and, on failure to make such payment, that all the purchaser's rights should be extinguished. *Thayer v. Wilmington Star Min. Co.*, 105 Ill. 540.

2. *Holman v. Vallejo*, 19 Cal. 498; *Courcier v. Graham*, 2 Ohio 341.

Where a petition to enforce an agreement to convey land alleged that the defendant had agreed to convey it for church purposes, it was fatal error to require him to convey it for church and school purposes. *McDaniel v. Watson*, 4 Bush (Ky.) 234.

In a suit for specific performance of a contract to convey land, the court will not assess complainant's damages, in case the performance cannot be decreed, unless the petition and prayer are adapted for this, and evidence with a view to this issue is given. *Yost v. Devault*, 9 Iowa 60.

"A, being unable to meet the deferred payments due under his purchase of land, induced B to advance the amount to the vendor, and to take a conveyance from the vendor; it being agreed that, on payment of the amount by A to B, B should convey to A by a deed containing a covenant of general warranty. A, being in default, a judicial sale was ordered, the decree, however, providing that, if A should make payment within a fixed time, B should convey with special warranty." The court held the decree to be erroneous, in that the form of warranty ordered should have been that prescribed by the contract. *Adkins v. Edwards*, 82 Va. 300.

Forms given of judgments or decrees, to compel the specific performance of an oral agreement to satisfy and discharge a mortgage held by a third person, not a party to the action, which is not yet due, and from which the plaintiff has not, as yet, suffered, although it is a lien upon his land. *Bennett v. Abrams*, 41 Barb. (N. Y.) 619. See *supra*, this title, *Procedure—Pleading*.

d. COMPENSATION IN LIEU OF PERFORMANCE.—Where a performance of the whole contract in specie is impossible and a substantial performance is either impracticable or undesirable, the finding will determine what sum of money will compensate the party in search of equitable relief for the failure of performance, and decree its payment.¹ But compensation will not be awarded where the primary relief, specific performance, would be improper, for the same rules govern the two forms of equitable relief.² Thus, compensation is permissible in a decree enforcing

1. Pratt v. Law, 9 Cranch (U. S.) 456; Aday v. Echols, 18 Ala. 353; 52 Am. Dec. 225; Kelly v. Allen, 34 Ala. 663; Slaughter v. Tindle, 1 Litt. (Ky.) 358; Fisher v. Kay, 2 Bibb (Ky.) 434; Milkman v. Ordway, 106 Mass. 232; Andrews v. Brown, 3 Cush. (Mass.) 130; Hamilton v. Hamilton, 59 Mo. 232; Phillips v. Thompson, 1 Johns. Ch. (N. Y.) 131; Parkhurst v. Van Cortlandt, 1 Johns. Ch. (N. Y.) 273; Williams v. Champion, 6 Ohio 169.

See also Ray v. Wilcoxon, 107 N. Car. 514. Where it is found that a complainant was originally entitled to a specific performance, but, pending the litigation, the very subject-matter of the agreement, to which the complainant is found to be entitled, is abstracted or destroyed, a court of equity will not turn him over to seek his damages in a court of law, but will afford a remedy by compensation. Chapman v. Mad River, etc., R. Co., 6 Ohio St. 119.

Compare Allen v. Young, 88 Ala. 338.

Where a court of equity has jurisdiction to decree specific performance of a contract in part, it will award damages for the breach of so much of it as cannot be specifically executed, and not turn the party round to his remedy at law. Chinn v. Heale, 1 Munf. (Va.) 63.

And see Davis v. Parker, 14 Allen (Mass.) 94; Woodbury v. Luddy, 14 Allen (Mass.) 1; 92 Am. Dec. 731; King v. Bardeau, 6 Johns. Ch. (N. Y.) 38; 10 Am. Dec. 312; Post v. West Shore R. Co., 50 Hun (N. Y.) 301.

Compensation must be decreed where the deficiency complained of is of such a character that it can be made the subject of compensation, or of consideration as damages, and where the court concludes that the purchaser would not have declined the contract had he known of the defect or matter complained of at the time of the purchase. Beyer v. Marks, 2 Sweeny (N. Y.) 715.

To a bill by a vendor praying a rescission or specific performance of the contract, the purchaser answered, not objecting to specific execution thereof, but insisting upon being compensated for injuries to which he had been subjected by the vendor's failure to comply, etc., and by the intermeddling of the vendor's agents, etc., it was held that the court might, as ancillary to the decree of specific performance, decree such compensation, to be ascertained either by a commissioner or by an issue of *quantum damnificatus*. Nagle v. Newton, 22 Gratt. (Va.) 814.

2. Lewis v. Yale, 4 Fla. 418; Black v. Black, 15 Ga. 445; Wiswall v. McGowan, Hoffm. Ch. (N. Y.) 125; Chase v. Hogan, 3 Abb. Pr. N. S. (N. Y.) 57.

Whenever a court of equity declines, by reason of a default on the part of the plaintiff, to decree a specific performance of a contract in his favor, it will also decline to award him damages for the breach. Chase v. Hogan, 3 Abb. Pr. N. S. (N. Y.) 57.

If a plaintiff, in a suit for specific performance, does not make out a case which entitles him to the decree which he seeks to obtain, no compensation for damages, nor for services performed under the contract, will be decreed him, unless some special equity intervenes. Sims v. McEwen, 27 Ala. 184.

Equity does not entertain jurisdiction to give redress by way of compensation or damages except when such relief is incidental to that sought by the bill and granted by the court; or where there is no adequate remedy at law; or where some peculiar equity intervenes. Scott v. Billgerry, 40 Miss. 119.

But it was held in Miles v. Dover Furnace Iron Co., 125 N. Y. 294; 53 Hun (N. Y.) 632, where the enforcement of performance would involve difficulty and trouble, that compensation was proper instead of performance.

the conveyance of land, where the vendor is unable to convey the entire title and the vendee sues for the part which he can convey.¹

The measure of compensation, where the suit is to enforce a contract for the sale of land which cannot be specifically performed, is the value of the land at the time the contract should have been performed with interest from that time,² or if for a deficiency, the value of such deficiency. Thus, in cases where the vendor's wife has refused to execute the deed, the amount of her dower interest is the sum which will be awarded.³ And the measure of damages for delay is the difference between the contract price and the market value at the stipulated time of execution, this rule prevailing whether the property be real or personal.⁴ It is error to award the absolute contract price by way of compensation where there has been unwarrantable default and loss of any kind has resulted therefrom. All elements of loss must be counted in determining the damages.⁵

c. MODE OF ENFORCEMENT.—Where the contract consists in negative covenants, the breach will be enjoined and an infraction

Compare Barlow v. Scott, 24 N. Y. 40, where under the code compensation was awarded, the complaint seeking for specific performance of a contract to convey land for compensation in damages, but the facts alleged being insufficient foundation for a decree for specific performance. Barlow v. Scott, 24 N. Y. 40.

1. See *supra*, this title, *Suits by Vendee*.

Compensation, When Improper.—

Where a bill asks for rescission or specific performance, to either of which the complainant is entitled, and no special equity exists, it will not be retained for the purpose of decreeing compensation for a deficiency in the quantity of land conveyed to and accepted by the complainant. Harrison v. Deramus, 33 Ala. 463.

Where the plaintiff knew, when he filed his bill for the specific performance of a contract, that the defendant could not perform it—held, that equity would not decree damages for nonperformance, but would leave the plaintiff to his remedy at law. McQueen v. Chouteau, 20 Mo. 222; 64 Am. Dec. 178. See Ellett v. Wade, 47 Ala. 456.

Where a bill is filed to obtain specific performance of a contract for the purchase of land it is erroneous to decree compensation, on the bill being taken for confessed. Davis v. Gleaves, 5 Litt. (Ky.) 142.

2. Rees v. Smith, 1 Ohio 124; Gibbs v. Champion, 3 Ohio 337; Dustin v. Newcomer, 8 Ohio 49; Peabody v. Tarbell, 2 Cush. (Mass.) 226; Woodbury v. Luddy, 14 Allen (Mass.) 1; 92 Am. Dec. 731.

Where the loss of land is not caused by the fraud of the vendor, the measure of damages, on a bill for specific performance by the vendee, is the value of the land at the time of the contract, to be ascertained by the purchase money agreed to be given. Rankin v. Maxwell, 2 A. K. Marsh. (Ky.) 488; 12 Am. Dec. 431.

3. See *supra*, this title, *Contracts Relating to Land—Suits by the Vendor*.

4. King v. Ruckman, 24 N. J. Eq. 298.

5. Penrose v. Leeds, 46 N. J. Eq. 294; Bostwick v. Beach, 103 N. Y. 414; Roberts v. Lovejoy, 28 Tex. 641; Bryan v. Loftus, 1 Rob. (Va.) 12; 39 Am. Dec. 242.

In estimating the compensation to be adjudged to the plaintiff for the loss he has sustained by the delay, it is not proper to consider the depreciation in the value of the lands; but only the value of their use during the period that they have been kept from him. Damages resulting from such depreciation are speculative and not to be considered; except in the case of a leasehold estate, in which case the estate is a term, which wastes by delay. Benson v. Tilton, 24 How. Pr. (N. Y.) 494.

of the injunction punished as contempt of court.¹ If the contract be for the execution of a writing, such as a deed of conveyance, and the delivery of the same, the party may be required to sign and deliver the instrument or be in contempt,² or the court may name a commissioner who on behalf of the party shall execute the will of the court.³ And sometimes the decree itself operates as a conveyance.⁴

In some cases it has been considered permissible, where suit is brought by the vendor of land to compel its purchase, to order the land sold and payment made out of the proceeds.⁵ But this will not always be done.⁶

Where the contract binds a lunatic, it is proper to require the committee of the lunatic to execute the contract in his behalf.⁷ If the party to be bound is a minor, the contract may be decreed to be performed at once, if equity so demands, by his guardian, or by the infant himself upon coming of age, possession of the property in suit, if the contract be one to convey real estate, being meanwhile given to the vendee.⁸ As against a corporation the decree may be enforced by *distringas* or sequestration.⁹

XII. SPECIAL STATUTORY PROVISIONS.—The statutes of many of the States make provision for suits for specific performance, some conferring simply a general authority upon the courts to enforce the specific execution of contracts, while others contain a complete code of procedure in such suits.¹⁰

1. See INJUNCTION, vol. 10, pp. 937-948.

2. Wharton v. Stoutenburgh, 39 N. J. Eq. 299; Penn v. Hayward, 14 Ohio St. 302.

3. Sproule v. Winant, 7 T. B. Mon. (Ky.) 195; 18 Am. Dec. 164; Wade v. Greenwood, 2 Rob. (Va.) 474; 40 Am. Dec. 759.

On a decree for specific performance of a contract by an ancestor to convey, it is erroneous to postpone a conveyance until the infants become of age; the deed should be executed by commissioners, reserving to the infants the usual time, after coming of age, to show cause against the decree. Hogan v. McMurtry, 5 J. J. Marsh. (Ky.) 633.

In an interlocutory decree against a purchaser of land to enforce specific performance of the contract, it is not error that it does not direct a deed to be made and tendered to him. Goddin v. Vaughn, 14 Gratt. (Va.) 102.

Nor, where such a decree directs a sale of the property if a part of the purchase money is not paid by a certain day, is it error to appoint the plaintiff's counsel a commissioner to make the sale, there being no personal objection to him. Goddin v. Vaughn, 14 Gratt. (Va.) 102.

In a decree for specific execution, it is error to appoint a commissioner to convey when the purchase money is paid; the time when the conveyance is to be made is a matter for the court alone. Payne v. Wallace, 6 T. B. Mon. (Ky.) 380.

4. See Georgia Code 1882, § 4209.

5. Corbus v. Teed, 69 Ill. 205; Clark v. Hall, 7 Paige (N. Y.) 382.

A vendee took a title bond and gave notes for the purchase money, and then indirectly purchased them after maturity for a mere trifle at a judicial sale by the vendor's administratrix. In a suit by the vendee for specific performance the court rendered judgment against him for the purchase money, directing a sale of the land if it shall not be paid. Burnap v. Sidberry, 108 N. Car. 387.

6. Boston v. Nichols, 47 Ill. 353; Thayer v. Wilmington Star Min. Co., 105 Ill. 540.

7. Swartwout v. Burr, 1 Barb. (N. Y.) 495.

8. Sutphen v. Fowler, 9 Paige (N. Y.) 280.

9. Jones v. Boston Mill Corp., 4 Pick. (Mass.) 507; 16 Am. Dec. 358.

10. The following States have statutory authority for the exercise of this

equitable function: *California, Colorado, Georgia, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Nebraska, New York, Ohio, Oklahoma, Oregon, Tennessee, Texas and Wisconsin.* An abstract thereof is given below.

California.—Code, §§ 3384-3402.

The *California* statutes furnish a complete manual of practice in such suits, defining the jurisdiction in clear terms. Section 3384 is a general authority for specific performance; 3386 makes mutuality essential; 3387 declares that real estate is presumed of such value to the obligee that money compensation therefor will not be adequate; 3388, that a contract need only be signed by the obligor to be enforceable in equity; 3389, that the mere fact that the contract contains a penalty and liquidated damages does not limit the party aggrieved to money compensation; 3390 prohibits the equitable enforcement of obligations to render personal service; to employ another in personal services; to submit to arbitration; to perform an act which the party has no power lawfully to perform when required to do so; to procure the consent of the obligor's wife to the contract or of any third person, and to perform an agreement the terms whereof are uncertain; 3391 excludes contracts upon inadequate consideration, those which are unjust, unreasonable, fraudulently procured, or made through mistake; 3392 forbids specific performance where the complainant has failed to fulfill all conditions precedent except where compensation can be made for the part unfulfilled; 3394 requires the vendor to furnish a "title free from reasonable doubt," and 3395 extends the power of the court in contracts for real estate to all claiming under the obligee by subsequent title except innocent purchasers for value.

Colorado.—*Colorado* General Statutes, 1883, in the chapter on Statute of Frauds, provide for the specific performance of contracts "in case of part performance," § 1519.

Georgia.—By chapter 12 of the *Georgia* Code of 1882, §§ 3186-3192, provision is made for specific enforcement where damages would be inadequate; for the enforcement of parol contracts for land under circumstances establishing part performance; for the recovery of chattels "if any good reason in equity or good conscience" requires it; that inadequacy of consider-

ation is no bar to a suit; that the vendor of land must show his ability to fully perform; that a voluntary contract will not be enforced, and that compensation may be awarded where performance is impossible.

By section 4209, a decree for specific performance is given the same force as a deed to convey, and shall be recorded as such in the registry of deeds.

Section 1775 authorizes the equitable enforcement of marriage articles of settlement whether written or oral.

Section 1951 excludes from the operation of the Statute of Frauds cases where the contract has been fully executed, where there has been part performance on one side accepted by the other in accordance with the contract, and where there has been such part performance as would render the refusal of a decree a fraud.

Illinois.—Chapter 29 of the *Illinois* Revised Statutes of 1889 contains a mode of procedure to enforce contracts in case of the obligor's death or insanity.

Maryland.—By the *Maryland* Public General Laws, art. 16, § 199 specific performance is not to be refused on the ground of an adequate legal remedy, unless the party resisting shall show that he has property from which such damages may be made or shall give bond to perform or pay damages. Section 76 defines the territorial jurisdiction, and section 85 provides a mode of enforcement against infants and persons of unsound mind.

Massachusetts.—*Massachusetts* Pub. Statutes, 1882, chapter 142, requires the executor of a decedent to execute decedent's contract upon notice given by the obligee to all persons interested. Chapter 151 confers general equity powers on the supreme judicial court, naming particularly "suits for the specific performance of written contracts." Merrill's Supp. to Pub. Stats., ch. 223, confers like powers on the superior court.

Iowa.—The *Iowa* Revised Code (1885), § 2487, authorizes specific performance against the personal representatives of the dead obligor, and declares unnecessary the making of others parties to the proceeding while permitting heirs and devisees to be made defendants at any time on their own motion.

Maine.—*Maine* Revised Statutes, 1893, chap. 77, § 6, confers equity powers

upon the Supreme Judicial Court to compel the specific performance of written contracts. Chapter 111, § 8, provides that if a person who has contracted in writing to convey real estate dies before making the conveyance, suit may be brought against his heirs, devisees, executors, or administrators to compel its performance, with certain restrictions as to time and notice, and provides a mode of enforcement by judgment for possession, etc. And chap. 71, §§ 17, and 18, provide for a like proceeding in the probate court.

Michigan.—See Howell's Ann. St. 1882. Sections 6010-6024, authorize decrees against administrators and executors for the execution of decedent's "contract in writing to convey real estate," and prescribe the course of procedure therefor. Section 6183 reserves to chancery courts the right to enforce verbal agreements for the conveyance of land in cases where there has been part performance. Section 6613 expressly confers upon the lessee of mining interests "an absolute right to have the same specifically enforced, if not in default himself." Section 5727 confirms defective deeds in certain cases, and provides that they may be taken as contracts to convey and so enforced in equity.

Nebraska.—Compiled statutes of *Nebraska*, 1887, p. 377, ch. 23, § 329, make the same provision as those in *Illinois* and *Maine* for the enforcement of a decedent's contract to convey. Ch. 32, § 6, which is a part of the Statute of Frauds, reserves the power to enforce contracts in case of part performance. Section 53 of the civil code authorizes the bringing of suits to compel conveyance of land in the county of defendant's residence.

New York.—Bliss's Annotated Code. By § 388, the limitation for specific performance of a contract is ten years.

Birdseye. By § 26 of the chapter on Insane Persons, p. 1498, specific performance may be decreed against infants and insane persons in certain cases.

By § 10 of the Statute of Frauds, p. 1234, part performance is declared sufficient to take a contract out of the statute.

Section 4 of the chapter on Judgment and Decree, p. 1713, specifies the mode of enforcement of decree for the conveyance of land.

Oklahoma Statutes, 1890, § 4329, provides for enforcing a contract to convey in favor of the vendee.

Oregon.—Hill's Ann. Laws, ch. 31, §§ 3211-3216 allows rendition of judgment for the payment in a particular kind of money under certain circumstances.

Tennessee.—By § 3148 of the *Tennessee* code, the administrator or executor of a deceased obligor may be required to fulfill the decedent's contract.

Wisconsin.—Sanborn & Berryman's Ann. St. 1889, § 2305, contains the authority for specific performance of contracts within the Statute of Frauds in cases of part performance. 3498-3501 empowers the court to enforce contracts made by decedents and by any one incompetent from insanity or drunkenness by a proceeding brought by the executor or administrator of such decedent, by the guardian of such incompetent person or by any one interested in the contract. A copy of the decree in such suit may be placed of record, and has the same force and effect as a deed of conveyance. By sections 3907-3911 authority is given to compel executors or administrators to make conveyance if decedent could be so compelled if living. Section 4253 contains a provision for the survival of actions for specific performance.

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